ANB *v* ANC and another and another matter
[2015] SGCA 43

Case Number	: Civil Appeal No 115 of 2014 and Summons No 3690 of 2014
Decision Date	: 21 August 2015
Tribunal/Court	: Court of Appeal
Coram	: Sundaresh Menon CJ; Andrew Phang Boon Leong JA; Tay Yong Kwang J
Counsel Name(s)	: Edmund Kronenburg and Lynette Zheng (Braddell Brothers LLP) for the appellant; S Suressh, Sunil Nair, Nicklaus Tan, Thian Wen Yi (Harry Elias Partnership LLP) for the respondents; Randolph Khoo (Drew & Napier LLC) on watching brief; Joseph Lee and Lim Xiu Zhen (Rodyk & Davidson LLP) on watching brief.
Parties	: ANB — ANC — AND

Civil Procedure – Injunctions

Tort – Confidence

Evidence – Admissibility of evidence

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2014] 4 SLR 747.]

21 August 2015

Andrew Phang Boon Leong JA (delivering the grounds of decision of the court):

Introduction

1 This was an appeal against the decision of the High Court Judge ("the Judge") which is reported as *ANB v ANC and another* [2014] 4 SLR 747 ("the GD"). At the conclusion of proceedings below, the Judge set aside, *inter alia*, an interim injunction previously granted at the *ex parte* stage in favour of the Appellant restraining the Respondents from using, disclosing or destroying certain information in their possession which was extracted from the hard disk of the Appellant's personal notebook computer and which the Appellant alleged was taken, copied and distributed in breach of confidence. We allowed the appeal and granted an interlocutory injunction on terms and upon certain undertakings given by the Appellant and the solicitors of both parties. The full details of the orders made and the undertakings given are set out in the document titled "Annex A" which is appended to our grounds of decision.

2 We were informed only recently that the parties had arrived at an amicable full and final settlement. In the circumstances, and given that the parties had consented to the discharge of the undertakings mentioned in the preceding paragraph, this court directed that the undertakings be discharged forthwith without requiring the parties' attendance before it. However, given the importance of the legal issues hitherto raised in the proceedings before us we are of the view that – in addition to setting out the reasons for our decision – we should also flag out some of the more salient points that will need to be considered in more detail when these issues come before the courts for a definitive ruling in the future.

The facts

3 The Appellant and the 1st Respondent were, at the time the appeal was heard and decided, husband and wife, respectively. They were also, at that particular point in time, involved in acrimonious divorce proceedings. They have two children aged six and eight who were, as noted by the Judge at various junctures of the GD, unfortunately caught in the acrimonious currents of the divorce proceedings. The 2nd Respondent was the law firm which represented the wife. Although there were various circumstances surrounding the divorce proceedings that were laid down by the Judge in the GD, we reproduce only the relevant facts that concerned the case before us, *ie*, those surrounding the alleged surreptitious copying of information stored in the Appellant's personal notebook computer.

4 It was not disputed that the 1st Respondent had moved out of the matrimonial home on 26 September 2012 to reside somewhere else. Divorce proceedings were thereafter commenced by the 1st Respondent on 10 October 2012. The 1st Respondent then returned to the matrimonial home on 18 December 2012 while the Appellant was overseas with their two children to find the doors to the matrimonial home padlocked. She then, on the same day, engaged a locksmith to unlock the padlock for her to gain entry into the matrimonial home.

5 The 1st Respondent found the Appellant's personal notebook computer while she was in the house. She took it from the house and passed it to her private investigator. The private investigator then, upon the 1st Respondent's instructions, proceeded to make copies of files contained in the hard disk drive. The copied data was saved onto an external hard disk drive by the private investigator and he passed it to the 1st Respondent who then passed on the information to the 2nd Respondent for use in the divorce proceedings she was engaged in with the Appellant. The 1st Respondent also returned the Appellant's personal notebook computer to its original location in the matrimonial home where she had initially found it.

6 The Appellant subsequently discovered the surreptitious copying of the information from his personal notebook computer when the 1st Respondent attempted to adduce some of that information as evidence in the divorce proceedings they were engaged in. He then commenced proceedings claiming, *inter alia*, breach of confidence and obtained the interim injunction which the Judge had discharged in the proceedings below.

The decision of the High Court

7 Aside from the Judge's views concerning the exclusionary discretion of the court in civil proceedings which we will, for the reasons given below (at [10]–[12]), deal with tentatively at a later part of our grounds, the Judge, in discharging the interim injunction, based his decision on his finding that there was no serious question as to whether there was a breach of confidence to be tried. In coming to this conclusion, the Judge provided the following reasons (see the GD at [66]–[67]):

(a) The information did not possess the necessary quality of confidence and was different from the sexual affairs of a person – a matter found by Judith Prakash J to possess the necessary quality of confidence in the Singapore High Court decision of *X Pte Ltd and another v CDE* [1992] 2 SLR(R) 575 ("*X v CDE*").

(b) The information was not obtained in circumstances importing an obligation of confidence as the relationship between the husband and wife had already broken down in the light of the fact that they were living apart.

8 Although his finding that there was no serious question to be tried was a sufficient ground for discharging the interim injunction, the Judge observed that the balance of convenience also lay in

favour of the Respondents as, in relation to the information already placed before other courts in the course of the divorce proceedings, "allowing the [interim] [i]njunction to stand would be tantamount to interfering with another court's fact-finding process and its right to decide on admissibility, relevance and weight" (see the GD at [72]).

Some words of caution

9 Before we give the detailed grounds for our decision, it is important, in our view, to state at the outset what this case is – and is not – about.

10 This case is, first and foremost, about *the law of breach of confidence*. It is *not* one that turns (at least on the *facts of the present case*) on *the law of evidence*. Further, this case relates to the granting of an *interlocutory* injunction and *not* a *final* injunction. Put simply, we allowed the appeal in the present case on the basis that the test applicable to the granting of an interlocutory injunction laid down in leading House of Lords decision of *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 ("*American Cyanamid*") was satisfied, since: (a) there was a serious question – as to whether a breach of confidence was committed – to be tried; and (b) the balance of convenience lay in favour of granting the interlocutory injunction.

11 In so far as the need to emphasise the point that this case related to the law of breach of confidence and not the law of evidence is concerned, we note at this particular juncture that the Respondents had, in the court below, focused instead (and wrongly, at least on the facts of the present case) on the law of evidence. Indeed, in the court below, counsel for the Respondents, Mr S Suressh, sought to argue that the principal precedent on which the Appellant had relied on in establishing his case that there had been *a breach of confidence* (*viz*, the English Court of Appeal decision of *Imerman v Tchenguiz and others* [2011] Fam 116 ("*Imerman*")) was *not applicable* in the *Singapore* context because it was, *inter alia*, *premised on* a *different rule of evidence*. In particular, Mr Suressh submitted that *Imerman* proceeded on the assumption that the court *could* refuse to admit improperly or illegally obtained evidence whereas, by virtue of the decision of the Court of 3 Judges in *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 ("*Phyllis Tan*"), the Singapore courts had *no* similar discretion to exclude such evidence. However, the Judge noted, in this regard, that this court had, in the criminal decision of *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 ("*Kadar*"), held that a court nevertheless retained a discretion to exclude improperly or illegally obtained evidence if the prejudicial effect of that evidence towards a party exceeded its probative value (hereinafter referred to as "the exclusionary discretion"). The Judge then proceeded to opine that *the exclusionary discretion* would *not*, however, be exercised in the context of *civil* proceedings in most instances (see the GD at [51]) and (more specifically) in the context of the present case (see the GD at [52]).

12 While it may be that an interlocutory injunction, if ordered, would practically prevent the Respondents from tendering the information as evidence *by copying and distributing the information* in any other suit *in potential breach of confidence*, it must be noted that such an injunction does not equate to a decision as to the *admissibility of such information as evidence*. The latter decision will only have to be made if, for example, the information in the present case was tendered as evidence in support of a suit and the Appellant objects to its admissibility on the ground that it was being used in breach of confidence.

13 Further, and with respect, it was by no means clear, in our view, that the Judge had rendered a correct statement of the relevant legal position as to the exercise of an exclusionary discretion in the context of civil proceedings for reasons which we tentatively state below. Our views (set out briefly below at [27]–[31]) are tentative simply because, as already mentioned, given the fact that this

appeal turned on the law relating to *breach of confidence* (and whether there was a serious question to be tried in this regard), the law of evidence was *not even engaged to begin with – at least on the facts of the present case*. Since the issue of admissibility under the law of evidence did not even arise, the (further) issue as to whether or not the exclusionary discretion may also be exercised in civil proceedings (such as the present) did not, *a fortiori*, arise.

14 It thus follows from the preceding paragraphs that we did *not* accept Mr Suressh's argument that *Imerman* is *not* good law in the Singapore context in so far as the relevant legal principles concerning breach of confidence were concerned. Nonetheless, there was *also* ***no*** *need for us to reach a* ***conclusive*** *decision* in the present case as to whether the legal principles enunciated in *Imerman*, and other associated overseas decisions concerning the protection of private information in the context of the law of confidence (which have not been considered by our courts prior to the present case), should be accepted in Singapore. This leads us to our second caveat – that this case concerned the granting of an *interlocutory* injunction, *not* a *final* injunction. As stated above, it was sufficient for us to be satisfied that there was, in the present case, a serious question to be tried as to whether or not there had been a breach of confidence by the Respondents. In our view, in conjunction with the live factual disputes, the novel and difficult question of law as to whether our law of confidence protects, at least to a certain extent, private information that is surreptitiously extracted or obtained (as illustrated in cases such as *Imerman*) was to be properly dealt with at trial (see also the Singapore High Court decision of *Lim and Tan Securities Pte v Sunbird Pte Ltd* [1991] 2 SLR(R) 776 at [22], cited with approval by this court in *Obegi Melissa and others v Vestwin Trading Pte Ltd and another* [2008] 2 SLR(R) 540 at [40] ("*Obegi Melissa*")). It was, in the light of this and the fact that the balance of convenience lay in favour of the Appellant, that we allowed the appeal and granted the interlocutory injunction on terms and upon certain undertakings.

15 Bearing these caveats in mind, we now proceed to give the detailed grounds for our decision.

The issues before the court

16 The parties did not dispute the applicable test *vis-à-vis* the granting of an interlocutory injunction. In our view, the only issues before this court were whether:

(a) the Judge was correct in finding that there was no serious question as to whether there had been a breach of confidence to be tried; and

(b) the Judge was correct in finding that the balance of convenience lay in favour of the Respondents.

Serious question to be tried

17 In determining whether there was a serious question to be tried, the Judge below relied on the formulation of the test for breach of confidence set out in the seminal decision of Megarry J in the English High Court ruling in *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 ("*Coco*"), a decision which has been cited with approval in various local High Court decisions (see *X v CDE* at [27]; *PH Hydraulics & Engineering Pte Ltd v Intrepid Offshore Construction Pte Ltd and another* [2012] 4 SLR 36 at [55]; and *Clearlab SG Pte Ltd v Ting Chong Chai and others* [2015] 1 SLR 163 at [64]). The three elements that must be established by a plaintiff in a breach of confidence claim, as stated by Megarry J in *Coco* (at 47), are that:

(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.

18 We did not disagree with the applicability of this test in the context of what has been described as "old fashioned breach of confidence" cases (see Paul Stanley, *The Law of Confidentiality: A Restatement* (Hart Publishing, 2008) ("*Stanley*") at p 6), *ie*, cases such as those which involve the transmission of information between transacting parties in a commercial context, or even the alleged engagement in an extra-marital affair between a man and his personal secretary (see *X v CDE*). However, the strict application of this test in relation to cases such as the one before us that involved the surreptitious taking of personal information must be viewed with at least some circumspection – the protection of such private information having been "shoehorned" into the law of confidence in England, not least owing to the need (see below at [21]) for the English courts to give effect to the relevant provisions (and corresponding articles) of the Human Rights Act 1998 (c 42) (UK) ("the HRA") (see *per* Lord Phillips of Worth Matravers MR (as he then was) in the English Court of Appeal decision of *Douglas and others v Hello! Ltd and others (No 3)* [2006] QB 125 at [96]). The HRA is, of course, not law in the Singapore context (see also below at [21]).

19 We thus disagreed with the Judge's rigid application of the test in *Coco* to the facts of this case in dealing with whether there was a serious question of a breach of confidence to be tried. In doing so, the Judge failed to consider English (and other) jurisprudence which has, under the confidentiality *genus*, developed "different features" for cases involving the protection of private information in contrast to the "old fashioned breach of confidence" cases (see *Imerman* at [67]). For example, rather than asking whether the information possessed the necessary quality of confidence and whether that information was imparted in circumstances importing an obligation of confidence pursuant to the first and second elements in the test laid down in *Coco* respectively, the question asked in England in a case concerning the protection of private information is whether the plaintiff had a "reasonable expectation of privacy" in relation to that information (*per* Lord Nicholls of Birkenhead and Lord Hope of Craighead in the House of Lords decision of *Campbell v MGN Ltd* [2004] 2 AC 457 at [21] and [85], respectively). Further, with respect to the third element, it was held in *Imerman* (at [71]) that there was no need to prove that there had been a misuse of the information for the claim to succeed (although this holding purported to apply to "old fashioned breach of confidence" cases as well).

20 In our view, the main issue which arose from this case was whether we should (and, if so, to what extent) adopt the English (or other) jurisprudence concerning surreptitiously acquired private information into our law of confidence. This would include consideration of, *inter alia*, the decision in *Imerman* where an injunction was granted by the English Court of Appeal upon its finding that the surreptitious procurement of information by the wife's brother from the husband's personal computer amounted to a breach of confidence – a case factually similar to the case before us.

21 The Respondent submitted that many of these cases, including *Imerman*, were driven by the coming into force of the HRA which was enacted pursuant to the UK's membership of the European Union and which incorporated into English law the right to privacy under Art 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950), 213 UNTS 221 (Art 8 is to be found in Schedule 1 of the HRA). In this regard, the 1st Respondent argued that there was no serious question to be tried since these cases were irrelevant in the light of the absence of any express guarantee of such a right under the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) ("the Constitution") and that the Judge was consequently correct in strictly applying

the test in *Coco*.

22 Whilst it is true that the right to privacy is not expressly enumerated under the Constitution, it must nevertheless be acknowledged that the protection of privacy under the law of confidence in England in fact materialised *before* the enactment of the HRA pursuant to a *common law right to privacy*. The first authoritative extension of the law of confidence to information obtained without the consent of the plaintiff is to be found in Lord Goff of Chieveley's seminal judgment 25 years ago in *Attorney-General v Observer Ltd and others* [1990] 1 AC 109 (at 281) (see also generally Tanya Aplin, Lionel Bently, Phillip Johnson & Simon Malynicz, *Gurry on Breach of Confidence – The Protection of Confidential Information* (Oxford University Press, 2nd Ed, 2012), especially at paras 6.52–6.191 as well as *Stanley*). Further, other common law jurisdictions, such as New Zealand, have also extended protection to private information *via* the law of confidence in the absence of any express constitutional (or similar) guarantees to the right to privacy. Finally, on a policy level, legislative developments in recent years, which included the enactment of the Protection from Harassment Act (Cap 256A, 2015 Rev Ed) and the Personal Data Protection Act 2012 (No 26 of 2012), also point towards an increasing recognition of the need to protect personal privacy – developments which must also be viewed in the context of recent spates of data breaches involving commercial customers and government employees in the United States.

23 In our view, these factors meant that a serious legal issue arose from this case as to whether we should afford, like the courts in England and various other jurisdictions, protection to one's privacy by way of the law of confidence regardless of whether such a right is guaranteed under the Constitution (an issue which is also dealt with in the comprehensive and perceptive article by George Wei Sze Shun, "Milky Way and Andromeda: Privacy, Confidentiality and Freedom of Expression" (2006) 18 SAcLJ 1, especially at paras 81–89). The extent to which we should adopt such jurisprudence, *ie*, the circumstances under which the law of confidence would extend its protection to private information acquired without consent, also depended on a determination of the facts (that are to a certain extent disputed) of the case. These matters, to our mind, gave rise to a serious question to be tried as to whether there was a breach of confidence and we thus disagreed with the findings of the Judge on this issue. However, we would again highlight the caveat that we were by no means endorsing, or even encouraging, the identification of a right to protection of private information under our law of confidence. We were simply of the view that such an issue was better left to be determined at trial upon a full and comprehensive canvassing of the relevant legal as well as factual arguments by counsel for both sides (which is of course now moot in view of the settlement arrived at between the parties (see above at [2])).

24 As a final point of note, we held in *Obegi Melissa* that a triable issue concerning a breach of confidence arose in a case where documents which were allegedly "abandoned" were obtained by one party from another surreptitiously. Although that case dealt with whether there was a triable issue in relation to the granting of leave to defend upon an application for summary judgment, we nonetheless found that it supported our conclusion that there was a serious question to be tried in this case.

The balance of convenience

25 As observed by Lord Nicholls in the House of Lords decision of *Cream Holdings Ltd and others v Bangerjee and another* [2005] 1 AC 253 (at [18]), "[c]onfidentiality, once breached, is lost for ever". Given that there was a serious issue to be tried in relation to a breach of confidence, we found that the balance of convenience also lay in favour of granting an injunction to preserve the confidential (or private) quality of the information. The Respondents relied on the Judge's reasoning below and submitted that prejudice could arise if the information obtained could not be used in the divorce proceedings between the parties. Again, we point out that these proceedings did not relate to the

admissibility of the information as evidence in the divorce proceedings (see above at [12]). In any event, we made it clear in the orders made that our holding in this case did not prevent the 1st Respondent from relying on her knowledge of the information to seek disclosure of the information *via* specific discovery in other proceedings in the usual course of litigation (although the admissibility of the information as evidence would be subject to the decision of whichever court is seized of the matter) (see Order of Court in Annex A at paras 1(c) and 10). In our view, such an arrangement obviated the practical prejudice contemplated by the Respondents and the Judge below that may arise upon a granting of an injunction.

Conclusion

26 For the reasons given above, we held that the test in *American Cyanamid* was satisfied by the Appellant and granted an interlocutory injunction in terms. These reasons formed the *sole basis* of our decision. Nonetheless, we would also proceed to take the opportunity to provide our tentative views on the inherent discretion of the courts to exclude evidence which the Judge had dealt with substantially below.

Some observations on the inherent discretion to exclude evidence

27 As we have explained at the outset of these grounds (at [9]–[14]), it was *unnecessary*, in our view, for us to have considered whether or not the information which formed the subject matter of the injunction was admissible pursuant to *the law of evidence*. However, this does *not* mean that the law of evidence will *never* be engaged. *Much will depend on the particular facts of the case itself* (see the example provided above at [12]). Nevertheless, where (as on the present facts) an interlocutory injunction ought to be issued to prevent a potential breach of confidence in the first place, it is important to reiterate that the court need not (consistently with what the Appellant argued, albeit contrary to what the Respondents had argued in the court below) even begin to enter into an inquiry as to whether or not the information that constitutes the subject matter of a breach of confidence claim is (or is not) admissible pursuant to the relevant principles of the law of evidence. Indeed, what the relevant principles of the law of evidence are in this last-mentioned regard would need to be decided when detailed arguments are made on a future occasion when the issue arises directly for consideration by the court. We would thus only make a few observations at this particular juncture in relation to the views expressed by the Judge below as to the court's inherent discretion to exclude evidence.

28 The Judge below, after considering *Phyllis Tan* and *Kadar* (cases which concerned criminal or quasi-criminal proceedings), found that the courts did possess an inherent discretion to exclude evidence in *both* criminal and civil proceedings (and for an excellent overview of this particular area of the law, see ch 10 of Jeffrey Pinsler, *Evidence and the Litigation Process* (LexisNexis, 4th Ed, 2013)). However, he was also of the view that a distinction should be "made between civil and criminal proceedings because of the need for precautions against injustice in the latter" (see the GD at [51] (and citing Prof Jeffrey Pinsler's article, "Admissibility and the Discretion to Exclude Evidence: In Search of a Systematic Approach" (2013) 25 SAcLJ 215 ("*Pinsler*") at para 2 (which paragraph was, however, referring specifically to the then new *statutory* discretion introduced by the Evidence (Amendment) Act 2012 (No 2 of 2012))). He thus concluded that, in the context of civil proceedings, the prejudicial effect in the probative value/prejudicial effect balancing exercise enunciated in *Kadar* "assumes a far lighter weight and role when put in the balance against the probative value component" and that "[i]n most instances, it boils down to a matter of weight in civil proceedings" (see the GD at [51]).

29 Whilst we agree that different societal and policy reasons as well as arguments may apply *vis-*

à-vis the inherent discretion of the court to exclude evidence as between criminal and civil proceedings, we do not, with respect, think that this *necessarily* leads to the conclusion arrived at by the Judge, *ie*, that the exclusionary discretion would be exercised with less rigidity such that most evidence would not be excluded in civil proceedings. First, it may simply be the case that the probative value/prejudicial effect balancing exercise (though well-suited to the nuances of and the values at stake in criminal proceedings) cannot be applied to civil proceedings and that a different balancing exercise should be conducted in that respect. Secondly, *Phyllis Tan* and *Kadar* related to fact situations which concerned the propriety of the conduct of law enforcement officers and private investigators with regard to the obtaining of the evidence and the effect of that conduct on the quality of the evidence. This is different from cases such as the present which was not only concerned with the propriety of the conduct of the Respondents, but also with the protection of the Appellant's potential pre-existing *proprietary* rights over the evidence as well, the protection of such potential proprietary rights in general being a matter of public interest. Thirdly, whilst the exclusion of the evidence in *Phyllis Tan* and *Kadar* may have deprived the prosecuting parties in both cases of certain evidence which could have been used to convict the defendants (*ie*, that the evidence in question could only have been admitted in the form and manner in which it was obtained), which may weigh against the court excluding the evidence, the same cannot be said of cases such as the case before us. The Respondents had an obvious alternative to obtain the same evidence, but in a lawful manner – that is, by way of discovery.

30 The factors discussed above illustrate the fact that too sharp a distinction should not be drawn between criminal and civil proceedings without further analysis of the *precise type* of impropriety or illegality behind the evidence attempted to be adduced – although we hasten to add that nothing we state should detract from the importance of the exclusionary discretion with regard to *criminal* cases because the life or liberty of the accused are at stake. Returning to the facts of the present case, although the 1st Respondent in this case might – looked at from one point of view – be said to have taken the information improperly or illegally, we note (consistently with the views we have just expressed) that this *might* be *a different conception of the concept of "unlawfully or illegally obtained evidence" which forms the basis of decisions in cases such as* Kadar *and* Phyllis Tan, and we therefore (except to the extent of our observations on the exclusionary discretion) say no more about this particular issue in this judgment. What we would note, however, is that there are good reasons why the inherent discretion to exclude evidence may also be needed to be exercised more robustly – or at least more vigorously than what the Judge envisaged in his decision below – in *civil* proceedings in the light of the very different countervailing factors that arise from the need to protect potential proprietary interests and the public interest in promoting the obtaining of evidence by way of legally prescribed methods. Put simply, the respecting of such rights and rules is something which is expected when one is living in a civilised society where the Rule of Law (and not of the jungle) must prevail. This is especially needful in the context of the sea change in both the quality – as well as the availability of – technology in the modern world. Much would of course also depend, in the final analysis, on the precise facts as well as context of the case.

31 We have enunciated the views above for the purpose of highlighting how the inherent discretion to exclude evidence may, contrary to the views of the Judge below, not be exercised as sparingly in civil proceedings as he had envisaged in his decision. Nonetheless, as we have already caveated above, these views are merely tentative and a full and final pronouncement on this issue, including the applicability of *Phyllis Tan* and *Kadar* (the former decision of which, we note, was strongly critiqued by Prof Ho Hock Lai in ""National Values on Law and Order" and the Discretion to Exclude Wrongfully Obtained Evidence" [2012] Journal of Commonwealth Criminal Law 232), should only be made after considering the detailed arguments in an appropriate case in the future. Indeed, Prof Pinsler was of the view that the fact that the *common law* exclusionary discretion discussed above presently exists side-by-side with a more specific *statutory* exclusionary discretion embodied

within ss 32(3) and 47(4) of the Evidence Act (Cap 97, 1997 Rev Ed) (in relation to hearsay evidence and expert opinion evidence, respectively) results in a situation that is, in his view, "unsatisfactory" (see *Pinsler* at para 40).

Annex A

These were the orders made by the court:

1 The Appeal is allowed on the terms set forth below.

2 Pending the final disposal of the action herein or until further order, the 1st and 2nd Respondents are restrained and enjoined, whether by themselves or by their servants or agents or otherwise, from howsoever using, disclosing or destroying any data or documents copied from the Appellant's Asus notebook computer … on or about 18 December 2012 or at any other time ("Copied Data"), or any copy, reproduction, extract or part of the Copied Data, SAVE THAT subject to paragraph 3 below:

(a) the Respondents shall be at liberty to use and refer to the Copied Data in Suit No. 427 of 2013 ("Suit"), including but not limited to any applications, appeals, defences and/or counter-claims therein;

(b) the Respondents shall be at liberty to disclose the Copied Data to their legal advisors for the purpose of obtaining legal advice in connection with the Suit, including but not limited to any applications, appeals, defences and/or counter-claims therein;

(c) the 1st Respondent shall be at liberty to use her knowledge and/or recollection of the Copied Data to support any application that she may make to Court for specific discovery in any proceedings, and if the Court allows her application, she shall be at liberty to use and refer to the documents so ordered to be disclosed in those proceedings, subject always to the law of evidence; and

(d) the 1st Respondent shall be at liberty to inform the relevant authorities, in the event that they so enquire of her, that the Copied Data has been delivered-up to the Appellant and his solicitors pursuant to this Order of Court.

3 Insofar as the Copied Data is subject to privilege, it shall not be used, disclosed and/or referred-to by the 1st and/or 2nd Respondents, and/or their servants or agents, whether in the Suit, in Divorce Suit No. 4895 of 2012 ("D4895"), or howsoever otherwise. All parts of the Copied Data subject to privilege in the hard and electronic copies of the affidavits filed by the 1st Respondent on 27 March 2013 and 2 May 2013 ("D4895 Affidavits") shall be forthwith expunged from (a) the copies of the said affidavits on file with the Court and (b) drafts and/or copies in the possession, custody and/or power of the Respondents. The Appellant and the Respondents shall make all applications to Court and/or consent to such applications (as the case may be), as may be necessary to give effect to this paragraph, with no Order as to costs.

4 Notwithstanding anything to the contrary in this Order:

(a) The Respondents shall be permitted to retain in their possession, hard copies and electronic copies of:-

(i) all complaints and/or draft complaints made by them to the relevant authorities as at

10 May 2013 that refer to and/or exhibit the Copied Data, or any part thereof;

(ii) the D4895 Affidavits and any drafts thereof; and

(iii) all Affidavits filed in the Suit to-date,

provided that any Copied Data in the above documents that is subject to privilege has been expunged therefrom, in accordance with paragraph 3 hereof. For the avoidance of doubt, the 1st Respondent shall also be permitted to use the D4895 Affidavits in D4895 after privileged material has been removed from them in accordance with paragraph 3 above, subject to the law of evidence.

(b) The Respondents shall be permitted to retain with Harry Elias Partnership LLP ("HEP") one hard copy of each of the following, without any privileged material redacted or expunged:-

(i) all complaints and/or draft complaints made by them to the relevant authorities as at 10 May 2013 that refer to and/or exhibit the Copied Data, or any part thereof;

(ii) the D4895 Affidavits and any drafts thereof; and

(iii) all Affidavits filed in the Suit to-date.

HEP shall until further Order retain and seal the said hard copies and shall not access, nor permit anyone to access, the same without leave of Court, in compliance with HEP's undertaking as set forth in Schedule Two of this Order. HEP shall effect the above sealing within eight (8) days of this Order and shall notify the Appellant in writing that it has done so.

5 Pending the final disposal of the action herein or until further order, the 1st and 2nd Respondents shall deliver-up the Copied Data as follows:

(a) Within eight (8) days of the date of this Order, the Respondents shall deliver-up all of the following to Drew & Napier LLC ("DN"), the Appellant's solicitor in D4895:

(i) the 1st Respondent's external hard drive … ("Wife's HDD"); and

(ii) all hard-copies of the Copied Data in the possession, custody or power of the 1st and/or 2nd Respondents;

(collectively, "Delivered-Up Material"); together with a schedule listing all of the same.

(b) At the same time as they comply with (a) above, the Respondents shall provide to the Appellant a complete list:

(i) of all storage media, devices and computers (each a "Repository" and together the "Repositories") in the possession, custody or power of:

(1) either of the Respondents;

(2) the servants and/or agents of either of the Respondents; and/or

(3) any other person(s) that either of the Respondents have made the Copied Data or any part thereof, available to,

on which electronic copies of the Copied Data ("Electronic Copies") are resident or were previously resident (to the best of the Respondents' knowledge and belief), excluding the Wife's HDD; and

(ii) stating the location(s) of the Electronic Copies in the relevant Repository by reference to the specific drive(s), folder(s) and filename(s) (to the best of the Respondents' knowledge and belief).

(c) Within 2 days of the above list being provided to the Appellant, the Respondents shall give, allow and/or procure the Appellant's nominated computer forensic expert ("ACFE") access to the Electronic Copies in the possession, custody or power of either of the Respondents and/or their servants and/or agents.

(d) Upon such access being given to the ACFE:

(i) he shall transfer the Electronic Copies, and all parts thereof, that he may find resident on the said Repositories, excluding the Wife's HDD, onto an external storage medium ("Preserved Data Storage Medium"); and

(ii) he shall thereafter take all necessary steps to permanently and irretrievably remove the Electronic Copies, and all parts thereof, from the said Repositories, excluding the Wife's HDD, while taking all reasonable measures to preserve or retain data on the said Repositories that is not part of the Copied Data.

(e) When the ACFE has completed his work, he shall certify that he has done so to the Appellant and the Respondents, in writing.

6 The Delivered-Up Material and the Preserved Storage Data Medium shall be retained by DN in compliance with the undertaking set forth in the Schedule to this Order.

7 Any Copied Data or part thereof already on record with the relevant authorities as at 10 May 2013 … , shall continue to remain on record. For the avoidance of doubt, nothing herein shall preclude the Appellant from applying to exclude any part of the Copied Data from consideration by the said authorities on the grounds of privilege or otherwise.

8 This Order supercedes and replaces the Orders made in the Suit on 10 May 2013, 15 May 2013 and 22 July 2014 and in this Appeal on 12 September 2014.

9 All undertakings to the Court of Appeal given on 12 September 2014 are discharged, and the parties to the same as released from their undertakings.

10 Nothing herein constitutes a finding or determination by the Court of Appeal that the Copied Data or any part thereof is protected by confidentiality.

11 For the avoidance of doubt, nothing herein absolves the Appellant or the Respondents from their obligations of discovery in Court proceedings.

12 Costs of the Appeal, of Summons 3690 of 2014 and Summons 2511 of 2013 be reserved to the trial judge and all earlier costs orders be set aside.

13 There shall be liberty to apply to the Court of Appeal.

Schedule One: Undertakings to the Court by Appellant and Drew & Napier LLC

[The Appellant and Drew & Napier LLC] hereby give the following undertakings to the court:

1 Drew & Napier LLC undertakes that it will retain the Delivered-Up Material and the Preserved Data Storage Medium, until further Order.

2 The Appellant and Drew & Napier LLC jointly and severally undertake that neither of them, nor their respective servants and/or agents, shall destroy, alter or dispose of the Delivered-Up Material or the Preserved Data Storage Medium, until further Order.

3 Nothing herein shall preclude either of the Appellant nor Drew & Napier LLC, nor their respective servants and/or agents, from (a) accessing, (b) using, and/or (c) providing copies of the Delivered-Up Material and/or the Preserved Data Storage Medium, or allowing the taking of images thereof.

4 The above undertakings shall remain in effect until discharged by Order of the Court of Appeal, and shall not be discharged without leave of Court even in the event that Drew & Napier LLC ceases to act as the Appellant's solicitors.

Schedule Two: Undertaking to the Court by Harry Elias Partnership LLP

Harry Elias Partnership LLP hereby give the following undertaking to the court:

> We undertake that we, and our servants and/or agents, shall until further Order retain and seal the hard copies of the documents set forth at paragraph 4(2)(a) to (c) of the Order of the Court of Appeal … and that we shall not access, nor permit anyone to access, the said hard copies without leave of Court.