IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 16

Suit No 350 of 2014

Between

(1) Comptroller of Income Tax

… *Plaintiff*

And

(1) ARW
(2) ARX

… *Defendants*

JUDGMENT

[Civil Procedure] — [Discovery of documents]
[Legal professional] — [privilege] — [Whether documents created by public authority in the process of investigatory audit are covered by privilege]

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30 November 2016; 1 December 2016

31 January 2017 Judgment reserved.

Aedit Abdullah JC:

Introduction

1 The question in this case is whether documents, communications and other papers generated in the course of an investigatory audit by a public authority are protected by legal professional privilege, either through litigation privilege or legal advice privilege. This question arose out of an application by the 1st Defendant, a company, for various documents relating to three matters: the grant of certain tax refunds ("the Tax Refunds") by the Plaintiff (the Comptroller of Income Tax), an audit of the 1st Defendant when issues arose about the tax refunds, and the Plaintiff's decision to take action against the 1st Defendant.

Facts

2 The 1st Defendant sought specific discovery of three broad classes of documents ("the Requested Documents"). The Plaintiff resisted discovery on grounds of irrelevance, lack of necessity and both litigation privilege and legal advice privilege. Having considered the arguments, I allow discovery of the three classes of documents, as these are relevant and necessary for the fair and efficient disposal of the matter, with neither litigation nor legal advice privilege applying.

Background

3 In 2003, the 1st Defendant's group of companies underwent a "Corporate Restructuring and Financing Arrangement", whereby the group of companies was restructured and entered into a financing arrangement through which a $225m loan was obtained from a Bank. The whole of this sum was returned to the Bank on the same day through a complex series of transactions. The point of the transaction was allegedly to obtain tax refunds from the Plaintiff. From 2004 to 2006, returns were filed by the 1st Defendant indicating that it had incurred interest expenses for the $225m loan, and claiming tax refunds in connection with these interest expenses. Based on these claims, the Plaintiff awarded the 1st Defendant substantial tax refunds amounting to approximately $9.6m.

4 Around July 2007, the Plaintiff reviewed cases in which significant amounts of tax refunds were paid out. As part of this review, an audit was conducted of the 1st Defendant, to determine the basis of its tax refund claim and whether these claims were made under a tax avoidance arrangement. Following the completion of the audit in April 2008, the Plaintiff came to the

conclusion that the 1st Defendant had indeed used a tax avoidance arrangement, and wrongly claimed the Tax Refunds. The Plaintiff then invoked s 33 of the Income Tax Act (Cap 134, 2008 Rev Ed) ("the Act") and purported to issue notices of additional assessment ("Additional Assessments") under s 74(1) of the Act. This was challenged by the 1st Defendant before the Income Tax Board of Review. Eventually, following an appeal, the Court of Appeal found that although the 1st Defendant had claimed the Tax Refunds under a tax avoidance arrangement, the Plaintiff was not entitled to recover the refunds by way of the Additional Assessments (see *Comptroller of Income Tax v AQQ* [2014] 2 SLR 847). However, the Court of Appeal left open the possibility of a common law action for mistaken payment.

Procedural history

5 The present proceedings (Suit No 350 of 2014) were then commenced by the Plaintiff in 2014. In the Statement of Claim, the Plaintiff claims the following:

(a) Reversal of unjust enrichment on the bases of mistaken payment of the Tax Refunds, failure of basis, as well as an ultra vires act;

(b) Deceit or fraudulent misrepresentation;

(c) Conspiracy by unlawful means; and

(d) Liability as a constructive trustee or fiduciary.

6 The 1st Defendant denies the claims made, maintaining that the restructuring was legitimate. It specifically raises the time bar under s 6(1) of the Limitation Act (Cap 163, 1996 Rev Ed).

7 In March 2015, the 1st Defendant filed the present application, but this was not determined pending the resolution of Summons 4769 of 2014. That summons, among other things, sought production of an advice from the Plaintiff's Law Division, given on 3 April 2008, concerning the 1st Defendant's Corporate Restructuring and Financing Arrangement. The matter eventually came up on appeal to the Court of Appeal, which found that the communications in question were privileged, and that this privilege had not been waived (see *ARX v Comptroller of Income Tax* [2016] 5 SLR 590 ("*ARX*")).

8 The 1st Defendant's request for specific discovery in this application covered a total of 15 categories. The 15th category covered documents relating to the abovementioned advice from the Plaintiff's Law Division. This request was not, in the end, pursued by the 1st Defendant following the Court of Appeal's decision in *ARX*. The remaining 14 categories are divided into three broad groups:

(a) Group 1: Documents relating to the Plaintiff's decision to pay the tax refunds;

(b) Group 2: Documents relating to the Plaintiff's discovery of the matters in the Statement of Claim for suit No. 350 of 2014; and

(c) Group 3: Documents relating to the Plaintiff's determination that the 1st Defendant had made use of a tax avoidance

arrangement, and the Plaintiff's decision to invoke s 33 of the Act.

9 This judgment will refer to the documents by way of these three groups.

The parties' cases

The 1st Defendant's case

10 The 1st Defendant argues that the Requested Documents are relevant and necessary, and that no legal professional privilege applies. In terms of relevance and necessity, the Group 1 documents show the internal discussions of the Plaintiff's representatives who conducted the tax assessments of the 1st Defendant, and would be relevant in showing whether the Plaintiff was mistaken as regards the entitlement of the 1st Defendant to the tax refunds, and whether the Plaintiff relied on the 1st Defendant's representations. The Group 2 documents relate to the conduct of the field audit, including the commencement of the audit, and the Plaintiff's decision to request various information and documents within the audit. The Group 3 documents relate to the internal discussions concerning the Plaintiff's determination that the Corporate Restructuring and Financing Arrangement was a tax avoidance arrangement, the decision to invoke s 33 of the Act, and the decision to issue additional notices of assessment. These documents pertain to the Plaintiff's state of mind and or knowledge at various junctures, and are therefore relevant and necessary for determining whether the Plaintiff's claims for recovery of the Tax Refunds are made out, and whether such claims are time barred.

11 As for legal professional privilege, the 1st Defendant argues that litigation privilege cannot be claimed in respect of the documents in Groups 2 and 3. This is because there was no reasonable prospect of litigation at the time the documents were created or obtained. The documents were created during an investigation into possible wrongdoing. Until suspicions of any possible wrongdoing were confirmed by investigation, there was no reason to anticipate litigation. The 1st Defendant also argues that there was no evidence to show that the documents were created for the dominant purpose of litigation.

12 The 1st Defendant further contends that no basis is made out for any claim of legal advice privilege since the documents in Groups 2 and 3 were not documents between the Plaintiff and the lawyers. Neither was any evidence adduced to show that these documents were created for the purpose of seeking legal advice, or in a confidential situation.

The Plaintiff's case

13 The Plaintiff resists the discovery application, arguing that the Group 1 documents were neither relevant nor necessary, while Groups 2 and 3 were covered by legal privilege. The Plaintiff does not concede the relevance and necessity of Groups 2 and 3 but the arguments in respect of these documents are mainly focused on legal privilege.

14 In terms of relevance and necessity, the Plaintiff argues that these criteria are not met, and characterises the 1st Defendant's application for discovery as a fishing expedition. Specifically, the Plaintiff disputes the 1st Defendant's contention that the Group 1 documents are relevant to the

question of whether the Plaintiff relied on the 1st Defendant's representations in paying the Tax Refunds.

15 The Plaintiff has also claimed both legal advice and litigation privilege over the documents in Groups 2 and 3. The Plaintiff argues that he has discharged the burden of showing that such privilege is made out by asserting such privilege in an affidavit verifying the list of documents; and that the 1st Defendant has not established facts which rebut the assertion of privilege.

16 In respect of legal advice privilege, the Plaintiff emphasises that such privilege covers any advice on what should or could be done in a specific legal context. This includes not only communications between the client and lawyer, but also any other document made confidentially for the purpose of giving or receiving legal advice, with such purposes to be construed broadly. The Plaintiff also highlights that the privilege applies even if the document in question was not actually sent or communicated to the legal adviser. On the facts, the Plaintiff argues that legal advice privilege is made out as the Requested Documents were made in a context where advice would have to be taken concerning s 33 of the Act, that is, for the Plaintiff to determine if there had been a tax avoidance arrangement and related matters.

17 The Plaintiff argues that litigation privilege is also made out. There was, at the material time, a reasonable prospect of litigation as the purpose of the audit was to assess the bases of the claims and to determine if these were made under tax avoidance arrangements. At the end of the audit, if the Plaintiff decided to invoke s 33 of the Act, litigation would be a likely result. This was what was contemplated by the Plaintiff, and would have been apparent to the 1st Defendant.

Issues

18 The issues to be determined are as follows:

(a) Whether the documents in Groups 1, 2, and 3 are relevant and necessary for the fair disposal of the action; and

(b) Whether the documents in Groups 2 and 3 are covered by legal professional privilege, including:

(i) Whether the documents in Groups 2 and 3 are covered by litigation privilege; and

(ii) Whether the documents in Groups 2 and 3 are covered by legal advice privilege.

Decision and analysis

19 All the three groups of documents are relevant and necessary. As no privilege is asserted in respect of the documents in Group 1, their discovery is ordered without more. As for the documents in Groups 2 and 3, discovery is ordered as well, as no legal professional privilege, whether in the form of litigation privilege or legal advice privilege, is made out. I now set out my reasons.

Whether the Requested Documents are relevant and necessary

20 I find that the documents sought are relevant and that disclosure should be ordered as it would be necessary at this stage for the fair and efficient disposal of the matter.

The law on relevance and necessity

21 The requirements of relevance and necessity are laid down in O 24 r 5, and O 24 r 7 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("the Rules"). O 24 r 5 (3) specifies that discovery may be ordered if the document is one which will be relied upon, which could adversely affect the applicant's or the other party's case, or support the other party's case, or which could lead to a chain of inquiry to lead to such documents. That encapsulates a broad concept of relevance. O 24 r 7 then specifies that discovery is not to be ordered if it is not necessary for fairly disposing of the matter or for saving costs. The precise interplay between relevance and necessity need not be resolved in the present case. As it stands, relevance probably has to be looked at more broadly in an O 24 r 5 application. What must be shown is that there is some connection between the documents and the case at hand. However, relevance alone is not sufficient; discovery will not be ordered unless the document sought to be disclosed is also necessary for the fair disposal of the matter, or for saving costs.

22 The Plaintiff describes the application as fishing. As the 1st Defendant correctly argues, any fishing would not be a bar to discovery if the requirements of relevance and necessity are otherwise made out. The contention that an applicant is fishing for documents is really one that neither relevance nor necessity is made out. However, casting about for something useful is not objectionable in itself if the Court can be persuaded that discovery should be ordered. What the term 'fishing' does is perhaps to compendiously indicate that relevance or necessity is not clearly shown, and that a discovery application has been made less on a secure foundation, and more on but a forlorn hope that a broad request will survive scrutiny and turn

up a good catch. Such requests are a waste of time and resources. But whether or not a request amounts to fishing is not an independent criteria to be weighed by the Court. I do not read the cases cited by the Plaintiff as stating more than this. Indeed, I believe that is the point of the decision of Choo Han Teck J in *Thyssen Hunnebeck Singapore Pte Ltd v TTJ Civil Engineering* [2003] 1 SLR (R) 75 at [5]–[6], in which the meaning of fishing in discovery was examined.

Relevance and necessity of the Group 1 documents

23 As mentioned earlier, the 1st Defendant seeks disclosure of the Group 1 documents as these are said to be relevant to whether the Plaintiff was truly mistaken about the 1st Defendant's entitlement to the Tax Refunds, whether the Plaintiff had doubts about the 1st Defendant's entitlement to the Tax Refunds; and whether the Plaintiff relied on the 1st Defendant's representations in paying out the Tax Refunds. This information would be necessary to allow the 1st Defendant to challenge the Plaintiff's case or to support its defence, especially in relation to the Plaintiff's state of mind or belief. The Plaintiff for its part argues that the 1st Defendant is merely trying to fish for relevant evidence.

24 I am of the view that the documents are necessary as they may assist the 1st Defendant in its case, and are thus within the scope of O 24 r 5 read with O 24 r 7. Relevance is made out as these documents would be material as to the belief or state of mind of the Plaintiff, and the basis for the Plaintiff's decision to pay out the Tax Refunds. While the Plaintiff has argued that some of these documents are not needed, this did not undermine the argument that relevance was made out by the 1st Defendant. It may be that the Plaintiff itself would have no need for the documents in question, such as the documents relating to clarification from the tax agent, but this did not mean that they are

irrelevant. Tracking the language of O 24 r 5 (3) (*b*), the documents in question would potentially affect adversely the parties' cases, or support the Plaintiff's case. This is certainly so for the whole of Group 1: for instance, the documents could potentially undermine the 1st Defendant's position or support the Plaintiff's position.

25 I further find that discovery of these documents is necessary at this stage for either fair or efficient disposal of the matter. As these documents would be material in the proceedings, their disclosure at this stage would go towards the proper and full preparation of the 1st Defendant's case. On the other hand, not ordering disclosure will probably result in inadequate preparation, and postponing disclosure would just add to the cost of the proceedings.

Relevance and necessity of the documents in Groups 2 and 3

26 The 1st Defendant argues that the documents in Group 2 are relevant as they encompass discussions, views and opinions of those involved in the audit. They would thus show the basis of the decisions to commence the audit, to request for certain information and documents from the 1st Defendant, and to issue Additional Assessments to recover the Tax Refunds. They would also show the Plaintiff's state of mind upon the review of such documents, and the dates when the Plaintiff's officers discovered various aspects of the financing arrangements. The Group 3 documents are relevant in showing the discussions, opinions and approvals of those involved in the audit concerning the Plaintiff's determination that the Corporate Restructuring and Financing Arrangement was a tax avoidance arrangement. The two groups of documents would be material in showing whether the nature of the financing arrangement could have been discovered before 4 April 2008, which relates to whether the

Plaintiff's claim is time-barred. The Plaintiff also does not make substantial arguments that the documents in these two groups are not necessary.

27 I am satisfied that the documents sought in Groups 2 and 3 are relevant and necessary as these are documents concerned with the question of when the Plaintiff came to know of matters underlying its claim that the 1st Defendant's arrangement was one of tax avoidance, and its subsequent decision to invoke s 33 of the Act.

Whether the Requested Documents are privileged

28 The Plaintiff claims legal privilege over the Group 2 and Group 3 documents on the basis of both litigation and legal advice, but does not claim either in respect of the Group 1 documents. I find that litigation privilege is not established because, though litigation was a reasonable prospect at the time, the documents were not created for the dominant purpose of litigation. Legal advice privilege could not be successfully invoked either as the evidence did not show that the documents in question were created for the purposes of obtaining advice from lawyers.

The law on legal professional privilege

29 Sections 128 and 131 of the Evidence Act (Cap 97, 1997 Rev Ed) ("EA") are generally taken as providing for legal professional privilege in Singapore. However, these sections do not stipulate the privilege in exactly the same form as the rules developed at common law. In *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2007] 2 SLR 367 ("*Asia Pacific Breweries*") at [27]–[31], the Court of Appeal noted that as ss 128 and 131 of the EA were essentially founded on

English cases, English law principles are applicable to determine the scope of ss 128 and 131 of the EA. However, this is subject to the limitation in s 2 of the EA that anything inconsistent with the EA would not be applicable: *Asia Pacific Breweries* at [31]. The arguments before me are made primarily on basis of the common law, with extensive citation of English authorities. I do not find that any of the principles relied upon are inconsistent with the EA.

(1) Are the Group 2 and Group 3 documents covered by litigation privilege?

30 The elements that have to be fulfilled for litigation privilege to be successfully claimed are that there must be a reasonable prospect of litigation and the documents must have been created for the dominant purpose of litigation.

REASONABLE PROSPECT

31 Litigation must be a reasonable prospect as the objective of the privilege is to protect the confidentiality between a person and his lawyers as they prepare to face off against their opponents. In *Minister of Justice v Sheldon Blank (Attorney General of Ontario, The Advocates' Society and Information Commissioner of Canada (Interveners))* [2006] SCC 39, cited in *Asia Pacific Breweries*, it was stated at [23] that:

> [The] object [of litigation privilege] is to ensure the efficacy of the adversarial process and not to promote the solicitor-client relationship. And to achieve this purpose, parties to litigation, represented or not, must be left to prepare their contending positions in private, without adversarial interference and fear of premature disclosure.

It may be queried how this should apply to a regulatory agency or public authority, given that such an organisation may not have an interest in

confidentiality of the same nature as a private citizen or a corporation preparing for trial. That may require argument and determination on another day: here, the 1st Defendant's focus was on the requirements of litigation privilege not being met in any event.

32 A requirement of anything less than a reasonable prospect of litigation would render litigation privilege too readily invoked, diluting the connection to the basis of the privilege in the need for parties to prepare for proceedings. Yet a standard higher than a reasonable prospect ignores the reality that decisions are contingent on many factors, and it is not possible to determine with certainty before the fact whether litigation should be pursued. Imposing too high a standard would, in other words, ignore reality. For that reason, what counts as a reasonable prospect need not be at the level of a 50% probability: *United States of America v Philip Morris* [2004] EWCA Civ 330 at [68]. On the other hand, a small chance would not count. Between these two levels, what must be shown then is that there is some possibility which is objectively probable.

33 In the present case, when the audit was conducted, litigation was not yet embarked upon. However, it was at least a possibility. Though there were a number of contingencies to be dealt with, namely whether the reassessment would be contested, as well as a decision on whether court proceedings should be instituted, the level of probability that litigation would occur was not negligible or very low. In other words, litigation was not just an off-chance event, or a remote possibility. Indeed, given that the 1st Defendant had obtained a substantial sum in refund, there was likely to be significant resistance to any remedial action by the Plaintiff. Thus, litigation was, in that context, a reasonable prospect.

34 The fact that the litigation in contemplation at the time was of a different nature or of a different basis would not matter. The maxim goes, 'Once privileged, always privileged': *Winterthur Swiss Insurance Company and another v AG (Manchester) Ltd (in liquidation) & Ors* [2006] EWHC 839 (Comm) at [72]. This concept has its basis in a rights based approach to the privilege, rather than a purely evidentiary one, reflecting the English position. While it may be that the rights based approach may not reflect the law in Singapore, and this too would be an issue that requires consideration on another day, the maxim is correct in so far as a change in the litigation contemplated would not disqualify reliance on the privilege.

DOMINANT PURPOSE

35 The dominant purpose of the creation of the documents sought to be protected must be for litigation. Otherwise, the basis of the privilege is not sufficiently engaged. It is not necessary, however, that litigation is the sole purpose: *Waugh v British Railways Board* [1980] AC 521.

36 On the facts, the documents would have been created at a time when the Plaintiff had not yet determined what the outcome would be following the review of the Tax Refunds obtained by the 1st Defendants. It would have been expected that a decision would need to be made about the correctness of the 1st Defendants' eligibility for the Tax Refunds. The immediate recourse if the view was formed that the initial decision to pay out the Tax Refunds was wrong, for whatever reason, would be some form of rescission or adjustment of the initial decision. What the Plaintiff initially chose to do was to essentially issue a reassessment under the Act. In other words, the immediate outcome was regulatory action. It may have been that if regulatory action was resisted, litigation would follow, but it could not be said that, at the point of creation

and communication of the documents in question, the dominant purpose was litigation. It was, at that point, only administrative or regulatory action.

37 In its arguments, the Plaintiff cited the decisions of *Re Highgrade Traders Ltd* [1984] BCLC 151 ("*Highgrade*"), *Plummers v Debenhams plc* [1986] BCLC 447 ("*Plummers*") and *Asia Pacific Breweries,* as authority for the proposition that the Court takes a broad, practical approach in determining the dominant purpose, considering what is overarching. That statement is not wrong. In *Highgrade*, what was sought to be disclosed were reports commissioned by insurers as to the cause of a fire. The insurers had commissioned the reports to determine both whether the claim on the insurance could be supported, as well as whether there should be litigation. The English Court of Appeal held that these dual purposes were "inseparable" because if the insurance claim was found to be unsupported, litigation would "inevitably follow" (see *Highgrade* at 173). Similarly, in *Plummers*, the document sought to be disclosed was an accountant's report prepared in order for the defendants to determine whether immediate repayment could be demanded from the plaintiffs, and thus whether the plaintiffs there would likely withdraw or compromise their claim. The Court held that the accountant's report was essentially prepared for the dominant purpose of determining whether a legal claim should be made (see *Plummers* at 457). In *Asia Pacific Breweries*, the documents sought to be disclosed were found to be created for several purposes, including to determine the respondent's liabilities arising out of the fraud of its employee, such rights pertaining to litigation, but also to advise the respondent on how it may prevent similar incidents of fraud from recurring. The Court of Appeal held that the documents were created for the dominant purpose of litigation, even though they also served other purposes (see *Asia Pacific Breweries* at [90]). In coming to this conclusion the

Court noted that litigation was not only a "reasonable prospect" but a "reality" which would have been "foremost in the mind" of the respondent at the time the documents were created (see *Asia Pacific Breweries* at [88]). What these various cases illustrate is that where there is a high probability or likelihood of litigation, litigation is likely to be made out to be the dominant purpose. That linkage stands to reason. A party would be expected to take steps to prepare for the probable and the likely.

38 But here, at the time of the creation of the documents, litigation was not an inevitability. Neither could the creation of the documents be considered part of a preparatory step for litigation. The Plaintiff's officer, Christina Ng, said at paragraph 9 of her 9th affidavit:

> The audit process involved obtaining documents and information from the 1st Defendant relating to the Corporate Restructuring and Financing Arrangement and legal advice from the Law Division. The audit concluded in April 2008 with the Plaintiff's determination that the Corporate Restructuring and Financing Arrangement was a tax avoidance arrangement which did not have *bona fide* commercial justifications and decision to invoke section 33(1) of the ITA to disregard the effect of the arrangement and issue the Additional Assessment pursuant to section 74(1) of the ITA. The 1st Defendant was notified of the Plaintiff's determination by way of a letter dated 7 April 2008.

39 Thus, the objective of the exercise was to determine whether a basis for additional assessment existed. Such additional assessment is a determination by the Plaintiff, and is a form of a regulatory action. This regulatory action would have been the first step, if the investigations bore out that the scheme was a tax avoidance arrangement. Litigation did not have to follow thereafter if the 1st Defendant accepted the regulatory action. It may be that it was probable, or even highly probable, that the 1st Defendant would resist, and that litigation would ensue. But, as clearly disclosed by the 9th

affidavit of Christina Ng, which indicates that s 33 of the Act was to be invoked, regulatory action would have been the first step. This means that litigation would not have been a dominant reason. Regulatory action would have created a branching set of events that could encompass litigation, but could also encompass a different outcome. In contrast, the conclusion in cases such as *Highgrade* was that the reports were but a prelude to litigation.

40 It could not be argued that litigation was a dominant purpose simply because it could have followed on after the regulatory action. Any regulatory action, or indeed management action, or even any every day act, can be the basis of a claim in litigation. That is not enough for litigation to be the dominant purpose of the creation of the documents. Litigation has to be the primary objective, and where some other course of action, such as a regulatory determination, is interposed, it can rarely be said that the primary objective is litigation.

41 For that reason, litigation privilege is not made out for the documents in Groups 2 and 3.

POSITION UNDER S 131 OF THE EA

42 Section 131 of the EA was stated by the Court of Appeal in *Asia Pacific Breweries* as clearly envisaging litigation privilege. As the elements of the privilege under s 131 of the EA corresponds to the common law requirements, for the reasons above, the privilege would not be applicable here.

(2) Are the Group 2 and Group 3 documents are covered by legal advice privilege?

43 Legal advice privilege protects communication between the client and his lawyer, covering both advice actually conveyed, and intended to be conveyed: *Three Rivers District Council v Bank of England (No 5)* [2003] QB 1556 at [21]. As is the case with litigation privilege, the aim is to allow a person to obtain advice from his legal adviser fully in confidence: *Balabel v Air India* [1988] 1 Ch 317 at 330 ("*Balabel*"). The privilege extends to advice obtained from in-house counsel, i.e. lawyers within the same organisation or entity: *ARX* at [25]. Legal advice privilege arises where the communication is made for the purposes of legal advice: *Balabel* at 330. It is further recognised that the communications between the client and the lawyer may take place across a continuum or spectrum of circumstances, ranging from, at one end, a specific request for legal advice or a document conveying clear and detailed legal advice, to the other end, where information or documents are communicated for the purposes of keeping each other apprised to allow advice to be given when needed: *Balabel* at 330.

44 Thus to qualify for the privilege, the advice must be given in a legal context: *Balabel* at 330. What amounts to a legal context is not narrowly defined. However, that legal context must exist. The mere fact that communications could possibly be referred on to lawyers for the giving of advice does not clothe such communication with legal advice privilege.

45 Here, a legal context was not shown to exist and persist in respect of the class of documents in question. It was not shown that the communications were with the lawyers in the organisation, unlike the advice from the Plaintiff's Law Division which was in issue in *ARX* (see [6], above). It may be

that the lawyers were part of the group of recipients, but where that is so, the presence of others in the group of recipients would weaken the argument that the communications were made in a legal context.

46 What matters is whether the communications concerned legal advice over the whole of the transactions. Thus in *Nederlandse Reassurantie Groep Holding NV v Bacon & Woodrow (a firm)* [1995] 1 All ER 976 ("*Bacon & Woodrow*"), which involved the giving of advice by lawyers in respect of the purchase of share capital, the English Court of Appeal found that a solicitor's professional duty extended to the commercial wisdom of a transaction in respect of which legal advice was also sought. All communications between the solicitor and his client relating to the transaction would be privileged as long as the communications related directly to the solicitor's performance of his professional duty as a legal advisor (see *Bacon & Woodrow* at 982). *Balabel* itself involved communications sent to lawyers in the midst of discussions about a conveyancing transaction, as well as the lawyers' advice on that transaction. In such contexts, it would be artificial to draw a line between express requests for legal advice and other matters passed on to the lawyers. The transaction as a whole may require communications between the client and solicitor. In the present case however, it could not be said that the transaction as a whole required the participation of the lawyers. There is nothing to show that any of the requested documents specifically were communicated or intended to be communicated to the lawyers for their broad advice. It may be otherwise if for instance the audit team reported directly to the lawyers involved and took directions from them at each stage. In such a situation, it could readily be inferred that communications was for legal advice, broadly speaking. There was, however, no evidence of that here at all.

47 The process involved within the Plaintiff's organisation in considering the audit, its fruits and the decision on the action to be taken was described by Christina Ng in a portion of her 9th affidavit, reproduced at [38], above. While that description referred to the obtaining of legal advice, it did not show that such advice was either in fact obtained, or was the purpose of the creation of the documents.

48 An investigatory audit for breach of statutory obligations would conceivably entail legal advice at some point. It may be that, for a specific investigation or audit, legal advice would be essentially for the whole of the audit process and the product of that process. An investigation for instance, by the police or similar body, would be of such a nature: the papers arising out of the investigation are handed over and considered by lawyers, namely, the prosecutors, and the decision one way or another is determined by lawyers. Now it is another matter whether a prosecutor in that scenario would be giving "advice" as such, but the example is given to illustrate a core example of a situation where legal advice privilege (as well as litigation privilege) would arise because the whole set of papers would be sent over to lawyers for legal determination. It is conceivable that a similar situation could arise in respect of non-police investigations, including investigatory audits by other bodies, but to attract legal advice privilege, it must be shown that the documents were generated and conveyed, or were intended to be conveyed, to lawyers for advice to be given, even if such advice was not expected to be given in respect of each and every document. If that is shown, following *Balabel* and similar cases, the court would accord legal advice privilege to the documents.

49 Here the documents in question related to the audit, and would have been prepared for consideration of the Plaintiff's position in relation to

reviewing its initial decision to grant the Tax Refunds. It is possible that lawyers may eventually have had to be involved. However, that is not enough to make out the privilege. There is no evidence that the documents were created for the lawyers to advise on the whole of the audit and the decisions taken after. What the affidavit of Christina Ng does not indicate is that the whole set of documents was given to the Law Division to examine as part of their work of giving legal advice to the Plaintiff. The affidavit refers separately to the obtaining of documents from the 1st Defendant through the audit, and the taking of advice from the Plaintiff's legal division. There was no link drawn between the documents and the advice. Without this, there can be no claim of privilege. Any document – a sick note, a grocery list, a lunch invitation – can be the subject of legal advice. The mere fact that documents exist and may possibly be considered and reviewed from a legal perspective is thus not enough. There must be evidence that the documents went to, or were intended to be sent to, the lawyers. The only conclusion that could be drawn was that legal advice was elective in that it could have been sought; but that is not sufficient.

50 One possible counterargument is that, in relation to the Plaintiff's review of its initial decision to pay the Tax Refunds, the consideration of the legal position would have taken place alongside any other non-legal determination within the Plaintiff's organisation, and thus there was no need to show that documents were sent, or were intended to be sent, to the lawyers. But that is for the Plaintiff to show, and they have not done so.

POSITION UNDER S 131 OF THE EA

51 The same result would obtain on a direct application of s 131 EA: there was insufficient evidence that the documents in question were confidential communication taking place between the Plaintiff and his legal advisers.

State Privilege

52 The Plaintiff's claim to privilege is fairly broad in ambit, and invokes protection for activities which do not fit readily into the usual mould of legal professional privilege. What the Plaintiff wants to protect are the fruits of the audit, review and related internal discussions. Such a claim of privilege is in respect of general communications and discussions within an organisation. The involvement of lawyers is really secondary to the ambit of the claim of privilege. But that type of situation is only conferred protection within the EA through public interest immunity and official communications privilege, under ss 125 and 126 of the EA respectively. Neither, it would seem, could be invoked by the Plaintiff here, and neither is relied upon.

Conclusion

53 The documents in Groups 1, 2 and 3 are thus to be given in discovery. Detailed directions as to both the orders sought and the determination of costs will be given separately.

Aedit Abdullah
Judicial Commissioner

Alvin Yeo SC, Lim Wei Lee and Oh Sheng Loong (WongPartnership LLP) for the Plaintiff;
Jaikanth Shankar, David Fong and Shirleen Low (Drew & Napier LLC) for the 1st & 2nd Defendants.