Tentat Singapore Pte Ltd v Multiple Granite Pte Ltd and Others
[2008] SGHC 136

Case Number : OS 1414/2007

Decision Date : 20 August 2008

Tribunal/Court : High Court

Coram : Kan Ting Chiu J

Counsel Name(s) : Tan Tian Luh (Chancery Law Corporation) for the plaintiff; Kelvin Tan (Gabriel Law Corporation) for the first and second defendants; Sim Chee Siang (Rajah & Tann) for the third defendan

Parties : Tentat Singapore Pte Ltd — Multiple Granite Pte Ltd; Tan Hong Huat; Tentat Holdings Pte Ltd

Civil Procedure – Privileges – Legal advice privilege – E-mail message from plaintiff's solicitors to plaintiff mentioned in affidavit deposed on behalf of defendant in action by plaintiff's related company against defendant – Whether that e-mail was privileged communication – Whether e-mail sent under a duty of confidentiality – Whether privilege waived

20 August 2008 Judgment reserved.

Kan Ting Chiu J:

The application

1 This matter started with a claim by Tentat Holdings Pte Ltd ("Tentat Holdings") against Multiple Granite Pte Ltd ("Multiple Granite") in Suit No. 215 of 2007 ("the suit") for the recovery of two loans for the total sum of $755,000.

2 In its defence, Multiple Granite denied that it had borrowed the sum from Tentat Holdings, and claimed that it was a shareholders' loan from Tentat Singapore Pte Ltd ("Tentat Singapore"), a related company of Tentat Holdings.

3 When Tentat Holdings applied for summary judgment against Multiple Granite, an affidavit was filed by Tan Hong Huat ("THH") in support of Multiple Granite's defence. THH referred in his affidavit to an email message from solicitors Rajah & Tann to Tentat Singapore dated 13 December 2005 which referred to the preparation of an agreement for Tentat Singapore in respect of a loan of $755,000 from Tentat Singapore to Multiple Granite ("the email").

4 THH's affidavit which referred to a loan agreement and a shareholders' agreement read:

> 17. Further to this, Sim Chee Siong of Rajah & Tann was in fact instructed by Lee Teng Hong to prepare a *shareholders agreement* to reflect his intention to acquire the interest in RDC and Imex through Multiple Granite. This agreement was enclosed in an email dated 13 December 2003 [*sic*] by Sim Chee Siong to Karen Lim, the assistant to Lee Teng Hong. In this email, Sim Chee Siong expressly records the fact that he was instructed to prepare a *loan agreement* for Tentat Singapore to lend the sum of $755,000.00 to Multiple Granite for the purpose of acquiring RDC and Imex's interest in shares in P T Bukit Granite and Samwoh. Sim Chee Siong also enclosed a draft agreement for consideration. This agreement was subsequently prepared and forwarded on 20 December 2005. As the Chief Investment officer for the Plaintiff, these emails and the agreement were forwarded to me on 21 December 2005. A copy of these emails and the agreement is annexed hereto and marked as "THH-1".

[emphasis added]

18. This loan of $755,000.00 was meant to be a loan in the form of equity. It was a long term investment. I was clearly informed as the representative of Lee Teng Hong and as a Director of Tentat Holdings by T M Tarah of this fact. i.e. long term investment. It was in my mind entered as a loan because it would be easier legally and accounting wise to obtain the distribution of profits or capital appreciation by repaying the loan. In the case of direct equity investment ie. By shares, a reduction in capital would entail complicated legal steps for example, winding up the company or obtaining the Court's approval.

19. Whilst the agreement was never signed, the fact is that that the emails it record the contemporaneous instructions and understanding of the parties at the time that the loans were actually disbursed. The position that is set out by the Plaintiff's solicitors themselves in the email wholly corroborates the position taken by the Defendants in these proceedings i.e. that this was to be a loan by Tentat Singapore / Lee Teng Hong for the purpose of investment. The fact that the cheques were issued by Tentat Holdings does not detract from this fact.

5 Tentat Singapore intervened in the suit and applied for a declaration that the email is legally privileged communication and that all references by Multiple Granite to the email be expunged and that THH and Multiple Granite were to deliver up or destroy all copies of the email in their possession.

6 When Tentat Singapore's application came on for hearing, issues were raised as to whether it was appropriate for Tentat Singapore to intervene in the suit and I directed that it should be brought up in separate proceedings. Pursuant to the direction, the present originating summons was filed by Tentat Singapore against Multiple Granite, THH and Tentat Holdings, seeking principally a declaration:

> that the legal advices rendered to the Plaintiffs by their solicitors [Rajah & Tann] and communicated to the Plaintiffs by way of an email dated 13 December 2005 9.29 pm, and references thereto, as referred to in the affidavit of Tan Hong Huat affirmed on 5 June 2007 (in particular at paragraphs 17 to 19 and exhibit "THH-1") and filed in Suit 215/2007/C, are legally privileged communications between the Plaintiffs and their solicitors.

with other prayers for Multiple Granite and THH to be restrained from further use of the email, the references of the email be struck out, and copies of the email be delivered up or destroyed.

7 There are two main persons involved in the communication of the emails, namely Lee Teng Hong and Tan Hong Huat:-

(a) Lee Teng Hong ("LTH") is a substantial businessman. He is a director and majority shareholder of Tentat Holdings and Tentat Singapore. Tentat Singapore is, in turn, a shareholder of Multiple Granite. LTH's confidential secretary was Karen Lim ("KL"). The email was sent by Rajah & Tann to KL, and she forwarded it to THH on 21 December 2005.

(b) Tan Hong Huat is a person of considerable corporate experience. He has been involved with 29 companies including listed companies, and is:-

(i) a director of Tentat Holdings from 6 June 2005 to 5 May 2006;[note: 1]

(ii) Chief Investment Officer of Tentat Holdings from 6 June 2005 to 5 May 2007;[note: 2]

(iii) an adviser to Tentat Singapore on fund raising issues until May 2005;[note: 3] and

(iv) a shareholder and director of Multiple Granite.

The email

8 The email in question was an attachment to an email from LTH's secretary KL to THH on 21 December 2005 in which she stated:

> As per Mr Lee's [LTH's] instruction, I forward e-mail and attachments from our lawyer, Mr Sim Chee Siong [of Rajah & Tann] for perusal and comments.

9 Two email messages were forwarded on 21 December 2005. One was dated 20 December 2005 from Rajah & Tann to KL enclosing a draft shareholders' agreement of Multiple Granite for LTH's consideration. No issue arises with regard to this email in this application.

10 The other email forwarded is the subject-matter of this application. This is a message dated 13 December 2005 from Rajah & Tann to KL:

> Subject: Multiple Granite Pte Ltd
>
> …
>
> We refer to the above matter and the discussion with Mr Lee [LTH] this morning.
>
> We are instructed to prepare a loan agreement for Tentat Singapore Pte Ltd to lend the sum of $755,000.00 to Multiple Granite Pte Ltd …

and followed by Rajah & Tann's advice on the proposed loan. The draft loan agreement mentioned by Rajah & Tann was not sent to THH with the email of 21 December 2005. As all three emails were sent in 2005, they will be referred to by date and month.

11 It is quite clear that legal advice privilege applies to this email of 13 December. It was advice rendered by Rajah & Tann on the instructions of LTH, the majority shareholder of Tentat Singapore, to prepare a loan agreement for Tentat Singapore's use. Rajah & Tann regarded the email as privileged and confidential, and added to the email a notice that:

> This message is intended for the recipient(s) addressed above. It contains privileged and confidential information. If you are not the intended recipient, kindly notify the sender or Rajah & Tann …. You must not read, copy, use, or disseminate this communication in any form …

The circumstances of THH's receipt of the emails

12 It is apparent on the face of the email of 21 December that the two emails from Rajah & Tann were not forwarded to THH for his own use, but for him to provide his comments to LTH. Initially, THH acknowledged this. In his affidavit filed in the suit on 5 June 2007, he deposed at [17] that:

> As the Chief Investment officer for the Plaintiff [Tentat Holdings], these emails … were forwarded to me.

However, in a subsequent affidavit filed on 30 July 2007, he changed his position and explained that:

> 10. [T]he agreement that was enclosed relates directly to the sums for which the Plaintiffs are

claiming for in this suit. This was a draft agreement that was prepared by Rajah & Tann, *the parties for which were T M Tarah Pte Ltd, Lee Teng Hong, Multiple Granite Pte Ltd and myself.* I received this agreement on the following basis:-

a. I was named as a party in this Agreement and therefore would have needed to approve it in my personal capacity.

b. I was also a Director of Multiple Granite at the time, and therefore would have had to approve this agreement on behalf of Multiple Granite.

c. Finally, I also received this in my capacity as the Chief Investment Officer for Tentat Holdings.

[Emphasis added]

11. In my earlier affidavit filed on 5 June 2007, I had only mentioned that I had received this as the Chief Investment Officer of Tentat Holdings. The reason why I had stated this was only to make it clear that this email had been properly and officially received. At that time, this issue of privilege had not been raised and therefore it was not necessary to go into this amount of detail as the facts of the email and the document that was enclosed speak for themselves.

13 The plaintiff rejected his explanation, with reason. THH had evidently given thought to the circumstances in which he received the email, and had described it correctly and fully in his first affidavit. There was no reason for him to hold back on a full disclosure of the circumstances when the receipt of the email was already in issue at that time. The reason offered, that the original description was given to make clear that the email was properly and officially received, is curious in that there was no allegation to the contrary. Furthermore, the agreement THH referred to in [10] of his affidavit was not the shareholders agreement; it could not be the loan agreement because Tentat Singapore, the alleged lender, was not named as a party to it.

14 THH is not the only one to succumb to equivocation. LTH had also resorted to it. In his affidavit of 5 July 2007 filed in the suit[note: 4], he deposed that the legal advice was sent to THH in his capacity as Chief Investment Officer of the Tentat Group. A month later, in an affidavit filed on 14 August 2007 in the same proceedings[note: 5], he affirmed that the email of 13 December was sent to THH by mistake, and that only the email of 20 December was intended to be sent to him.

15 LTH's explanation is not more satisfactory than THH's, inasmuch as it contradicts an earlier statement made when the circumstances of the sending of the email was already in issue. Further to that, there was no evidence from KL that when she sent the email of 13 December to THH, it was not done on LTH's instructions, as expressly stated in her email.

16 I do not accept the attempts at retraction or qualification and hold each of them to his original statement. I find that the email was sent to THH for his comments, and THH received it in confidence as Chief Investment Officer of Tentat Holdings.

The submissions of Multiple Granite and THH

17 Multiple Granite and THH are the effective defendants in this application. Tentat Holdings does not intend to use the email. It is included as a defendant only because it is the plaintiff in the suit, and it supports the application. I will refer to Multiple Granite and THH hereinafter as the defendants.

18 The defendants contended that the plaintiff's claim of privilege is unsustainable because:

(i) the plaintiff is not the party entitled to claim privilege (the retainer issue);

(ii) the plaintiff had waived privilege in the emails;

(iii) the plaintiff, having waived its right in respect of the emails dated 20 December and 21 December, cannot assert privilege for the email of 13 December (the cherrypicking issue).

19 On the retainer issue, the defendants argued that there is uncertainty as to whether Rajah & Tann's advice was issued to Tentat Singapore, Tentat Holdings or LTH in his personal capacity. The response from the plaintiff is that this submission is tenuous, and that it is clear, from the statement in Rajah & Tann's email that "we are instructed to prepare a loan agreement for Tentat Singapore Pte Ltd", that the retainer was for Tentat Singapore.

20 While it is possible for LTH to have instructed Rajah & Tann in his personal capacity, or on behalf of Tentat Holdings rather than to have that done on Tentat Singapore's account, that is improbable and unlikely. On a clear balance of probabilities, the retainer was from Tentat Singapore.

Waiver of privilege

21 Rajah & Tann's email of 13 December was forwarded to THH. When privileged information is disclosed to third parties, the privilege could be waived by an express waiver, or an implied waiver. The circumstances of the dissemination would determine whether there is a waiver.

22 This is succinctly described in two leading books on the subject:-

> [W]here the document is disclosed to one or more third parties with no express or implied requirement that the third party should treat the document as confidential, it is hard to see why there should be any legal bar on the third party disclosing the document ...

- *Phipson On Evidence* 16th Ed London Sweet & Maxwell 2005 ("*Phipson*"), para 26-08. In this situation, the privilege in the document is waived, but it is not waived –

> Where information is imparted in the course of a relationship or venture which a reasonable person would regard as involving a duty of confidentiality, it is enough that a reasonable person in the recipient's position would regard the information as confidential.

- *Confidentiality, Toulson & Phipps*, 2nd Ed Sweet & Maxwell 2006 ("*Toulson & Phipps"*), para 18-060.

23 When the emails were sent to and received by THH in his capacity as Chief Investment Officer of Tentat Holdings for his comments, he must have known he received them under a duty of confidentiality.

24 It was also contended that when the plaintiff objected to the disclosure of Rajah & Tann's email of 13 December, but not Rajah & Tann's email of 20 December or KL's email of 21 December forwarding those two emails, that amounted to cherrypicking, and the plaintiff cannot be allowed to do that. Cherrypicking is explained in *Phipson* at paras 26-11 and 26-12 where reference was made to *Great Atlantic Insurance Co Ltd v Home Insurance Co* [1981] 1 WLR 529:-

> In opening a trial, the plaintiff's counsel read out the first two paragraphs of a privileged

memorandum under the impression that the document was complete as it stood. It became apparent afterwards that part of the document had been blanked out as privileged and the defendants sought disclosure of the rest on the ground that even if the whole document was privileged, the disclosure of part of the document to the court amounted to a waiver of privilege. The Court of Appeal held that the entire document was privileged, but by reading out part of a privileged document to the court the plaintiffs had, albeit unwittingly, waived privilege in the entire document. Templeman L.J. said:

> "… Once it is decided that the memorandum deals with only one subject matter, it seems to me that it might be or appear dangerous or misleading to allow the plaintiffs to disclose part of the memorandum and to assert privilege over the remainder. In the present case the suspicions of Heath which have not unnaturally been aroused by the disclosure of any part of the memorandum can only be justified or allayed by disclosing the whole."

It is apparent from this that waiver of privilege is a doctrine of fairness. If the document in *Great Atlantic* was *a single document which could not be severed as to its subject matter*, then, whether or not they were aware of it, *the plaintiffs were seeking to read one part of the document to the court but to claim privilege for another part of the same document*. If that were permitted, it would enable a party to "cherrypick" parts of documents which were favourable and retain privilege for those which were unfavourable.

[Emphasis added]

25 The situation here is quite different. The emails of 20 and 21 December are distinct from that of 13 December in content. The email of 21 December contained no privileged information on its own. The email of 20 December referred to a shareholder agreement. Only the email of 13 December referred to the loan agreement that THH and Multiple Granite proposed to bring into evidence in the suit. The plaintiff is not seeking to disclose parts of the legal advice on the loan agreement which suit it or Tentat Holdings while holding back other portions of the same advice.

Secondary evidence

26 The defendants also contended that even if the email of 13 December was privileged, and privilege was not waived, secondary evidence of the email can be produced in evidence.

27 The authority for this proposition is the decision of the English Court of Appeal in *Calcraft v Guest* [1898] 1 QB 759 ("*Calcraft*"). This was an action by the plaintiff Mr Calcraft against a defendant Mrs Drax for trespass. Judgment was given against Mrs Drax, who appealed. Mrs Drax gave notice that she intended to rely on some documents in the appeal, including proofs of witnesses and rough notes of evidence in an earlier action which were the plaintiff's predecessor's privileged documents. When the defendants' solicitors had knowledge of the documents, they inspected and took copies of them. Under the threat of legal proceedings, the solicitors then handed the documents to the plaintiff, but retained the copies. The question was whether these copies could be used by the defendant. Lindley MR, delivering the judgment of the Court of Appeal started by on the basis that as a general rule, subject to waiver, "one may say once privileged always privileged" and he cited Parke B's statement in *Lloyd v Mostyn* 10 M &W 478 that:

> Where an attorney intrusted confidentially with a document communicates the contents of it, or suffers another to take a copy, surely the secondary evidence so obtained may be produced.

in allowing the copies of the documents to be used.

28 Neither Lindley MR nor Parke B explained how privilege is lost through the process of copying. Inasmuch as privilege subsists in the content of the information, the rule has engendered disagreement and controversy, leading *Toulson & Phipps* to call it "the unfortunate decision of the Court of Appeal in *Calcraft v Guest*" (at para 18-014).

29 The use of secondary evidence was refused in another important decision of the Court of Appeal in this area of the law, *Lord Ashburton v Pape* [1913] 2 Ch 469 ("*Ashburton*"). In this case, Pape obtained letters written by Lord Ashburton to his solicitor, which were admitted to be privileged. Pape's solicitors had obtained them from a clerk of the solicitor under questionable circumstances, made copies of them, and delivered the original letters to Pape. Upon demand, the letters were handed over to Lord Ashburton's new solicitor. Lord Ashburton applied successfully to restrain Pape and his solicitors from making use of the copies of the letters.

30 In the judgments of the Court, Cozens-Hardy MR explained at p 473:

> The rule of evidence as explained in *Calcraft v Guest* [1898] 1 QB 759 merely amounts to this, that if a litigant wants to prove a particular document which by reason of privilege or some circumstance he cannot furnish by the production of the original, he may produce a copy as secondary evidence although that copy has been obtained by improper means, and even, it may be, by criminal means. The Court in such an action is not really trying the circumstances under which the document was produced. That is not an issue in the case and the Court simply says "Here is a copy of a document which cannot be produced; it may have been stolen, it may have been picked up in the street, it may have improperly got into the possession of the person who proposes to produce it, but that is not a matter which the Court in the trial of the action can go into." But that does not seem to me to have any bearing upon a case where the whole subject-matter of the action is the right to retain the originals or copies of certain documents which are privileged.

while Kennedy LJ stated at p 474:

> [T]he principle which is laid down in *Calcraft v Guest* [1898] 1 QB 759 must be followed, yet, at the same time, if, before the occasion of the trial when a copy may be used, although a copy improperly obtained, the owner of the original can successfully promote proceedings against the person who has improperly obtained the copy to stop his using it, the owner is none the less entitled to protection, because, if the question had arisen in the course of a trial before such proceedings, the holder of the copy would not have been prevented from using it on account of the illegitimacy of its origin.

and Swinfen Eady LJ confirmed that he was of the same opinion.

31 Subsequent cases have not been consistent in the application of the rules stated in the two cases. In *Webster v James Chapman & Co (a firm) and others* [1989] 3 All ER 939 which was cited by the defendants, Webster was injured in an industrial accident, and he commissioned consulting engineers to report on the system of work. When his solicitors received the engineers' report, his solicitors instructed the engineers to consider their adverse conclusions. By mistake, a copy of the report was sent to the employer's solicitors, who refused to return it or to undertake not to use it. The plaintiff then brought an action for the return of the report, and to restrain the use of it.

32 On the facts, there was no issue of the use of secondary evidence. However, Scott J in his judgment dismissing the plaintiff's action considered *Calcraft* and *Ashburton* and concluded at pp 943-944:

> *Calcraft v Guest* and *Lord Ashburton v Pape* are examples of two independent and free-standing principles of jurisprudence. The former case related to privileged documents and to the scope of the protection provided by legal privilege. The latter case related to confidential documents and to the protection that equity will provide to that category of documents. I think it is important to notice the different principles on which protection of confidential documents on the one hand and privileged documents on the other hand are based.
>
> Once a privileged document or a copy of a privileged document passes into the hands of some other party to the action, prima facie the benefit of the privilege is lost: the party who has obtained the document has in his hands evidence which, pursuant to the principle in *Calcraft v Guest,* can be used at the trial. But it will almost invariably be the case that the privileged document will also be a confidential document and, as such, eligible for protection against unauthorised disclosure or use.

Then addressing *Ashburton* and confidential information, he held at p 945:

> The law regarding confidential information is, I think, now relatively well settled. The court must, in each case where protection of confidential information is sought, balance on the one hand the legitimate interests of the plaintiff in seeking to keep the confidential information suppressed and on the other hand the legitimate interests of the defendant in seeking to make use of the information. There is never any question of an absolute right to have confidential information protected. The protection is the consequence of the balance to which I have referred coming down in favour of the plaintiff.

33 There is a difficulty with the analysis because the letters in *Ashburton* were found by all the three judges in that case to be confidential as well as privileged. *Ashburton* cannot be distinguished from *Calcraft* on the basis that *Ashburton* referred to confidential documents only.

3 4 *Calcraft* and *Ashburton* have been dealt with differently in other cases. In the often-cited decision in *Goddard and another v Nationwide Building Society* [1987] 1 QB 670 ("*Goddard*") of the English Court of Appeal, May LJ found at p 683, that the application of the two rules depends on the stage of use of the privileged information:

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

indicating that the right to use the copies is liable to be defeated by timely objection and Nourse LJ affirmed that at pp 684-685 that:

> The crucial point is that the party who desires the protection must seek it *before the other party has adduced the confidential communication in evidence* or otherwise relied on it at trial.
>
> [Emphasis added]

This statement is on its face clear because any objection must be made before the evidence is used,

and a party which remains silent can be said to have waived privilege, or acquiesced to the use of the evidence. However, the plaintiff in *Calcraft* had objected to the intended use of the information in the pending appeal, and the objection was rejected.

35 Some judges do not attempt to reconcile the rules in *Calcraft* and *Ashburton*. In *R v Uljee* [1982] 1 NZLR 561, a decision of the New Zealand Court of Appeal, Cooke J noted at p 563 that *Calcraft* did not discuss the admissibility of secondary evidence of privileged documents as a matter of principle, and that diminished its value as guidance for the court. McMullin J went further to say at p 574 that *Calcraft* "should not be regarded as authoritative on the proposition for which it appears to speak."

36 In *English & American Insurance Co Ltd v Herbert Smith* [1988] FSR 232, Sir Nicolas Browne-Wilkinson V-C acknowledged the difficulties in reconciling *Calcraft* and *Ashburton* and ventured at p 237 that when the issue reaches the House of Lords, "it may well be that the absolute rule laid down in *Calcraft v Guest* is the suspect decision", rather than the rule in *Ashburton*.

37 In *Baker v Campbell* 49 ALR 385, a decision of the High Court of Australia in 1983, Brennan J was more out-spoken in declaring at p 428: "In my opinion, *Calcraft v Guest* should not be followed in this country", but his opinion was not endorsed by the other members of the Court.

38 Although *Calcraft* is established law, uncertainties remain over its rationale and application. *Ashburton,* on the other hand, is clear in allowing a party to object to the use of privileged documents or copies of such documents. *Ashburton* is uncomplicated on its own; it is its relationship with *Calcraft* that is challenging.

Has the email been used?

39 As I have indicated earlier, May LJ had stated in *Goddard* at p 683 that:

> If a litigant has in his possession copies of documents to which legal professional privilege attaches he may nevertheless use such copies as secondary evidence in his litigation: however, if he has not yet used the documents in that way, the mere fact that he intends to do so is no answer to a claim against him by the person in whom the privilege is vested for delivery up of the copies or to restrain him from disclosing or making any use of any information contained in them.

40 When a document has become a part of the record in any court proceedings, the information in the document enters into the public domain, and it will be too late to preserve the privilege in the document.

41 Has the email of 13 December been used by Multiple Granite or THH in this sense? It has been referred to in THH's affidavit filed in support of Multiple Granite's defence to Tentat Holdings's application for summary judgment in the suit. Clearly Multiple Granite and THH intended the email to be part of the evidence in the hearing for summary judgment. The filing of the affidavit was preparatory to the admission of that evidence. However, as the application of summary judgment has not been heard, the email has not been admitted in evidence for that purpose. The very question whether the parts of the affidavit which refer to the email should be struck out is to be addressed.

42 At this stage, Multiple Granite and THH cannot be said, in Nourse LJ's words in *Goddard*, to have "adduced the confidential communication in evidence or otherwise relied on it at trial", and it is not too late for the plaintiff to make the application to exclude the email from the pending proceedings.

Conclusion

43 My findings on the issues in this application are:

(i) the email of 13 December was covered by legal advice privilege;

(ii) the email was sent to THH under a duty of confidentiality;

(iii) there was no waiver of the legal advice privilege; and

(iv) the email has not been used in evidence.

The defendants should not be allowed to tender the email or secondary evidence of it in the suit. I grant the plaintiff's application, and order the first and second defendants to pay costs to the plaintiff.

[note: 1]Affidavit of LTH, 3 July 2007 para 1

[note: 2]Affidavit of THH, 5 June 2007 para 10, 1st and 2nd Defendants' Written Submissions, 28 Dec 2007, para 4

[note: 3]Affidavit of THH, 27 July 2007 para 5

[note: 4]at para 22

[note: 5]at para 13