# CIFG Special Assets Capital I Ltd (formerly known as Diamond Kendall Ltd) *v* Polimet Pte Ltd and others
[2015] SGHC 325

**Case Number** : Suit No 758 of 2013 (Registrar's Appeal No 232 of 2015)

**Decision Date** : 23 December 2015

**Tribunal/Court** : High Court

**Coram** : George Wei J

**Counsel Name(s)** : Shivani d/o Sivasagthy Retnam and Ben Mathias Tan (Drew & Napier LLC) for the plaintiff; Tan Chee Meng SC, Alvin Lim Xian Yong and Sngeeta Rai (WongPartnership LLP) for the defendants.

**Parties** : CIFG SPECIAL ASSETS CAPITAL I LTD (formerly known as Diamond Kendall Limited) — POLIMET PTE LTD — LEE SIN PENG — ANDY HO — ONG PUAY KOON — YAP TIEN SUNG — CHRIS CHIA WOON LIAT — YEO KAR PENG

*Civil Procedure – Discovery of documents*

*Legal Profession – Professional privileges*

23 December 2015 Judgment reserved.

**George Wei J:**

**Introduction**

1 This is an appeal against the entire decision of the Assistant Registrar ("the AR") made on 30 July 2015 in Summons No 1632 of 2015, ordering that the plaintiff disclose documents and written communications between itself and its solicitors, Messrs Richard Wee & Yip ("RWY"), in relation to an unsigned agreement in 2011 ("the Documents"). The AR awarded costs of $5000 (excluding reasonable disbursements) to be paid by the plaintiff to the defendants.

2 RWY is a law firm in Kuala Lumpur, Malaysia. Mr Yip Huen Weng ("Mr Yip") is an advocate and solicitor of the High Court of Malaya and a partner of RWY. [note: 1] There is no suggestion that Mr Yip has been called to the bar in Singapore or that he holds a Singapore practising certificate. The relevance of this point will become clearer below.

3 Central to this appeal are the issues of (a) whether the Documents are relevant for disposing fairly of the matter and/or for saving costs; and (b) whether the Documents are cloaked with legal professional privilege.

**Background**

***The parties***

4 The plaintiff, CIFG Special Assets Capital I Ltd ("CIFG"), is a private company incorporated in Mauritius. [note: 2] It was set up as a special purpose vehicle by Kendall Court Mezzanine (Asia) Fund 1 LP ("Kendall Court") for the purpose of entering into Convertible Bond Subscription Agreements

("CBSAs") with the defendants. [note: 3] It is worth noting that CIFG was formerly known as Diamond Kendall Limited and most of the material events took place prior to the change of name. To be clear, references to "the plaintiff" will include both CIFG and its previous incarnation, Diamond Kendall Limited.

5 The first defendant, Polimet Pte Ltd ("Polimet"), is a private limited company incorporated in Singapore. [note: 4] It is in the business of, *inter alia*, manufacturing lead-in wires and cold formed components for the glass diodes and semiconductor industry. [note: 5] The second to fifth defendants were the initial shareholders of Polimet. At present, the second defendant, Lee Sin Peng ("Ms Lee"), is a director of Polimet. I note that the second to fifth defendants are Malaysians.

6 The third parties, Chris Chia Woon Liat ("Mr Chia") and Yeo Kar Peng ("Ms Yeo"), were the plaintiff's former nominee directors in Polimet. [note: 6] They were directors of Polimet from 5 October 2007 to 21 September 2012, and 5 October 2007 to 26 March 2012 respectively. [note: 7] The third parties were the representatives of Kendall Court in the negotiations leading up to the CBSAs entered into between the plaintiff and the defendants. [note: 8] After the plaintiff was formed, the third parties were also the plaintiff's representatives in all matters related to and arising out of the CBSAs. [note: 9]

***The agreements***

7 In October 2007, the parties entered into a Convertible Bond Subscription Agreement dated 5 October 2007 ("2007 CBSA") by which Polimet issued a convertible bond with a redemption value of US$8,333,333 (subsequently increased to US$9,166,667) and the plaintiff subscribed for the full amount the bond. In exchange, the plaintiff granted Polimet a facility in the sum of US$5,500,000 to be drawn down in three tranches.

8 On 16 October 2008, the parties entered into another CBSA ("2008 CBSA"). The parties also entered into a Supplemental Bond Subscription Agreement on the same date ("Supplemental 2008 CBSA"). Under these agreements, Polimet issued a convertible bond with a redemption value of US$4,666,667 and the plaintiff subscribed for the full amount of the bond. In exchange, the plaintiff granted Polimet a facility in the sum of US$2,800,000.

9 Both the 2007 CBSA and the 2008 CBSA contained a general indemnity clause (cl 12.1) stating that each of the defendants jointly and severally agreed and undertook to fully indemnify the plaintiff from and against all losses, costs, liabilities and expenses arising directly or indirectly from any breach of the corresponding CBSA ("the General Indemnity Clause"). [note: 10] Over and above the General Indemnity Clause, Ms Lee (the second defendant) and the third defendant, Andy Ho ("Mr Ho"), executed personal guarantees for up to 50% of Polimet's obligations and liabilities under the 2007 CBSA and the 2008 CBSA ("the Personal Guarantees"). [note: 11]

10 It is undisputed that Polimet drew down the entire facility extended by the plaintiff pursuant to the aforesaid agreements. In 2009, at Polimet's request and in the light of the defendants' inability to meet its upcoming payment obligations and maintain the financial ratios required of it under the 2007 CBSA and the 2008 CBSA, the parties entered into a Supplemental CBSA on 28 October 2009 ("Supplemental 2009 CBSA"). [note: 12] The purpose of the Supplemental 2009 CBSA was to grant Polimet a two-year grace period in respect of its payment obligations and eased the financial ratios to be maintained by Polimet under the 2007 CBSA and the 2008 CBSA. [note: 13]

11 In or around October 2011, the parties were in discussions about implementing a moratorium of Polimet's obligations under the CBSAs ("the Proposed Agreement"). Mr Yip was appointed to draft the Proposed Agreement. On one hand, the plaintiff takes the position that Mr Yip was appointed as the plaintiff's solicitor. On the other hand, the defendants argue that Mr Yip was the solicitor of both the plaintiff and the defendants.

12 The Proposed Agreement was never concluded. Pertinently, the Documents that are the subject of this appeal relate to the communications between the plaintiff and Mr Yip in relation to the Proposed Agreement.

13 It appears that the 2007 and 2008 CBSAs and the Supplemental 2009 CBSA were prepared by law firms in Malaysia. The Proposed Agreement in October 2011 was prepared by My Yip.

***The suit***

14 To properly understand the issues arising in this appeal, it is necessary to have a broad understanding of the claims and defences in the main suit, *ie*, Suit No 758 of 2013 ("the Suit"). The plaintiff commenced this suit, claiming the outstanding sums due and owing to them under the CBSAs.

(a) Against Polimet, the plaintiff claims to be entitled to terminate the CBSAs and be paid all monies due under the same as a result of Polimet's breaches of the CBSAs. [note: 14] These breaches include the failure to make payments due under the CBSAs and the failure to maintain the requisite financial ratios.

(b) Against Ms Lee and Mr Ho, the plaintiff claims (on the Personal Guarantees) for 50% of all the sums owing by Polimet under the CBSAs.

(c) Against Ms Lee, Mr Ho, Mr Ong Puay Koon (*ie*, the fourth defendant) ("Mr Ong") and Mr Yap Tien Sung (*ie*, the fifth defendant) ("Mr Yap"), the plaintiff claims sums due and owing under the General Indemnity Clause.

15 In their defence and counterclaim, the defendants dispute the plaintiff's understanding of the General Indemnity Clause and further allege that there was an oral agreement between the plaintiff's representatives, Mr Chia and Ms Yeo, and Ms Lee, that the second to fifth defendants' liability was limited to the loss of their initial shareholding in Polimet.

16 In the alternative, the defendants take the position that the General Indemnity Clause was included in the 2007 CBSA under a common, or alternatively, a unilateral mistake on the defendants' part as to its nature and effect on the liability of the second to fifth defendants. They further plead that Mr Chia and Ms Yeo, as the plaintiff's representatives, had misrepresented the effect of the General Indemnity Clause to the second to fifth defendants.

17 The defendants further allege that the circumstances surrounding the negotiations for the Proposed Agreement in October 2011 cast light on the parties' understanding of the effect of the General Indemnity Clause that is set out in the 2007 and 2008 CBSA. According to them:

(a) In the course of the negotiations, Mr Ong wanted written confirmation from RWY that his liability under the Proposed Agreement shall be limited to the loss of his initial shareholding in Polimet, as it allegedly was "supposed to be" under the 2007 CBSA.

(b) Mr Ong could not obtain a satisfactory answer from RWY. Consequently, Mr Ong was not

agreeable to proceed with the Proposed Agreement which was ultimately never concluded.

18 The plaintiff, in contrast, has pleaded that RWY (which the plaintiff alleges was its solicitor exclusively) did not provide Mr Ong with written confirmation that his liability under the Proposed Agreement was limited to the loss of his initial shareholding in Polimet because his liability was not limited in that manner.

19 There are two issues before me in this appeal:

(a) First, are the Documents relevant and necessary for the fair disposal of the matter or the saving of costs?

(b) Second, even if the Documents are relevant and necessary, are the documents cloaked with privilege such that they should not be disclosed?

**Relevance of Documents**

20 The AR took the view that the Documents were relevant. She reasoned that the negotiations and/or communication between RWY and the plaintiff's representatives in the lead up to the Proposed Agreement are likely to reveal the state of the defendants' knowledge and understanding of the extent of their liability, as well as the state of the plaintiff's and/or RWY's knowledge of the defendants' understanding of the same.

***The arguments***

21 The defendants' stated purpose for seeking disclosure is to shed light on the parties' understanding of the extent of their liability under the 2007 CBSA. More specifically, they contend that the Documents will show that the parties were under a mistake or that the plaintiff was aware of the unilateral mistake in respect of the inclusion of the General Indemnity Clause.

22 The plaintiff first submits that the Proposed Agreement and its terms are wholly irrelevant because it was never concluded and the plaintiff is not suing on it. *Second*, the plaintiff submits that the documents are unnecessary because documents that have been disclosed already show the plaintiff's views on the extent of the defendants' liability under the CBSAs. *Third*, the plaintiff contends that the defendants are fishing and that is impermissible. In its view, the category of documents sought is very broadly framed and includes ***all*** written communications between RWY and the representatives of Kendall Court in relation to the negotiations and discussions leading up to and execution of the Proposed Agreement in October 2011, extending far beyond those pertaining to the General Indemnity Clause.

***Decision***

23 Order 24 r 5 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) permits a party to apply for the discovery of specific documents or a specific class of documents within the possession, custody or power of another party. The rule reads as follows:

Order for discovery of particular documents (O. 24, r. 5)

5.—(1) Subject to Rule 7, the Court may at any time, on the application of any party to a cause or matter, make an order requiring any other party to make an affidavit stating whether any document specified or described in the application or any class of document so specified or

described is, or has at any time been, in his possession, custody or power, and if not then in his possession, custody or power, when he parted with it and what has become of it.

(2) An order may be made against a party under this Rule notwithstanding that the party may already have made or been required to make a list of documents or an affidavit under Rule 1.

(3) An application for an order under this Rule must be supported by an affidavit stating the belief of the deponent that the party from whom discovery is sought under this Rule has, or at some time had, in his possession, custody or power, the document, or class of document, specified or described in the application and that it falls within one of the following descriptions:

(a) a document on which the party relies or will rely;

(b) a document which could —

(i) adversely affect his own case;

(ii) adversely affect another party's case; or

(iii) support another party's case;

(c) a document which may lead the party seeking discovery of it to a train of inquiry resulting in his obtaining information which may —

(i) adversely affect his own case;

(ii) adversely affect another party's case; or

(iii) support another party's case.

(4) An order under this Rule shall not be made in any cause or matter in respect of any party before an order under Rule 1 has first been obtained in respect of that party, unless, in the opinion of the Court, the order is necessary or desirable.

24 Relevance is one of the essential pre-conditions to be satisfied before discovery will be ordered and it is defined by reference to the categories set out in O 24 r 5(3). Whether a document would affect that party's claim, adversely affect another party's case or support another party's case depends on the issues pleaded in the action. Significantly, when seeking discovery of a class of documents, relevance must be shown in relation to the entire class described as a class, and not only some parts of the class: *Singapore Civil Procedure 2015* vol 1 (G P Selvam gen ed) (Sweet & Maxwell, 2015) at para 24/5/1.

25 Relevance, of course, is always one of degree. The degree of relevance will depend on the circumstances. What is clear is that merely establishing relevance may not be sufficient to justify an order of discovery. O 24 r 5 remains expressly subject to the overriding test of whether discovery is *necessary* for disposing fairly of the proceedings or for saving costs in O 24 r 7. Indeed, what is relevant may not be necessary: *Bayerische Hypo-und Vereinsbank AG v Asia Pacific Breweries (Singapore) Pte Ltd and other applications* [2004] 4 SLR(R) 39 at [37].

26 Having considered the parties' submissions, I agree with the plaintiff that the category (class) of documents sought is overly broad and gives the overall impression of a fishing expedition. The category of documents relates to all written communications between RWY and representatives of

Kendall Court in relation to the negotiations and discussions leading up to and execution of the Proposed Agreement in 2011. Moreover, given the broadly framed request, I am not convinced that all of the Documents would be relevant to the pleaded issues of mistake and misrepresentation in respect of the 2007 CBSA. All the relevant parties are joined in the Suit. The positions that they take on the General Indemnity Clause is clear. The discussions in 2011 over the Proposed Agreement arose in the context of an attempt by the parties to amicably resolve problems the first defendant (borrower) was facing in making repayment. It was the first defendant who appears to have requested negotiation for the Proposed Agreement in October 2011 and a moratorium. It bears repeating that the Proposed Agreement in October 2011 was not entered into.

27 For the above reasons, I am not satisfied that all the Documents are relevant and necessary for disposing fairly of the proceedings or saving costs or time. That said, it is unnecessary for me to come to a firm view on this issue. As shall be elaborated later, I find that the Documents are privileged.

**Whether the Documents are privileged**

28 It is undisputed that (a) the Documents are not privileged as between the parties *if* there is joint privilege; and (b) there can only be joint privilege if the parties had jointly retained RWY. It logically follows that the Documents would only have to be disclosed if the defendants manage to prove that RWY was jointly retained by and acted for both parties in relation to the Proposed Agreement.

***The AR's decision***

29 Before the AR, the issues were broadly characterised as follows:

(a) whether RWY was retained by both the plaintiff and the defendants, or just the plaintiff;

(b) if it was the former, whether there was a joint retainer or two separate retainers.

30 On the first issue, the AR found that RWY had been engaged by the defendants under an implied retainer during the period of negotiation and discussion leading up to and execution of the Proposed Agreement. In arriving at her conclusion, the AR reviewed the correspondence between the parties and took the view that Mr Yip was appreciative of the fact that he was advising both sides and he had expressed his wish not to misadvise Mr Ong. In particular, she noted that Mr Yip did not state that he was singly engaged by the plaintiff when Ms Lee insisted that he was to advise both sides without fear or favour and on a neutral basis. Instead, Mr Yip went on to reply that he appreciated the situation that was facing them but he just needed to be sure that he was not misadvising Mr Ong, and that he was proceeding to advise parties on a neutral basis. The AR also noted that Mr Yip went on to issue a letter to Mr Ong and Ms Lee advising them of the legal effect of the various clauses under the Proposed Agreement. Subsequently, Mr Yip proceeded to issue a revised letter to clarify the contents of the first letter. In the midst of all these, Mr Yip had also issued an invoice to Polimet for the professional charges incurred.

31 On the second issue, the AR found that RWY was acting for the defendants pursuant to a joint retainer. The AR's finding was based on the following facts: (a) the fact that the plaintiff was copied in all correspondences between RWY and the defendants; and (b) an invoice issued by RWY on 25 October 2011 ("the Invoice") which stated that the law firm was providing "general advice for both parties' benefits [*sic*]".

***The arguments***

***The arguments***

32 It will be more convenient to begin with the defendants' arguments. As mentioned earlier, the defendants argue that RWY was jointly engaged by the parties and had advised the defendants on their legal obligations pursuant to the joint engagement. In support of their case, the defendants assert that: [note: 15]

(a) On 12 September 2011, Mr Andi Gunawan ("Mr Andi"), a representative of the plaintiff, emailed Ms Lee seeking her approval for the joint engagement of Mr Yip of RWY to advise both the plaintiff and the defendants on the terms of the Proposed Agreement. Ms Lee agreed to the appointment of Mr Yip in her reply on 13 September 2011.

(b) On 7 October 2011, Ms Lee attended a meeting at RWY's offices with, among others, Mr Ho and Mr Ong ("the 7 October 2011 Meeting"). Mr Yip took the defendants through and explained in detail the terms of the Proposed Agreement and advised them on the legal effect of the same. According to Ms Lee, Mr Yip did not inform the defendants that they should appoint their own lawyers.

(c) RWY had issued written advice to Ms Lee and Mr Ong, including a letter sent on 21 October 2011 ("the 21 October 2011 Letter") and a revised version of the letter on the same day on the terms of the Proposed Agreement.

(d) The description of work done in an invoice issued by RWY, *ie*, the Invoice referred to at [31] above, shows that RWY had acted for the defendants. The relevant part of the Invoice states: [note: 16]

> … perusing through the documents forwarded by both parties, *advising parties* on the term sheet, seeing thru the fairing and execution of the term sheet, *providing general advice for both parties' benefit*, counsel liaising with both parties over various drafts of the [Proposed Agreement]; Counsel attending meeting with your goodselves on 16.10.2011…
>
> [emphasis added]

33 On the other hand, the plaintiff's primary position is that RWY was not jointly engaged by the plaintiff and the defendants, and had at all times represented only the plaintiff. To this end, the plaintiff asserts that:

(a) The defendants were unrepresented while the plaintiff was represented in the previous CBSAs entered into between 2007 and 2009. Whilst the defendants were unrepresented, Polimet bore the legal fees for the drafting of the CBSAs as it was contractually obliged to do so.

(b) In 2011, the plaintiff spoke to RWY about engaging RWY. It was also the plaintiff which negotiated RWY's fees. The defendants were not involved in the process of engaging RWY. As it had been for the earlier agreements, Polimet was contractually obliged to bear the legal fees of the Proposed Agreement.

(c) The plaintiff alone instructed RWY to prepare the Proposed Agreement. The parties did not jointly instruct RWY to prepare it.

(d) After RWY prepared the Proposed Agreement, RWY did not send it to both parties – RWY only sent the draft Proposed Agreement to the plaintiff. It was the plaintiff which forwarded the

draft to the defendants.

(e) The defendants did not contact RWY directly, even though they had RWY's email address. The defendants went through the plaintiff's representative, Mr Chia, to arrange the 7 October 2011 Meeting. At the meeting, Mr Yip informed the defendants of their right to seek independent legal advice.

(f) The defendants also referred to RWY as the plaintiff's lawyer. Not once did they refer to RWY as their lawyer.

(g) Polimet's board never even considered appointing RWY as its solicitors in relation to the Proposed Agreement, much less actually appointing RWY. Ms Lee could not approve RWY's appointment on behalf of Polimet because she was not a director of Polimet at the relevant time.

(h) It is Mr Yip's unchallenged evidence that RWY's clerk prepared the Invoice and he had overlooked the mis-description in the Invoice.

34 In the alternative, the plaintiff argues that even if RWY was acting for the defendants, it was pursuant to a separate retainer. In order for the court to find a joint retainer, the plaintiff would have had to expressly or impliedly agree to a joint retainer. But there was no such evidence.

***Analysis***

35 In a nutshell, the plaintiff seeks to resist the defendants' discovery application by asserting legal professional privilege. Against that, the defendants argue that the privilege does not operate between the parties as RWY was jointly engaged by both sides.

*Relevance of choice of law analysis*

36 Before delving into the arguments raised by the parties, I will first deal with a preliminary point pertaining to the applicability of Singapore law on professional privilege, bearing in mind that RWY is a Malaysian law firm and Mr Yip is a Malaysian lawyer. Much of the legal advice appears to have been provided in Malaysia. In particular, I note that the the 7 October 2011 Meeting took place at RWY's office in Malaysia. This was followed by a number of letters said to amount to advice, such as the 21 October 2011 Letter sent by RWY via email to the first defendant's office in Singapore.

37 Neither party initially raised issues on private international law and the question of whether Singapore rules of legal professional privilege extend to foreign legal advisers. Both parties approached the question of legal professional privilege on the basis that Singapore rules were applicable. Given the relevance and significance of the matter, I directed parties to tender further written submissions on the issue of the applicability of Singapore rules of legal professional privilege and professional conduct.

Applicability of Singapore rules of legal professional privilege

38 The central question here is: which law applies to govern the issue of legal professional privilege as between the parties and Mr Yip, bearing in mind that Mr Yip is a Malaysian lawyer and much of his communications with the parties occurred in Malaysia?

39 The starting point of the analysis is whether legal professional privilege is a matter of procedure or substance. Procedural matters are always governed by the law of the forum and it will only be

necessary to proceed further in the choice of law analysis where the matter is substantive: *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis, 2013 Reissue) ("*Halsbury*") at para 75.255. That said, the distinction between substance and procedure is by no means clear cut. The traditional common law approach was to distinguish the existence of a right from the enforcement of a right. The former was regarded as substantive and subject to choice of law rules whilst the latter was treated as procedure and governed by forum rules. It appears, however, that a "stricter" functional test has been applied in some other Commonwealth jurisdictions: *Halsbury* at para 75.255. The stricter test asks whether application of foreign law in the particular instance will seriously inconvenience the administration of justice.

40 Whatever are the merits of the stricter approach, Singapore law, as laid down in *Star City Pty Ltd (formerly known as Sydney Harbour Casino Pty Ltd) v Tan Hong Woon* [2002] 1 SLR(R) 306 still follows the traditional broader approach, that is, to ask whether the rule in question is one that affects the existence of the right or its enforcement. While the stricter approach has been recognised as persuasive, it has not yet been decided upon by the Court of Appeal in Singapore: see *Goh Suan Hee v Teo Cher Teck* [2010] 1 SLR 367.

41 The question of whether legal professional privilege is a matter of procedure or substance is the subject of considerable controversy. That said, whether it has been characterised as a matter of procedure or substance, the general view is that the issue of legal professional privilege is nevertheless governed by the law of the forum. I am not aware of any local authority that is directly on point, but this issue has arisen for determination in other jurisdictions

Australia

42 In *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* [2002] HCA 49 ("*Daniels Corporation*") at [9]–[11], the High Court of Australia held that legal professional privilege is a rule of substantive law as it goes beyond a rule of evidence that is restricted to processes of discovery and inspection and the giving of evidence in judicial proceedings since it may be relied upon to resist other investigatory processes and is an important common law immunity.

43 In James McComish, "Foreign Legal Professional Privilege: A New Problem for Australian Private International Law" (2006) 28 Sydney Law Review 297 ("*McComish*"), the author argues that the same should hold true for purposes of private international law: legal professional privilege is not simply a procedural mechanism (at p 311). Rather, it is a substantive right that exists independently of any actual adjudicative process.

44 In the recent case of *Stewart v Australian Crime Commission* [2012] FCAFC 151 ("*Stewart*"), it was opined that legal professional privilege was governed by the law of the forum despite the HCA's characterisation of the nature of legal professional privilege as a rule of substantive law. In that case, the appellants argued that documents prepared by an attorney-at-law in the United States, California, including legal advice, were subject to legal professional privilege based on the law of California. The appellants relied on the following facts:

(a) the documents were prepared in California;

(b) the documents were prepared by an attorney or attorneys admitted to practice in California;

(c) the documents were prepared pursuant to a retainer, the proper law in respect of which

was Californian law; and

(d) the documents were prepared to advise clients primarily on Californian law.

45 Among the three judges, only Besanko J considered that an issue of choice of law had arisen. He went on to comment that the governing law for legal professional privilege was the law of the forum despite recognising that legal professional privilege was substantive and not procedural in nature under Australian law. His reasons were as follows (at [53]):

> Despite the force of these matters, in my respectful opinion, the better argument is that the governing choice of law rule for legal professional privilege is the lex fori. My reasons are as follows. First, Australian law of legal professional privilege incorporates within it a foreign element as cases such as *Kennedy v Wallace* make clear. Secondly, as has been seen, the English and Australian cases, so far as they go, suggest that the law to be applied is the lex fori. I accept that some of those cases were decided at a time when legal professional privilege was considered to be a rule of evidence or at least there was uncertainty as to whether it was a rule of evidence or a substantive doctrine. Thirdly, although legal professional privilege is linked to the contract of retainer between the client and his or her lawyer, it is not a "transaction" in the same sense as the formation of a contract or the commission of a tort. It is an immunity from what would otherwise be a coercive process dictated or mandated by, in the majority of cases, a statute or piece of delegated legislation of the forum where, to the extent that Parliament has not by express words or necessary intendment made its intention clear, the policy in the statute or piece of delegated legislation gives way to an important common law immunity based on considerations relevant to the administration of justice. Put another way, in the case of legal professional privilege, there are important connecting factors with the forum, namely, the production of documents or a request for their production and a claim or assertion of privilege. These matters considered together lead me to the conclusion that the governing choice of law rule in the case of legal professional privilege is the lex fori.

46 I note in passing that whilst the majority in *Stewart* agreed with the result (that the issue of legal professional privilege is determined by the *lex fori*), they rejected the idea that a choice of law issue had arisen. This was because Australian law of privilege extended to foreign lawyers, whether or not the law as to which they were advising was local or foreign, and whether the communications occurred within Australia or somewhere else (at [77]).

47 Whilst it is not necessary for me to decide the point, I am, with respect, of the view that the approach taken by Besanko J is preferable. As Besanko J states at [48]:

> … When legal professional privilege is raised in answer to a demand to inspect and use documents, the first question is whether the privilege exists. That question leads to a consideration of the common law including the common law choice of law rule. If, and this is where the first and second issues intersect, the choice of law rule directs attention to foreign law then I cannot see any reason why legal professional privilege determined by reference to a foreign law would not be recognised for the purpose of Australian law including Australian Statutes. …

48 Once it is decided that the issue of legal professional privilege is a matter of substance, the question as to whether the law of forum applies would necessarily have to be answered by reference to choice of law rules which have been developed to serve the ends of justice (see *Halsbury* at para 75.250). That said, the end result was the same as Besanko J found that the governing choice of law rule pointed to the *lex fori*.

England

49 English courts have similarly classified legal professional privilege as a substantive right. In *R v Derby Magistrates' Court, Ex p B* [1996] AC 487 Lord Taylor of Gosforth CJ, with whose reasons the other members of the House agreed, stated at 507:

> The principle which runs through all these cases, and the many other cases which were cited, is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer will never be revealed without his consent. *Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests.*
>
> [emphasis added]

50 In *R (Morgan Grenfell & Co Ltd) v Special Comr of Income Tax* [2003] 1 AC 563 at 606, Lord Hoffmann described legal professional privilege as "a fundamental human right long established in the common law". In reaching that conclusion, he referred with approval to the judgment of the New Zealand Court of Appeal in *Comr of Inland Revenue v West-Walker* [1954] NZLR 191, where the privilege was described as not merely a rule of evidence but a substantive right founded on an important public policy.

51 Despite the characterisation of legal professional privilege as a matter of substance, the general view is that English law (*ie*, lex fori) applies.

52 In *Re Duncan, Decd. Garfield v Fay* [1968] P 306 at 311, it was held that privilege was a matter to be decided by the *lex fori* and the learned judge held, on that basis, that all documents which are communications passing between the plaintiff and his foreign legal advisers were privileged, whether or not proceedings in this or any other court were contemplated when they came into existence.

53 In *Bourns Inc v Raychem Corporation and Anor* [1999] 3 All ER 154, documents disclosed by the respondent in proceedings in the United Kingdom ("UK") appeared to be material to the appellant's case in another set of proceedings between the same parties in the United States ("US"). The respondent claimed that the documents were privileged and applied to restrain the appellant from using the documents in the US proceedings. The appellant, on the other hand, claimed that the respondent had waived privilege in the documents according to US law. It was held by Aldous LJ (at 167–168) that:

> … I believe it is not desirable to decide this issue which depends upon US law. Matters of US law and practice are best decided by the US courts if that is possible.
>
> [The appellant] do [*sic*] not suggest that under English law privilege is lost in England because privilege cannot be claimed for documents in another country. To suggest otherwise would mean that a court, when deciding whether to uphold a claim for privilege, would need to be informed as to whether privilege could be claimed in all the countries of the world. 'Our system of civil procedure is founded on the rule that the interests of justice are best served if parties to litigation are obliged to disclose and produce for the other party's inspection all documents in their possession, custody or power relating to the issues in the action.' (See *Ventouris v Mountain, the Italia Express* [1991] 3 All ER 472 at 476 … per Bingham LJ.) Privilege is an exception to that rule justified on the ground of public interest. It involves a right to keep confidential the document and the information in it. The fact that under foreign law the document

is not privileged or that the privilege that existed is deemed to have been waived is irrelevant. The crucial consideration is whether the document and its information remain confidential in the sense that it is not properly available for use. If it is, then privilege in this country can be claimed and that claim, if properly made, will be enforced.

In the present case the documents and the information in them remain confidential in the sense that I have used that word. It follows that the documents remain privileged under English law, whether or not the right to privilege from production in a foreign country is deemed not to exist or to have been waived.

54 The English position is also clearly set out in Dicey, Morris & Collins, *The Conflict of Laws* vol 1 (Sweet & Maxwell, 15th Ed, 2012) ("*Dicey, Morris & Collins*") at para 7-022:

… [A]s general rule, the lex fori determines how the facts in issue must be proved. In the context of English proceedings, whether or not a document is privileged is to be determined by English law; the fact that under a foreign law the document is not privileged or that the privileged that existed is deemed to have been waived is irrelevant.

55 Thus, it appears that the English position is that legal professional privilege falls to be governed by the *lex fori*. Indeed, it has been suggested that there are strong grounds for reconsidering the English position on the issue of whether legal professional privilege is governed by the *lex fori*. The learned author of *Phipson on Evidence* (Hodge M Malek gen ed) (Sweet & Maxwell, 18th Ed, 2013) states at paras 23-25 and 23-26:

23-25 … [I]t has been held that so long as the communication satisfies the prerequisites of English law of privilege, the privilege may be claimed for communications between foreign lawyer (whether or not he practises in England) and foreign client, and that this applies even when litigation is not in contemplation and where the foreign lawyer is advising on English law.

23-26 There have been a number of subsequent cases which have applied *Re Duncan*, generally without argument. But there are strong grounds for reconsideration of the principle. When *Re Duncan* was decided, the prevailing view was that privilege was merely a right to refuse to produce material on discovery or at trial. For privilege issues to be governed by the lex fori is consistent with this, because procedural issues are governed by the lex fori. But, as we have seen, the modern view is that privilege is a fundamental right. Substantive rights are typically governed by the law governing those rights rather than the lex fori. Privilege rights may sometimes be based on contractual rights, such as in "implied contract" cases of without prejudice privilege or where the contract between solicitor and client is material to the analysis. Contractual issues will normally be governed by the proper law of the contract. It is not merely that privilege was once a rule of evidence and now is a substantive right of law. Multi-jurisdictional litigation is now a regular occurrence in the way that it was not a generation ago, so the problem has become a common one. Moreover, at the time of *Re Duncan* in 1968 the English courts took a much more chauvinistic and less international view of their rules and procedure than is the case today.

56 Returning to the case at hand, the weight of authorities, as it stands, suggests that legal professional privilege is a matter to be addressed by the law of the forum. I agree. As was observed by Besanko J in *Stewart*, whilst the issue of privilege is linked to the contract of retainer between a lawyer and his client, it inevitably is dictated by and subject to, in the majority of cases, the policy in statute or delegated legislation based on considerations relevant to the administration of justice. This ultimately turns on the public policy considerations that find expression in the law of the forum. For

now, it would suffice for our purposes to say that legal professional privilege falls to be governed by the law of the forum (*ie*, Singapore law). In any case, it is not necessary for me to express a concluded view on this since the parties have not pleaded or proved foreign rules on legal professional privilege.

Singapore rules of legal professional privilege

57 In Singapore, legal professional privilege is statutorily embodied in ss 128 and 131 of the Evidence Act (Cap 97, 1997 Rev Ed). These provisions cover legal advice privilege and also an element of litigation privilege: *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and other appeals* [2007] 2 SLR(R) 367 ("*Skandinaviska*") at [27]. The statutory privilege applies to communications between clients and an advocate or solicitor of the Supreme Court of Singapore *or* a legal counsel which has been defined in s 3(7) of the Evidence Act to include:

> (a) a person (by whatever name called) who is an employee of an entity employed to undertake the provision of legal advice or assistance in connection with the application of the law or any form of resolution of legal disputes;
>
> (aa) any Deputy Attorney-General; or
>
> (b) a public officer in the Singapore Legal Service —
>
> > (i) working in a ministry or department of the Government or an Organ of State as legal adviser to that ministry or department or Organ of State; or
> >
> > (ii) seconded as legal adviser to any statutory body established or constituted by or under a public Act for a public function.

58 Clearly, communications with foreign lawyers would fall outside the ambit of the statutory privilege. However, the Evidence Act is exhaustive only to the extent that all the rules which are not saved by statute and which are inconsistent with it (the Evidence Act) are inapplicable: see s 2(2) of the Evidence Act and *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [117]. Thus, despite the codification of legal professional privilege in Singapore, common law rules of privilege pertaining to foreign lawyers will continue to apply in so far as they are not inconsistent with the provisions of the Evidence Act.

59 In reaching this conclusion, I note that when the Evidence (Amendment) Bill was passed by Parliament in 2012, the Minister of Law, Mr K Shanmugam explained that the amendments would enhance the court's discretion to consider relevant evidence as well as deal with "procedural justice", including the confidentiality of legal advice by "widening legal professional privilege" (*Singapore Parliamentary Debates, Official Report* (14 February 2012) vol 88 at p 1127).

60 One of the amendments to legal professional privilege concerned an "extension" to communications with in-house legal counsel made for the purpose of obtaining legal advice. During the second reading debate, the observation was made by several Members of Parliament that the law of evidence in Singapore comprised the Evidence Act as well as common law rules, at least where the latter were not inconsistent with the statutory provisions. In appropriate cases, it was possible for gaps in the Evidence Act to be filled by the common law. One Member of Parliament noted that the common law may have covered the gap on communications with in-house counsel but that its application was "uncertain and subject to change and challenge" (at p 1129). Another Member of

Parliament noted that the amendments (to broaden the definition of legal professional advisor to include in-house counsel) did not cover cases where clients sought legal advice from foreign lawyers or law firms overseas and questioned whether it was desirable to amend the Evidence Act to cover that situation (at p 1135).

61 The Minister of Law, in response, clarified that there was "no intention to affect privilege or deal with privilege between foreign lawyers and their local clients" (at p 1143). The Minister of Law's response in full was:

> Mr Lee also raised a number of questions generally concerning the scope of the Evidence Act. He wanted to know what the professional advisor in section 131 included. Would it include advocates as well as in-house legal counsel? Will that mean communications with foreign lawyers is excluded from privilege? I would clarify that the main intention behind section 131 is to expand the definition of legal professional advisor to include in-house legal counsel and ***there is no intention to affect privilege or deal with privilege between foreign lawyers and their local clients. That remains to be dealt with by common law.***
>
> [emphasis added in bold italics]

62 The fact that Parliament choose to amend the Evidence Act so as to expressly cover communications with in-house counsel without dealing with foreign counsel did not mean that Parliament's intention was to take away or make an affirmative statement that such communications with foreign lawyers was not protected. Instead, this was deliberately left to the common law.

63 The common law position is well-settled. Legal advice privilege will apply to advice received from foreign lawyers. In *International Business Machines Corp and another v Phoenix International (Computers) Ltd* [1995] 1 All ER 413, the document in issue was a road map prepared by the defendant's (Phoenix) US attorneys which set out their advice on the legal position in the UK and the strategy to adopt in relation to contemplated proceedings. The plaintiff, IBM, submitted that the road map contained advice on English law and was not privileged because the author was a US attorney who was not a qualified practitioner in the UK. IBM, however, accepted that it would be a privileged document if it had been written by an English solicitor. Aldous J rejected IBM's argument and held (at 429) that:

> … The fact that the advice given related predominantly to English law is irrelevant. It was advice of foreign lawyers acting as lawyers, to be used by Phoenix to decide what strategy to adopt in carrying on business. … The correct approach is to look at the substance and reality of the document, the circumstance in which it came into existence and also its purpose. It was advice given by lawyers in circumstances where litigation was contemplated to enable the recipient to decide what strategy to adopt, both from a legal and business standpoint. Such a document is privileged.

64 A variety of English commentaries hold the view that the privilege will extend to the advice given by foreign lawyers based abroad provided that they are qualified to practise under their own regulatory authority. In his helpful review, *McComish* citing cases such as *Bunbury v Bunbury* (1839) 2 Beav 173 concludes (at p 315) that "the great mass of English authority supports the view that privilege applies as much to communications to foreign lawyers as to local lawyers and that both are subjected to English (ie the forum's) law of privilege." *McComish* goes on to comment (at p 318): "[t]he fact that foreign lawyers are not subject to the supervision and discipline of domestic courts was no reason to deny their communications privilege under the law of the forum: so long as the lawyer was in fact admitted to practice in the foreign jurisdiction".

65 In *Kennedy v Wallace* (2004) 213 ALR 108, Allsop J explained the underlying rationale for extending privilege to communications with foreign lawyers. In coming to the decision that the law of the forum (Australia) recognised privilege over communications with foreign lawyers, the Full Federal Court recognised that in a global society, people may well need the advice of foreign lawyers. Allsop J held as follows (at [200]–[208]):

> 200 Members of the community may well need to seek the assistance of foreign lawyers. The considerations of the kind that Wilson J spoke of in *Baker v Campbell*: the multiplicity and complexity of the demands of the modern state on its citizens, the complexity of modern commercial life and the increasing global inter-relationships of legal systems, commerce and human intercourse, make treatment of the privilege as a jurisdictionally specific right, in my view, both impractical and contrary to the underlying purpose of the intended protection in a modern society.
>
> 201 One important issue in any consideration of the proper scope for advice privilege whether in relation to foreign lawyers or generally is the identification of the underlying rationale for the privilege: see for example the discussion by Lord Carswell in *Three Rivers* [2004] UKHL 48 at [76]–[117]. As I would understand the law in Australia, the privilege is to be seen as a fundamental common law right in relation to legal advice and litigation. The purpose and rationale of the privilege is to enable persons in a civilised complex modern society to be able to conduct their affairs with the assistance of legal advice. Expressed thus, it is a fundamental right conforming to and underpinning the rule of law…
>
> 202 A refusal to recognise foreign lawyer's advice privilege or narrowly to constrict advice privilege to the precise communication requesting or imparting the advice (as ASIC does on the Notice of Contention, to which I will come) would undermine the rationale of the privilege. It would also undermine the administration of justice by enlivening a threat in this jurisdiction to the confidentiality of communications which would otherwise be protected in other places.
>
> 203 If an adviser is a lawyer admitted to practice in the foreign country, as was agreed here, it seems to me unnecessary to require evidence about legal and ethical practices and controls by foreign courts. …
>
> 204 The position may be different if the circumstances otherwise raise questions as to the position of the lawyer. There may be a question whether the adviser is a lawyer at all, properly understood. There may be a question whether, by the proper law of the country in which the lawyer is admitted to practice or in which the advice is given, there is any privilege recognised. Difficult questions may arise in any given case. This is not intended to be an exhaustive list.
>
> 205 Without evidence of foreign law, it can be assumed that Switzerland protects legally privileged communications. Mr Hafner was a qualified lawyer in a European democratic state. No suggestion was made that Mr Hafner was not in fact a lawyer.
>
> …
>
> 207 The view expressed by McHugh J in *Carter v Northmore Hale Davy & Leake* at CLR 160-61 … does not, however, reflect the law as otherwise expressed by the High Court on advice privilege, and it gives no basis for viewing foreign lawyers and foreign legal advisers differently to Australian lawyers and legal advice.
>
> 208 Part of the practical guarantee of the fundamental, constitutional or human right and part

> of the practical worth of the fundamental common law privilege is to seek advice from a lawyer as to one's rights and obligations in a complex human, commercial and governmental environment which may be, for any particular person, multi-jurisdictional. A principle which differentiates between foreign and domestic lawyers in terms of approach based on training, ethics and curial control is not warranted, in my view, by reference to the underlying rationale of the privilege, at least in circumstances where the person opposing the privilege claim does not raise issues of the kind referred to earlier.

66 In view of the above excerpt (which I agree with), I accept that the common law position which extends privilege to communications passing between a client and his foreign legal adviser applies in Singapore as there is no inconsistency between the common law position and the statutory provisions. Whilst Jeffrey Pinsler SC, *Evidence and the Litigation Process* (LexisNexis, 5th Ed, 2015) ("*Evidence and the Litigation Process*") at para 14.017 comments that communications with foreign lawyers are not protected by legal advice privilege, it is apparent that this comment was made in respect of the provisions of the Evidence Act as amended and not the common law position. Presently, it bears noting that the defendants accept that the documents are privileged. The only issue is whether the plaintiff is obliged to disclose the documents to the defendants on the basis that the privilege is jointly held by the parties.

67 It will also be seen later on that the applicable rules or codes of professional conduct may be relevant or helpful in the present case for providing the context of some of the discussions and communications sent by RWY in connection with the Proposed Agreement.

Concluding remarks on choice of law

68 It bears recalling that the main question is whether the privilege in question is jointly held by the parties or singly held by the plaintiff. The answer to this main question requires the consideration of a subsidiary question concerning the existence and character of the contract of retainer between Mr Yip and the parties to this dispute. Where parties dispute the existence or the nature of the contract of retainer (which contains foreign elements), what then is the law governing such disputes? Ordinarily, this question has to be analysed through the lens of the forum's choice of law rules. That said, it is again unnecessary to probe further in this respect since the parties have not pleaded or proved foreign law *vis-à-vis* the contract of retainer. In the absence of such proof, it is well established that the law of the forum applies by default.

69 To conclude, whilst Mr Yip is a Malaysian lawyer and much of the legal advice appears to have been provided in Malaysia, it must be borne in mind that the suit has been commenced in Singapore. As mentioned earlier, I am of the view that the issue of privilege is to be governed by Singapore law (*ie*, the law of the forum) and that Singapore law permits claims of privilege over communications between foreign lawyers and their clients. Further, in the absence of proof of foreign law, I will apply Singapore law to determine the issues arising out of this appeal.

*Legal Professional Privilege*

70 I begin my analysis by setting out the applicable legal principles. Legal professional privilege is found in two principal forms, *viz*, legal advice privilege and litigation privilege. Both serve a common cause: the secure and effective administration of justice according to law: *Skandinaviska* at [23].

71 The plaintiff appears to be relying on the former category of privilege, *viz*, the legal advice privilege which protects from disclosure confidential communications between a client and his legal adviser which arise in a legal context in the course of their relationship: *Evidence and the Litigation*

*Process* at para 14.001. The rationale for legal advice privilege is neatly encapsulated in the following passage in the Canadian Supreme Court decision of *Minister of Justice v Sheldon Blank (Attorney General of Ontario, The Advocates' Society and Information Commissioner of Canada (Interveners))* [2006] SCC 39 at [26]:

> … [Legal advice privilege] recognizes that the justice system depends for its vitality on full, free and frank communication between those who need legal advice and those who are best able to provide it. Society has entrusted to lawyers the task of advancing their clients' cases with the skill and expertise available only to those who are trained in the law. They alone can discharge these duties effectively, but only if those who depend on them for counsel may consult with them in confidence. The resulting confidential relationship between solicitor and client is a necessary and essential condition of the effective administration of justice.

72 The above passage was quoted and accepted by the Court of Appeal in *Skandinaviska* at [23]. For legal professional privilege to apply, the solicitor-client relationship must be in existence or at least contemplated: Suzanne McNicol, *Law of Privilege* (The Law Book Company Limited, 1992) at p 76. A solicitor-client relationship may come about by an express retainer or a retainer that is implied by conduct: *Royal Bank of Scotland v Etridge (No 2)* [2001] 3 WLR 1021 at [179]. In particular, a retainer may be implied where on an objective consideration of all the circumstances, an intention to enter into such a contractual relationship ought fairly and properly to be imputed to all the parties: *Anwar Patrick Adrian and another v Ng Chong & Hue LLC and another* [2014] 3 SLR 761 ("*Anwar Patrick*") at [49].

73 It is apposite to note that once a plea of privilege is made over the list of documents and verified by affidavit, the court will accept the plea as conclusive unless it is disproved: *Singapore Court Practice 2014* (Jeffrey Pinsler gen ed) (LexisNexis, 2014) at para 24/3/4. As such, it is for the party seeking disclosure (*ie*, the defendants in the present dispute) to prove that the documents in question are not privileged.

*Joint Privilege*

74 It will be helpful to also consider the nature and effect of a joint privilege. According to Bankim Thanki QC in *The Law of Privilege* (Oxford University Press, 2nd Ed, 2011) ("*The Law of Privilege*") at para 6.01, joint privilege may arise in two circumstances:

> ( a ) Joint interest: Where, even though the parties have not jointly retained a lawyer, they have a joint interest in the subject matter of the communication at the time that it comes into existence.
>
> (b) Joint retainer: Where two (or more) parties jointly retain the same lawyer.

Joint interest

75 In my view, the parties did not have a joint interest that gave rise to joint privilege in the negotiations leading up to the Proposed Agreement. Examples where such joint interest might arise are between (*The Law of Privilege* at paras 6.09–6.11):

> (a) a trustee and beneficiary;
>
> (b) a parent company and its wholly-owned subsidiary;

(c) a company and its shareholders;

(d) a company and its director; and

(e) partners.

76 In the present case, there was no identity of interests between the plaintiff and the defendants during the negotiations in relation to the Proposed Agreement. Unlike the examples above, the parties here were essentially in a lender and borrower relationship with opposing interests. There was at least reason to believe that Polimet was in a "poor" financial state and was in no position to fulfil its repayment obligations under the original agreements. The negotiations were broadly an attempt (which ultimately was unsuccessful) to settle amicably the liabilities of the first defendant under the loan agreements. That was why the Proposed Agreement was necessary in the first place.

77 The defendants seem to suggest that their joint interest lay in executing the Proposed Agreement. Before me, counsel for the defendants argued this joint interest was evidenced by the following statement found in Mr Yip's email to the parties after Mr Chia gave "the final green light on the last draft" of the Proposed Agreement: [note: 17]

> Thanking and congratulating parties in being able to reach a solution via the Supplemental Agreement.

78 I do not accept this contention. In the same email, Mr Yip recognised that the parties had opposing interests. He said, "I think the parties do appreciate each others [*sic*] position and are entering into the [Proposed Agreement] with the intention of resolving the issues rather that [*sic*] 'fighting' one another which we [*sic*] benefit neither party in the long run". [note: 18]

79 Furthermore, if taken to its logical conclusion, the defendants' argument would mean that a vendor and purchaser who retain the same solicitor for the sale of a parcel of land would be taken to have a common interest, that is, in executing the sale and purchase agreement. That cannot be right. The court in *Foo Ko Hing v Foo Chee Heng* [2001] 1 SLR(R) 664 ("*Foo Ko Hing*") expressly recognised that where a vendor and purchaser retain the same solicitor, a distinction must be made between communication to the solicitor in the character of one party's own legal advisor and communication to him in the *adverse character* or legal advisor for the other party (*Foo Ko Hing* at [15]).

Joint retainer

80 With the issue of joint interest out of the way, the only matter left to be determined is whether Mr Yip was acting for the plaintiff and defendants pursuant to a joint retainer (whether express or implied). The following comment in *The Law of Privilege* at para 6.02 provides a useful starting point for the analysis:

> Joint privilege will arise when two (or more) parties jointly retain the same lawyer. In such circumstances the parties retain no confidence against one another and each of them is entitled to benefit from any privileged communication arising out of that retainer. Indeed, it matters not whether the privileged communication is addressed by the lawyer to one or both of them; likewise, if one of the parties communicates with the lawyer pursuant to the joint retainer, there is no privilege as against the other in respect of that communication. …

81 Parties who grant a joint retainer to solicitors retain no confidence as against one another: if

they subsequently fall out and sue one another, they cannot claim privilege: *Hellenic Mutual War Risks Association (Bermuda) Ltd And General Contractors Importing and Services Enterprises v Harrison (The Sagherra)* [1997] 1 Lloyd's Rep 160 at 165–166.

82 I turn now to consider whether the defendants have discharged their burden of proving that RWY was jointly engaged by the plaintiff and defendants (whether pursuant to an express or implied retainer).

***Was there a solicitor-client relationship between the defendants and RWY?***

83 Before me, the defendants asserted that the plaintiff had, prior to its engagement of Mr Yip, sought and obtained the approval of Ms Lee. This suggests that the plaintiff was tasked to engage Mr Yip on behalf of all the parties to the Proposed Agreement.

84 There are thus two related issues. The first issue is whether there was an express joint retainer, *ie*, whether the plaintiff had appointed Mr Yip on behalf of all the parties to the Proposed Agreement. If the answer is no, the second issue arises, *viz*, whether an implied retainer had subsequently arisen between the defendants and RWY in the circumstances surrounding the negotiations in relation to the Proposed Agreement.

*Express retainer*

85 I am unable to accept the defendants' contention that there was an express joint retainer. My reasons are as follows.

Previous conduct

86 The defendants' contention that RWY was jointly engaged to represent all the parties to the Proposed Agreement is plainly incongruent with the defendants' previous course of conduct. It is undisputed that the defendants were unrepresented while the plaintiff was represented in the previous CBSAs entered into between 2007 and 2009. This is reflected in the following table.

| S/N | Agreement | Parties' Representation |
|---|---|---|
| 1 | 2007 CBSA dated 5 October 2007 | Plaintiff – Raslan Loong<br>Defendants – unrepresented |
| 2 | Supplemental 2007 CBSA dated 16 October 2008 | Plaintiff – Raslan Loong<br>Defendants – unrepresented |
| 3 | Personal Guarantee and Indemnity dated 5 October 2007 | Plaintiff – Raslan Loong<br>Defendants – unrepresented |
| 4 | Supplemental Personal Guarantee and Indemnity dated 16 October 2008 | Plaintiff – Raslan Loong<br>Defendants – unrepresented |
| 5 | 2008 CBSA dated 16 October 2008 | Plaintiff – Raslan Loong<br>Defendants – unrepresented |

| | | |
|---|---|---|
| 6 | Supplemental 2008 CBSA dated 16 October 2008 | Plaintiff – Raslan Loong<br>Defendants – unrepresented |
| 7 | Personal Guarantee and Indemnity dated 16 October 2008 | Plaintiff – Raslan Loong<br>Defendants – unrepresented |
| 8 | Supplemental 2009 CBSA | Plaintiff – Wong, Gowry, and Yip (Mr Yip's previous firm)<br>Defendants – unrepresented |

87 In 2007, the plaintiff had encouraged the defendants to engage their own legal counsel. The defendants declined because they did not want to spend money on their own legal fees given that they were already contractually obliged to pay for the plaintiff's legal fees. [note: 19] Thereafter, the defendants were apparently content to be unrepresented for the other CBSAs that were subsequently concluded between the parties.

88 Against that backdrop, it seems rather odd that the defendants made an about-turn on the issue of legal representation when it came to the Proposed Agreement. At the hearing before me, the defendants' counsel suggested that the nature of the Proposed Agreement was different from the previous CBSAs. He said that if the Proposed Agreement had proceeded, one of its effects was to dilute the shareholdings of all the parties, and that it was not inconceivable that all the parties would have used the same solicitor in light of this common interest. As was pointed out by the plaintiff's counsel, this assertion is wholly unsubstantiated. The defendants have not come forward to say on affidavit that they realised the need for legal representation because of the character and effect of the Proposed Agreement.

Email correspondence

89 I am also unable to agree with the defendants' interpretation of the email correspondence in which Ms Lee's approval was allegedly sought and given for the appointment of Mr Yip. I will first set out the contents of the relevant emails.

90 By an email dated 12 September 2011 at 11.16 am, the plaintiff's representative, Mr Andi, wrote to Ms Lee:

> Dear Ms Lee,
>
> As I understand from Marcus, I believe that now we have reached an agreement on the Term Sheet for the Diamond restructuring and is in [sic] process of signing it. Please be advised that upon signing of the term sheet, as [*sic*] formal agreement will follow. *We will use [Mr Yip] from [RWY], who drafted the last supplemental agreement for our restructuring, to draft this 2nd supplemental agreement. The expected cost would be around RM 12-15k, which is approximately the same as the previous one*.
>
> [emphasis added]

91 In an email dated 13 September 2011 at 11.14 am, Ms Lee replied as follows:

> Dear Andi,

***Noted*** the name of the lawyer. Is first draft ready for review?

[emphasis added in bold italics]

92 Ms Lee in her affidavit asserted that Mr Andi was seeking her approval for the joint engagement of Mr Yip to advise both the plaintiff as well as the defendants on the terms of the Proposed Agreement. She further asserted that there would otherwise be no reason for Mr Andi to email her informing her of the same, or to seek her approval for their estimated professional fees. I am unable to agree with her interpretation of the above emails.

9 3 *First*, from the plain words of the email correspondence, it is difficult to infer that the plaintiff was seeking Ms Lee's approval for the engagement of Mr Yip. In the same vein, it is also difficult to infer from Ms Lee's reply that she had approved of the same. Rather, in my view, it is evident that the purpose of Mr Andi's email was to notify Ms Lee of the plaintiff's intention to engage Mr Yip to prepare the Proposed Agreement and an estimate of the professional fees that would be incurred. This is entirely consistent with the parties' understanding that Polimet was to bear all legal costs incurred in connection with the CBSAs and the supplemental agreements. Indeed, her short response "[n]oted" is consistent with the view that she was merely being provided with information as to the identity of the lawyer.

9 4 *Second* and more significantly, Ms Lee had no authority to approve RWY's appointment on behalf of Polimet because she was not a director of Polimet at the material time. Mr Chia and Ms Yeo were the only directors of Polimet then, [note: 20] and it is undisputed that Polimet's board of directors were not asked to consider the issue of who to appoint as Polimet's counsel. In any case, Ms Lee could not consent to the appointment of RWY on behalf of the remaining defendants since there is no evidence to show that she had authority to do so except on behalf of herself.

9 5 *Third*, if the parties had indeed agreed that the plaintiff was to appoint Mr Yip on behalf of all the parties to the Proposed Agreement, the parties would have had to inform Mr Yip of the arrangement. It is inconceivable that an express joint retainer can be concluded without the lawyer's knowledge. Furthermore, there is no evidence that Mr Yip knew or understood that he was acting for all the parties at the point of engagement. In contrast, the material before me showed that Mr Yip was under the impression that the plaintiff was his only client. He had re-used the file reference that was previously used for the previous matter that he handled for Kendall Court. It is his evidence that this was done because there was no change in client since Kendall Court gave instructions on behalf of the plaintiff in relation to the Proposed Agreement. Mr Yip further stated that if he had been jointly engaged by both sides, he would have opened a new file in September 2011.

96 Whilst the defendants have attempted to discredit Mr Yip's evidence by asserting that Mr Yip had ample reason to favour the plaintiff since he had acted for the plaintiff in the past, this is a bald assertion. It bears recalling that the onus is on the defendants to prove that there was an express joint retainer since they are the ones challenging the plaintiff's claim of privilege and alleging the existence of joint privilege. Discrediting the plaintiff's evidence does not amount to such proof.

97 Finally, I would like to conclude the issue with the observation that the defendants' case appears to lack internal coherence. On one hand, the defendants argue that Ms Lee's approval was sought for the engagement of Mr Yip for the plaintiff and the defendants. [note: 21] On the other hand, the defendants also contend that Mr Chia, being one of the nominee directors of Polimet at the material time, had appointed RWY on behalf of both the plaintiff and Polimet. [note: 22] Leaving aside the question of Ms Lee's authority, why would her approval be necessary if Mr Chia could, in his

capacity as the plaintiff's nominee director on Polimet's board, engage Mr Yip on behalf of the plaintiff as well as Polimet? In addition, even if it is accepted that Mr Chia had indeed engaged RWY on behalf of Polimet and the plaintiff, the defendants' argument would fail for a further reason – there is no suggestion that Mr Chris Chia had the authority to appoint RWY on behalf of the second to fifth defendants as well.

98 For the foregoing reasons, I find that there was no express joint retainer. In other words, I find that Mr Yip was singly appointed as the plaintiff's lawyer at the point of engagement. I now turn to consider if an implied retainer had subsequently arisen between Mr Yip and the defendants during the negotiations for the Proposed Agreement.

*Implied retainer*

99 Before delving into the analysis proper, it bears repeating that RWY is a Malaysian law firm and Mr Yip is a Malaysian lawyer. The meeting took place at RWY's offices in Kuala Lumpur. Neither side raised the question as to whether it is the professional conduct rules of Singapore or Malaysia which are relevant (if at all) in determining the question whether an implied retainer had arisen. This is a point to which brief reference has been made at [67] above. To be clear, whilst references was made to the Singapore Legal Profession (Professional Conduct) Rules (Cap 161, R 1, 2010 Rev Ed) ("PCR"), no submissions or evidence was placed before me as to whether the equivalent Malaysian rules were the same or different. The significance of the professional conduct rules is that they may assist as relevant background material against which the statements and conduct of Mr Yip is to be assessed as part of the determination of whether an implied retainer had arisen. Apart from a reference to a Malaysian decision on the duty of a lawyer to a party with no legal representation discussed below at [126], there was no evidence as to the Malaysian Rules brought before me. As I have mentioned at [68] above, I shall proceed on the basis that Singapore law applies for this issue in the absence of proof of Malaysian law. I shall address this matter further below.

100 This case raises the difficult question of the extent of a lawyer's duty to unrepresented parties who have interests that are opposed to his client's. There are various ethical rules that may come into play. On one hand, it is well established that a lawyer is duty-bound to advocate and advance his client's interests fearlessly within available legal means: see r 12 of the PCR. As a corollary, the lawyer is not permitted to act against his client by advising another party with opposing interests: r 30 PCR. On the other hand, the lawyer is under an obligation to not take unfair advantage of third parties, including opposing parties: see r 53A of the PCR. I pause to briefly observe that the Legal Profession (Professional Conduct) Rules 2015 (S 706/2015) ("PCR 2015") has recently come in force on 18 November 2015, superseding the earlier PCR (the provisions of which will be considered in this judgment). To be clear, only the provisions of the earlier PCR are relevant to the present application.

101 Where an opposing party elects to be unrepresented, the lawyer has to strike a balance between doing his best for the client and not taking unfair advantage of the opponent's lack of legal knowledge. In these situations, the lawyer is placed in an invidious position. Should he overreach by providing more assistance to the opponent than he ought to, the lawyer could find himself with a new putative client if an implied retainer is found. Besides that, he may also find himself in breach of his duty not to act against his (original) client. However, should he provide less assistance than he ought to, he could be blamed for having taken unfair advantage of third parties. This, put broadly, was the dilemma that Mr Yip found himself to be in.

102 With the above in mind, it is apposite to now consider the law on implied retainers. I begin with the leading case in Singapore, *Anwar Patrick*, in which the Court of Appeal held that "[a] retainer might be implied where, on an objective consideration of all the circumstances, an intention to enter

into such a contractual relationship ought fairly and properly to be imputed to all the parties" (at [49]).

103 In *Anwar Patrick*, the solicitor in question had been retained by Agus Anwar to assist him on various financial transactions. A bank with which Agus maintained a credit facility demanded further collateral when the value of Agus' existing collateral diminished. Agus told his solicitor that he was agreeable to the terms save for the term that required his sons to provide personal guarantees. Subsequently, the bank sent his solicitor security documents which required Agus' sons to each provide a personal guarantee. The solicitor forwarded the security documents to Agus' sons who signed them. Later, as Agus was unable to meet his obligations under the credit facility, the bank commenced a suit against Agus and his sons.

104 Agus' sons commenced a suit against the solicitor in question for failing to bring the personal guarantee clauses to their attention or advising them on it before they signed off. The Court of Appeal found an implied retainer. Several factors were taken into account.

105 From the perspective of the solicitor, he had signed off as "the solicitor for the mortgagors" on the Certificate of Correctness which formed part of the security documents. As a seasoned solicitor, he had to be taken to have known of the importance of his signing the Certificate of Correctness which was an official document of paramount importance. Thus, from an objective standpoint, he must have thought that he had the authority to act for Agus' sons and that he was their agent (at [58]).

106 From the perspective of the putative clients, they would have legitimately considered the respondent to be their solicitor. The respondent had signed off as their solicitor on the Certificate of Correctness. The respondent was the only legally trained person on their side, and the other side had a solicitor representing them as well. They were therefore entitled to think that the respondent was their solicitor on record (which he was) who would help them through the transaction (at [59]).

107 In *Anwar Patrick*, reference was made to the earlier case of *The Law Society of Singapore v Ahmad Khalis bin Abdul Ghani* [2006] 4 SLR(R) 308 ("*Ahmad Khalis*"). In *Ahmad Khalis*, the Court of Three Judges found an implied retainer. One of the issues that arose was whether an advocate and solicitor who had been engaged to act for the administrator of an estate also acted for the remaining beneficiaries of the estate by implication. The solicitor was held to have been engaged under an implied retainer because of several reasons. First, he had given express advice on the relevant documents to the putative clients without qualifying the answers or telling them that they should seek independent advice. Further, he did not say or make it clear to the putative clients that he was acting solely for his original client. Additionally, the solicitor had acted for the estate in petitioning for the letters of administration. All of these happened in a situation where there was no other solicitor acting for the putative clients. Thus, the Court of Three Judges was satisfied that there was an implied retainer between the solicitor and the beneficiaries.

108 In *The Law Society of Singapore v Uthayasurian Sidambaram* [2009] 4 SLR(R) 674 ("*Uthayasurian*"), the respondent-solicitor acted for the complainant who was an investor in a proposed joint development of a piece of land ("the Property") with the Royal Brunei Government ("RBG").

109 The project commenced in 2001 when the respondent was approached by one Ang, who claimed to be a close business associate of another named PSN who represented RBG's business interests in Singapore. PSN allegedly represented to the respondent over the telephone that he could take instructions from Ang or his son, Atamaya. The respondent was subsequently introduced to one

Lim. Lim had incorporated a company, LKIL, and claimed that he had PSN's consent to negotiate with potential developers and that LKIL was to enter into a joint development agreement with RBG. The approved developer would then enter into a joint venture with LKIL or become a subsidiary of LKIL.

110 In April 2006, the respondent was informed by Ang that he had found a potential joint developer, Chin, a director and shareholder of another company, LKIPL. The respondent prepared a pre-contract agreement for the joint development of the Property ("the Pre-Contract Agreement") between LKIL and LKIPL. However, Ang subsequently informed the respondent that Chin was found not to be a suitable joint developer.

111 Around this time, the complainant decided to invest $1m into the project as well as buy out Chin's interest. He appointed the respondent as his solicitor and signed a warrant to act. The complainant deposited $1m into the respondent's client account and following that, authorised Ang to disburse funds on his behalf. Sums were subsequently released pursuant to Ang's instructions.

112 An issue that arose was whether the respondent had, by implication, acted for all the parties in the project. The Court of Three Judges held that on an objective consideration of all the circumstances, there was an implied retainer between the respondent-solicitor and all the parties to the project.

(a) First, the respondent acted only on the instructions of Ang in relation to the disbursement of funds.

(b) Second, in the interim bill tendered, the respondent stated that the payment of $100,000 was for the work done and services rendered to all the parties, not simply the complainant.

(c) Third, both PSN and Atamaya gave instructions via their conduit, Ang.

(d) Fourth, the respondent prepared the Pre-Contract Agreement under which Lim and LKIL both agreed to jointly develop the Property subject to LKIL securing the mandate from RBG.

(e) Finally, under cross-examination, the respondent testified that he was "acting for PSN" as well as for LKIL and Lim.

113 The observations of the Court of Three Judges are illuminating (at [41]–[42]):

> 41 … It is our view that an implied retainer had clearly arisen between the parties and the respondent. In *Law Society of Singapore v Ahmad Khalis bin Abdul Ghani* [2006] 4 SLR(R) 308 ("*Ahmad Khalis*"), this court considered whether an advocate and solicitor who represented the administrator of an estate also acted for the beneficiaries of the estate by implication and emphasised that the existence of an implied retainer depends "very much on the precise factual matrix concerned" (at [64]). Pointing to clear evidence of an implied retainer arising between the beneficiaries and the solicitor, such as the solicitor rendering advice on a renunciation document to the beneficiaries, informing them of the costs and the delay in having a co-administrator, this court concluded that the solicitor must have been acting for both the administrator as well as the beneficiaries (at [67]). As noted by Prof Pinsler in *Ethics and Professional Responsibility* at para 14-005, this must be considered in an objective context – it would not do well for an advocate and solicitor to argue, for instance, that he believed that such a relationship of solicitor-client did not come into existence if such a belief were found to be unreasonable (*Dean v Allin & Watts* [2001] 2 Lloyd's Rep 249, cited in *Ahmad Khalis* at [66]). Prof Pinsler also states in *Ethics and Professional Responsibility* at para 14-005 that "[i]t is essential to take into account the person's

perspective: did this person reasonably believe that such a relationship had arisen?" We also note the incisive observations by Frederic T Horne in *Cordery's Law relating to Solicitors* (Butterworths, 8th Ed, 1988) of instances where a retainer may be implied (at p 51):

A retainer may be implied where:

i) the client acquiesces in and adopts the proceedings;

ii) the client is estopped by his conduct from denying the right of the solicitors to act …, or from denying the existence of the retainer …;

iii) the client has by conduct performed part of the contract of employment …;

iv) the client has consented to a consolidation order. …

42 More particularly, in *Cordery on Solicitors* (Anthony Holland gen ed) (LexisNexis UK, 9th Ed, 1995, 2004 Release) at para E 425 (and cited by Prof Pinsler in *Ethics and Professional Responsibility* at para 14-006), it has been emphatically stated as follows:

> A retainer may be implied where, on an objective consideration of all the circumstances, an intention to enter into such a contractual relationship ought fairly and properly to be imputed to all the parties. The implication would have to be so clear that the solicitor ought to have appreciated it. Circumstances to be taken into account might include, where appropriate, who is paying the [solicitor's] fees, who is providing instructions and whether a contractual relationship has existed between the parties in the past. [emphasis added]

114 The plaintiff has referred me to the English High Court decision in *Burkle Holding v David Eric Laing* [2005] EWHC 638 ("*Burkle v Laing*"). The case concerned an application for disclosure of specific documents relating to two loan transactions between Burkle (lender) and Mr Laing (borrower). Burkle's lawyer, Mr Kelly, had prepared a loan agreement for both Burkle and Mr Laing to sign. Mr Laing claimed that Mr Kelly was acting for both Burkle and Mr Laing on the basis of a joint retainer, and sought disclosure of the documents on that basis

115 No disclosure was ordered and the court's reasoning was as follows. The test of whether or not Mr Laing and Mr Kelly were in a solicitor-client relationship at the relevant time requires answering the question of whether Mr Kelly gave Mr Laing advice relating to his rights, obligations or remedies under private law. In coming to the conclusion that there was no solicitor-client relationship between Mr Kelly and Mr Laing, the court took the following matters into account.

(a) The court found that the correspondence between Mr Kelly and a third party contained references to "our client" and "my client" which clearly meant Burkle. But there were no references to Mr Kelly acting for Mr Laing (at [60], [62] and [67]).

(b) It is a well-recognised circumstance in relation to a loan agreement that the borrower pays the lender's costs. A letter from a solicitor to a borrower informing him that he was to be responsible for the solicitor's costs does not necessarily connote or establish a solicitor-client relationship between the borrower and the solicitor (at [70]).

116 A few key points may be gleaned from the discussion of the cases above. First and foremost, it bears emphasising that the inquiry is one that is extremely fact-sensitive: see *Ahmad Khalis* at [64]. The factual matrix will be evaluated in its entirety and it is unlikely that any single factor will be

determinative.

117 Second, the perspectives of the parties involved are relevant and material to determine whether an implied retainer had arisen in the circumstances. Ultimately, it is a question of whether an intention to enter into a contractual relationship ought fairly and properly to be imputed to *all the parties*. The inquiry is by no means limited to the perspective of the putative clients, although having said that, the perspective of the alleged putative clients would nonetheless feature significantly. More critically, the subjective intentions and perspectives of the parties are not the be all and end all; they must be construed in an objective context. As was held in *Ahmad Khalis*, "the question is whether it was reasonable for the respondent or the beneficiaries to have arrived at the conclusions that they did in respect of their characterisation of their relationship *inter se*" (at [66]).

118 Finally, these are some of the factors that have led to the finding of an implied retainer:

(a) Solicitor providing advice to the alleged putative client without qualifying the answers or informing the latter to seek independent advice: *Ahmad Khalis*;

(b) Solicitor failing to clarify that he was not acting for the alleged putative client: *Ahmad Khalis*;

(c) Solicitor signing off as the solicitor for the alleged putative client on a legally important document: *Anwar Patrick*;

(d) Solicitor issuing an invoice that included work done and services rendered to the alleged putative clients: *Uthayasurian*; and

(e) Solicitor taking instructions from the alleged putative client: *Uthayasurian*.

119 Applying the principles set out above, I find that an implied retainer did not arise between RWY and the defendants. My reasons are as follows.

The Invoice

120 One of the reasons why the AR found an implied retainer was that RWY issued the Invoice to Polimet. In this connection, the defendants also placed reliance on the Invoice which stated *inter alia* that Mr Yip had liaised with and advised both parties (reproduced at [32(d)] above). In my view, however, the addressee and the contents of the Invoice do not unequivocally point to the existence of an implied retainer between the defendants and Mr Yip.

121 The Invoice cannot create an engagement. What is relevant is what transpired before the Invoice was issued. Whilst I accept that the Invoice may evidence Mr Yip's own understanding as to who he was representing, I am not inclined to place too much weight on the description of work done in the Invoice since Mr Yip has given evidence that he acted only for the plaintiff, and that he did not prepare the description of work done in the Invoice. [note: 23] Further, the Invoice was sent to Polimet only because there was an understanding that the borrower (Polimet) was to pay the lender's (the plaintiff's) legal costs. It is not disputed that there was such an understanding.

The Malaysian statement of claim

122 The defendant also relies on a statement of claim filed by RWY in Malaysia in March 2015 where it is stated that: "[t]he terms of the legal services rendered by [RWY] to [Polimet] are as stated in

[RWY's] invoice" ("the Malaysian SOC"). [note: 24] To provide some context, the Malaysian proceedings were commenced by RWY to recover, from Polimet, fees for their legal services. The statement relied upon by the defendants, when construed in its context, does not lead to the unequivocal conclusion that Mr Yip had understood himself to be advising both sides to the transaction. In fact, it was clearly stated in the Malaysian SOC that RWY's client was *the plaintiff*. The relevant part of the Malaysian SOC reads: [note: 25]

> In year 2011, [the plaintiff] … had retained the service of [RWY] to prepare the [Proposed Agreement] to be executed by [the plaintiff] and [Polimet] whereby [Polimet] had agreed, inter alia, with [the plaintiff] to bear all cost incurred including but not limited to legal fees and disbursements for the preparation and execution of the said Agreement.

In this context, it is clear that the reference to "legal services rendered by [RWY] to [Polimet]" cannot be construed to mean that RWY was advising all the parties. The Malaysian SOC was directed at Polimet only because of the parties' understanding that Polimet was to pay for the plaintiff's legal fees. That does not in itself make Polimet RWY's client.

123 In any case, the defendants' position is not that the plaintiff and Polimet alone were RWY's/Mr Yip's clients. Instead, the defendants' case is that the plaintiff and *all* the defendants were jointly represented by RWY through Mr Yip. For this reason, it would be illogical for the defendants to rely on a throwaway statement in proceedings that were solely directed at Polimet to support the contention that there was an implied retainer between *all* the defendants and Mr Yip. That said, I note that the defendants have suggested that there was an agreement between all the parties that Polimet was to bear the legal costs incurred by the plaintiff, Polimet as well as the second to fifth defendants. [note: 26] Again, this is but a bare assertion. There has been no evidence tendered in support of this assertion.

The "advice" that was provided

124 It bears recalling that the AR found that Mr Yip had advised the defendants and did not state that he was singly engaged by the plaintiff. Moreover, according to the defendants, Mr Yip had provided them with advice on several occasions.

(a) At the 7 October 2011 Meeting, Mr Yip advised, *inter alia*, Ms Lee and Mr Ong on the legal effect of the terms of the Proposed Agreement. [note: 27]

(b) In an email dated 10 October 2011, Mr Yip expressly advised the defendants on the legal implications of various clauses in the Proposed Agreement and asked for Ms Lee's instructions on whether to proceed with the execution of the Proposed Agreement. [note: 28]

(c) On or around 20 October 2011, Mr Ong had certain reservations about his personal liability under the Proposed Agreement and requested that Mr Yip issue a letter of advice to him explaining the same. Ms Lee relayed Mr Ong's request to Mr Yip, and Mr Yip replied that he would have to "run [the letter of advice] by Mr Chris Chia (the Plaintiff's representative) before issuing [it]". [note: 29]

(d) On 21 October 2011, Mr Yip issued the 21 October 2011 Letter, a "letter of advice" to Mr Ong and Ms Lee advising them of the legal effect of the various clauses under the Proposed Agreement and their liability under the same. [note: 30] Subsequently, on 15 November 2011, Mr

Yip issued a revised letter of advice to clarify the contents of the first letter and to inform Mr Ong of his obligations ("the 15 November 2011 Letter"). [note: 31]

125 Against that, Mr Yip averred that he had only explained the terms of the Proposed Agreement because the defendants were unrepresented and he believed it was his duty to explain the terms as best as he could and not mislead the defendants in any way. [note: 32] Mr Yip also stated that everything he did was on the instruction of, and only of, the plaintiff. The plaintiff asserts that Mr Yip was simply discharging the duty of an advocate and solicitor to explain the terms of the contract and the legal consequences fully and frankly so that neither of the contracting parties has any unfair advantage over the other. [note: 33] I also note Mr Yip's assertion that at the 7 October 2011 Meeting, he had specifically informed the defendants that he could not advise them and that if they had any concerns they were free to obtain their own legal advice on the terms. [note: 34] Whilst Ms Lee claims that they were not told to appoint their own lawyers, after reviewing the emails that followed and the conduct of the parties, I have no reason to doubt Mr Yip's recollection as to what he had said at the meeting.

126 To this end, the plaintiff cites as authority the Malaysian case of *Letchemy Arumugan v N Annamalay* [1982] 2 MLJ 198 ("*Letchemy Arumugan*"). In that case, the plaintiff sought a rescission of a sale agreement executed by her on the basis of fraudulent misrepresentation made by the defendant developer. In allowing the plaintiff's claim for rescission and fraudulent misrepresentation, the court made the following observations on the duty of an advocate and solicitor to an unrepresented party:

> *Where a party, especially an ignorant or illiterate one, is unrepresented by an advocate and solicitor in a transaction and the opposite party is represented by one, it is the duty of the advocate and solicitor to explain the terms and conditions of the contract and the legal consequences thereof fully and frankly to the unrepresented party and ensure that this unrepresented party understands the terms and conditions and legal consequences fully, so that neither of the contracting parties has any unfair advantage over the other.* Where there is a conflict of interest, as in this case, the advocate and solicitor should advise the plaintiff to be separately represented. The advocate and solicitor must at all times maintain his professional ethics, honestly, integrity and independence. He should never abuse his special position and the confidence reposed in him if he is not maintain [*sic*] the public respect for and confidence in the legal profession.
>
> [emphasis added]

127 The defendants sought to distinguish *Letchemy Arumugan* on the basis that it involved an unrepresented illiterate party. However, it is clear from a plain reading of the above passage that the duty is not confined to the situation where the unrepresented party is ignorant or illiterate. Pertinently, I note that *Letchemy Arumugan* remains good law in Malaysia as the above principle has been endorsed and applied in a more recent case of *Loh Bee Tuan v Shing Yin Construction (Kota Kinabalu) Sdn Bhd & Ors* [2002] 2 MLJ 532.

128 Whilst there has been some suggestion by the parties that the Singapore and Malaysia professional and ethical rules differ on this issue, I disagree. In my view, the principle stated in *Letchemy Arumugan* is equally applicable in the context of Singapore.

129 In Singapore, the rule against taking unfair advantage of third parties is encapsulated in r 53A of the PCR. The rule states:

> An advocate and solicitor shall not take unfair advantage of any person or act towards anyone in a way which is fraudulent, deceitful or otherwise contrary to his position as advocate and solicitor or officer of the Court.

130 Some useful observations on this rule were made by the Disciplinary Tribunal in *The Law Society of Singapore v Ong Teck Ghee* [2014] SGDT 7 (at [97] and [98]):

> 97. The first observation of this provision is that it covers an advocate and solicitor's relationship with "any person". It is not predicated on the existence of a solicitor and client relationship or a retainer. The next observation is that it has a wide reach in that it is not confined to conduct which is fraudulent or deceitful, but covers the taking of "unfair advantage of any person ……. contrary to his position as advocate and solicitor or officer of the Court".
>
> 98. The strict standard of conduct demanded of an advocate and solicitor in his relationship with others, even if the other person is not a client, stems from the fact that an advocate and solicitor is a member of an honourable profession. To behave otherwise would be contrary to his position as an advocate and solicitor. *There is certainly no honour in a person schooled in law taking unfair advantage of a person who is not so schooled*. …
>
> [emphasis added]

131 The rule against taking unfair advantage of third parties must be construed in the light of a solicitor's duty to not act against his client's interests. Rule 30 of the PCR reads:

> 30.—(1) An advocate and solicitor or any member of his law firm or any director or employee of the law corporation of which the advocate and solicitor is a director or an employee or any partner or employee of the limited liability law partnership of which the advocate and solicitor is a partner or an employee ***shall decline to advise a person whose interests are opposed to that of a client he is representing on any matter*** and shall inform such person to obtain independent legal advice.
>
> (2) If the person does not obtain such independent legal advice, the advocate and solicitor is under a duty to ensure that the person is not under an impression that his interests are protected by the advocate and solicitor.
>
> [emphasis added in bold italics]

132 On one hand, the solicitor cannot take unfair advantage of a counterparty that is not so schooled in the law. On the other hand, he cannot overreach by advising a person with opposing interests. How should the line be drawn? In *Ethics and Professional Responsibility: A Code for the Advocate and Solicitor* (Academy Publishing, 2007), Prof Pinsler states at para 25-012:

> The advocate and solicitor would also act improperly if he gives *bona fide* advice to the unrepresented party as his actions may constitute a breach of his duty to his client (by compromising his case) and give rise to an implied retainer between the advocate and solicitor and the formerly unrepresented party. Such conduct could result in a conflict of interests between his original client and the formerly unrepresented party.

133 With respect, the above passage begs the question as to what constitutes "advice" for the purposes of r 30 of the PCR. In this connection, I note that counsel for the plaintiff has urged me to draw a distinction between the situation where a solicitor merely explains the legal effect of

contractual terms, and the situation where the solicitor goes further by advising parties how they should proceed.

134 In *The Law Society of Singapore v Surinder Singh Dhillon* [2010] SGDT 8 ("*Surinder Singh Dhillon*"), the Disciplinary Tribunal observed that the word "advice" cannot be given its entire natural and ordinary meaning in the context of r 30 (at [2.2.9]–[2.2.10]):

> 2.2.29 … It is a common occurrence that a solicitor representing a client is contacted by a person whose interests are opposed to the client's interests and who seeks advice. This typically happens in a debt-recovery claim where a debtor will contact the creditor's solicitor directly and ask the creditor's solicitor what he (the debtor) ought to do. In these cases, the creditor's solicitor typically tells the debtor that he should make full payment as demanded failing which legal action will ensue with the consequences being judgment, execution and possibly bankruptcy. Simply saying this is, in the ordinary and natural meaning of the word, the giving of "advice". *But to interpret the word "advice" so widely would be impracticable and out of touch with the realities of practice.* More importantly, giving the word "advice" such a broad meaning does not advance the underlying policy of the conflict of interest rules – no client could reasonably feel betrayed or could reasonably feel that his relationship of trust and confidence with his solicitor had been fatally compromised by the solicitor giving advice of this nature, which in fact is a warning, to the debtor.
>
> 2.2.10 It would be different if the creditor's solicitor went on to tell the debtor that if he (the debtor) was not in a position to pay his debts in full, he should propose an individual voluntary arrangement which would, if passed by the requisite majority, bind all creditors including dissenting creditors to a compromise. In that situation, the solicitor has surely gone too far. The distinguishing feature appears to be whether or not the solicitor is, in the communication with the opposing party, seeking to safeguard or advance the opposing party's interests instead of his client's. *If the solicitor is not attempting to safeguard or advance the opposing party's interests, then the content of that communication cannot be "advice" within the meaning of Rule 30.* This is, admittedly, a fine line but one which practitioners will be able readily to recognise.
>
> [emphasis added]

135 The decision in *Surinder Singh Dhillon* aligns the Singapore position with the American Bar Association's Model Rules of Professional Conduct ("ABA's Model Rules"). Model Rule 4.3 of the ABA's Model Rules states:

> ***Transactions With Persons Other Than Clients***
>
> **Rule 4.3 Dealing With Unrepresented Person**
>
> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

136 As was noted in Alvin Chen, "Declining to 'Advise' a Person with Opposing Interests Under Rule 30 PCR" *Singapore Law Gazette* (April 2012), a significant difference between Model Rule 4.3 and r 30

of the PCR is that the former appears to be stricter because it prohibits the giving of "legal advice" except for advice to secure counsel. That said, it was also observed that Model Rule 4.3 is qualified by Comment [2] which states:

> The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. *So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.*
>
> [emphasis added]

137 Under r 30 of the PCR, a solicitor is not precluded from explaining the meaning of documents and stating his view of the underlying legal obligations to an unrepresented counterparty so long as he makes it clear that he is not representing the person and that independent advice should be sought. To my mind, this is also a factor to be considered when determining if an implied retainer exists between a solicitor and an unrepresented counterparty to the transaction. It must be appreciated that the rules governing implied retainers do not operate in isolation from the rules contained in the PCR. Together, they reflect policy considerations that must ultimately form a sound and coherent ethical framework.

138 Bearing in mind the preceding analysis, I am of the considered view that merely explaining the legal effect does not amount to "advice" for the purposes of finding an implied retainer. An implied retainer should only be found when the solicitor has gone to the extent of providing advice for the purposes of safeguarding or advancing the interests of the putative client. This view is consistent also with the cases in which an implied retainer has been found.

139 In any event, even if I am wrong and the Singapore PCR provisions are different (stricter) from those in Malaysia, I note the further submissions of the plaintiff and indeed the defendants, that the Singapore PCR provisions were not applicable to Mr Yip. At the material time, Mr Yip was an advocate and solicitor of the High Court of Malaya operating out of a law firm in Kuala Lumpur. Mr Yip was not operating in Singapore (at that time) and he was not an advocate and solicitor of the Supreme Court of Singapore. He did not possess a practising certificate in Singapore. It is clear that Mr Yip was subject to the professional and ethical rules of the Malaysian bar. The precarious position that Mr Yip refers to (see [147] below) and which provides the context of his meeting and communications with the defendants concern his ethical and professional duties in Malaysia. This is the relevant background context in which I approach the question whether an implied retainer was entered into by RWY and the defendants as a result of the meeting and communications.

140 In *Anwar Patrick*, the solicitor had signed off as the "solicitor for the mortgagors" in the Certificate of Correctness which formed part of the security documents and the effect of the solicitor's signature was to imply that he had the authority to act as agent for and on behalf of the party in respect of the instrument (*Anwar Patrick* at [54]–[56]). In *Ahmad Khalis*, the solicitor was

introduced to the putative clients as a friend and a lawyer who was there to assist them (*Ahmad Khalis* at [46]). The beneficiaries of the estate (the putative clients) were uncomfortable with the solicitor's client being appointed the sole administrator. In these circumstances, the solicitor took it upon himself to address their misgivings by assuring them that the sole administrator (his client) could not deal with the estate property without their authorisation (*Ahmad Khalis* at [44]). He did not qualify his answers or tell the beneficiaries that they should seek independent legal advice (at [48]). Neither did he say or make it clear to the beneficiaries that he was acting only for the sole administrator (*Ahmad Khalis* at [48]). In *Uthayasurian*, whilst there was no suggestion that the respondent solicitor had advised the putative clients, he was found to have taken instructions from them and acted on the same (*Uthayasurian* at [43]).

141 It is evident that the solicitors in the aforementioned cases had ventured beyond explaining or stating the legal effect of documents that were prepared. They had actively advanced or purported to safeguard the interests of the putative clients. That is to be contrasted with the case at hand. I find that Mr Yip did not go to the extent of providing advice for the purposes of safeguarding or advancing the interests of the defendants. My reasons are as follows.

142 The defendants assert that Mr Yip had advised the defendants on the legal effect of the terms of the Proposed Agreement during the 7 October 2011 Meeting. They do not say that Mr Yip advised them on the steps they ought to take to advance or safeguard their interests. It is also Mr Yip's evidence that he made it clear during the meeting that he did not act for them. [note: 35]

143 The defendants also say that in an email dated 10 October 2011 ("the 10 October 2011 Email"), Mr Yip had expressly advised the defendants on the legal implications of the various clauses in the Proposed Agreement. It would be useful to reproduce this email in full.

> Dear Ms. Lee,
>
> Enclosed is the revised 2nd draft of the Supplementary Agreement with Kendall Court's comments marked thereon.
>
> You may wish to take note of the following:-
>
> 1) Clause 1.1 – Definition of Distributable Proceeds
>
> KC has no objections to the addition of the clarification on the definition.
>
> 2) Clause 4.3
>
> The Clause has been duly amended to reflect the agreement between yourself and KC's Mr. Chris Chia that the debts in Category A are to be settled at the same time as KC's debts. Debts in Category B shall remain ranked in pari passu as other unsecured creditors.
>
> 3) Clause 7.1
>
> Clause 7.1 has been duly amended to add clarity to the Clause.
>
> Please note that this Clause will have to be cross-referred to Clause 13.1 of the Agreement which provides that in the event of default of any of the Agreements herein by the issuer i.e. Breach of Agreement, then the Personal Guarantees will revert to the Original obligation i.e. No longer $6.4 million but the entire Bond amount. But this is only in the event of a default. If all terms are

complied with, then Clause 7.1 shall remain applicable.

4) Clause 14

References to 'the Personal Guarantee Agreements" have been added to clarify the application of the Clause and to obviate and [sic] dispute later in the day.

5) Clause 14.1

***Our client*** wishes this Clause to be maintained to state with clarity that all other obligations (which are not specifically stated in the 2nd Supplementary Agreement) shall remain binding on the respective parties.

6) Guarantors Consent

We have duly amended this Clause to reflect the provisions of Clause 7.1 of the 2nd Supplementary Agreement.

Apart from the above, KC has no further comments.

If the terms as stated above have addressed the concerns raised in our recent meeting at our office and reflect the terms negotiated with KC, then *please provide us with your immediate instructions* to proceed with the execution of the 2nd Supplementary Agreement.

Your usual early attention is appreciated.

Thank you.

Regards,

YIP HUEN WENG

[emphasis added in bold italics]

144 It is clear from a perusal of the email that Mr Yip had not gone beyond explaining the suggested amendments to the Proposed Agreement as well as stating his client's position on the same. Again, he did not purport to safeguard or advance the defendants' interests.

145 The defendants also say that Mr Yip had issued letters of advice to Mr Ong and Ms Lee advising them of the legal effect of the various clauses under the Proposed Agreement and their liability under the same. These are the 21 October 2011 Letter and the 15 November 2011 Letter. The contents of the letters are substantially the same since the 15 November 2011 Letter is a revised version of the earlier letter. The 15 November 2011 Letter states: [note: 36]

We refer to the above matter and the telephone conversation between your Ms. Lee Sin Peng and our Yip Huen Weng earlier this evening.

Pursuant thereto, we confirm our understanding of Clause 7 of the Proposed 2nd Supplemental Bond Subscription Agreement ("the Agreement"), to be as follows:-

1) that upon the execution of the Agreement, the liability of the Guarantors, Ms. Lee Sin Peng

and Mr. Andy Ho ("the Guarantors"), under the Personal Guarantee Agreements [as defined in the Agreement] ("the PG") shall be capped at USD$6,400,000-00;

2) that provided always that the terms of the Agreement are complied with, upon:-

(i) the completion of the sale of the Boluo Property; **OR**

(ii) the achievement of the milestones as provided in Clause 7.1 of the Agreement

then the Guarantors shall be liable for 50% of any shortfall of any other balance amounts owing under the PG thereafter. However, ***our client*** would still have recourse against the Issuer for any remaining outstanding thereafter (subject, of course, to the distribution of proceeds as provided under Clause 3 of the Agreement);

3) provided that the terms of the Agreement are complied with, the Bondholder would not have recourse against any other party apart from those specifically stated above i.e. the Guarantors and the Issuer (Polimet Pte Ltd), and shall only have a claim against the Initial Shareholders for liabilities, undertakings, warranties and/or obligations under the original Convertible Bond Subscription Agreement dated 16 October 2008 ("the Principal Agreement") which were not specifically amended by the Agreement, in particular, Clauses 5.3(b), 5.7, 7, 8.2 and 12 of the Principal Agreement and/or where it has been specifically provided for or consented to in writing by the Initial Shareholders; and

4) in the unlikely event of any of the events of default as stated in Clause 12 of the Agreement, the Bondholder would be able to exercise any of its rights as provided under the Bond Subscription Agreements, the Supplemental Agreements and the PG as if the Agreement had never been executed.

We trust the above is sufficient for your purposes.

Please do not hesitate to contact the undersigned for any further clarification/assistance required.

Yours faithfully,

YIP HUEN WENG

[emphasis added in bold italics]

146 Once again, there is no indication that Mr Yip provided advice that went beyond explaining and clarifying the effects of certain terms in the 2007 CBSA. It bears noting that the letters of advice were only issued after the plaintiff had cleared them. [note: 37] Further, the letters consistently referred to the plaintiff as "[RWY's] client" and had the plaintiff is copied in its capacity as RWY's client. [note: 38]

147 Finally, the defendants also assert that Mr Yip had acknowledged his role as lawyer and adviser to both the plaintiff and the defendants. When Ms Lee relayed Mr Ong's request for a letter of advice explaining the latter's personal liability under the Proposed Agreement, Mr Yip replied that he would have to run the letter of advice by Mr Chia, the plaintiff's representative. Ms Lee then wrote to Mr Yip reminding him that he was in a position where he had to "advise both sides without fear or favour" and on a "neutral" basis. [note: 39] Otherwise, she said, Mr Ong would insist on his own lawyer. Mr Yip

responded as follows: [note: 40]

> Hi Ms Lee,
>
> I appreciate the situation facing us but I just need to be sure that I am not 'mis-advising' Mr. Ong in any way. From my reading of the Initial Convertible Bond Agreements, there were some undertakings which were provided by Mr. Ong as an initial shareholder which I think, to be fair to Mr. Ong, I would have to highlight to him as well.
>
> Unfortunately, while I am proceeding to advise parties on a ***'neutral' basis*** , I must still ensure that such advise [*sic*] is accurate and correct.
>
> I trust you can appreciate my ***precarious position*** in the matter and I shall revert to you before the end of today.
>
> [emphasis added in bold italics]

148 Bearing in mind my earlier analysis of the nature of the letters, I cannot accept that the above email was an acknowledgment by Mr Yip that he was acting pursuant to a joint retainer. That is contrary to Mr Yip's observation that he was in a "precarious position" and also his actions taken thereafter.

149 Ms Lee's email was clearly driven by her unhappiness that Mr Yip intended to run the letter of advice by Mr Chia. If Mr Yip had wanted to advise parties on a "neutral" basis, it would not have been necessary for him to subsequently seek the plaintiff's instructions on the letter of advice. Further, Mr Yip's reference to his "precarious position" cannot be disregarded; it is explicable only on the basis that he could not go further than explaining the terms of the Proposed Agreement for he was only acting for the plaintiff. If he were acting pursuant to the alleged joint retainer, there would be no "precarious position" to speak of.

The party giving instructions

150 The evidence before me shows that Mr Yip never took instructions directly from the defendants. Even if he had done so, he cleared it with the plaintiff before acceding to the defendants' request.

151 *First*, the plaintiff was the one who instructed RWY to prepare the Proposed Agreement. The plaintiff was also the one who instructed Mr Yip to arrange the 7 October 2011 Meeting and to go through the terms of the Proposed Agreement with the defendants. [note: 41]

152 *Second*, when Ms Lee relayed Mr Ong's request for a letter regarding his personal liability, Mr Yip made it clear that he would have to seek Mr Chia's clearance before issuing such a letter. Thereafter, Mr Yip sought and obtained the plaintiff's instructions to issue the letter and proceeded to issue the 21 October 2011 Letter. More pertinently, the 15 November 2011 Letter (the purpose of which was to clarify the contents of the 21 October 2011 Letter) was sent after the plaintiff instructed Mr Yip to accommodate the defendants' request as best as he could in view of the fact that the defendants had delayed execution of the Proposed Agreement for more than a month since the 7 October 2011 Meeting. [note: 42]

153 *Third*, whilst the defendants assert that Mr Yip had requested for their instructions in the 10

October 2011 Email [note: 43] (which has been reproduced in full earlier at [143]), that email does not suggest that Mr Yip was seeking the defendants' instructions *qua* the defendants' lawyer. Rather, it is clear that Mr Yip was writing in his capacity as the plaintiff's lawyer. The purpose of the email was to state his client's (*ie*, the plaintiff's) position to find out if the defendants were agreeable to the same. This interpretation is fortified by looking at an earlier email in the same chain of correspondence. In an email dated 7 October 2011 (sent shortly after the 7 October 2011 Meeting), Mr Yip said: [note: 44]

> Dear Ms. Lee,
>
> It was my privilege to have met with you, Mr. Ong, Mr. Andy Ho and Ms. Thong earlier today.
>
> Enclosed is a copy of the revised Supplemental Agreement as per our discussion. We are forwarding a copy of the same simultaneously to ***our client*** for their perusal. The final agreement is, of course, subject to any further amendments ***our client*** may wish to make to the enclosed revised Supplemental Agreement.
>
> Kindly let us know if you have any further comments on the enclosed draft.
>
> Please do not hesitate to contact me for any further clarification/assistance required.
>
> Regards,
>
> YIP HUEN WENG
>
> [emphasis added in bold italics]

154 Looking at the emails in their context, there were on-going negotiations between the defendants and Mr Yip, who was the plaintiff's agent. It bears emphasising that Mr Yip had consistently referred to the plaintiff as his client. He had also made it clear that whatever was discussed in the 7 October 2011 Meeting remained subject to his client's approval. Thus, I cannot accept the defendants' contention that Mr Yip had requested for the defendants' instructions *qua* the defendants' lawyer. I find, instead, that the plaintiff was the only party that had instructed Mr Yip.

155 For completeness, I should add that the case of *Foo Ko Hing* does not assist the defendants' case at all. In that case, it was held that solicitors dealing with joint clients may take instructions from both of them jointly or from one of them by convention or by express instructions. Here, there is no suggestion at all that the parties had agreed that the plaintiff was to relay instructions on behalf of the defendants.

The perspective of the defendants

156 In my view, none of the parties to the alleged implied retainer was labouring under the impression that Mr Yip was representing them and safeguarding their interests. The evidence shows that the defendants appreciated Mr Yip's role as the plaintiff's lawyer. As mentioned earlier, Mr Yip had also always taken the view that the plaintiff was his only client.

157 Significantly, Ms Lee herself accepted that RWY acted for the plaintiff. In an email dated 29 May 2013, Ms Lee suggested that Kendall Court's lawyer, *ie*, RWY, was to blame for Mr Ong's failure to sign the Proposed Agreement. Ms Lee attempted to explain away the statement on the basis that she was not using the term "KC's lawyer" in the sense of who had engaged Mr Yip, but in the sense that it was the plaintiff that had recommended Mr Yip to draft the Proposed Agreement, thereby

resulting in the state of affairs. [note: 45] I do not accept her explanation.

Concluding remarks

158 Looking at the circumstances in the round, I am of the considered view that the defendants have not discharged their burden of proving that there was an implied retainer between RWY and themselves. The material shows that Mr Yip was always acting for the plaintiff *only* and had only acted upon the plaintiff's instructions. Further, he had consistently, in correspondence sent to all parties, made it clear that the plaintiff was his client. Whilst Mr Yip did provide explanations of the contractual terms to the defendants, this in itself is insufficient to give rise to an implied retainer. Mr Yip may have walked the thin line, but I am not convinced that he had ventured into acting for the defendants or leading the defendants to believe that he was acting for them.

159 If I am wrong and there was indeed an implied retainer between the defendants and Mr Yip, I turn to consider whether Mr Yip was acting for the defendants under a joint or separate retainer.

*Was there a joint retainer?*

160 It bears recalling that the AR held that Mr Yip had acted for both parties pursuant to a joint retainer. She did not accept the contention that there were separate retainers because the plaintiff had been copied in all correspondence between RWY and the defendants and the description of the Invoice stated that RWY was providing "general advice for both parties' benefit".

Arguments

161 The plaintiff submits that the AR erred in her conclusion. It takes the position that even if Mr Yip was acting for the defendants, it was pursuant to a separate retainer because the plaintiff had not agreed, expressly or by implication, to a joint retainer.

162 In *Burkle v Laing*, whilst the court was satisfied that there was no solicitor-client relationship between Mr Kelly and Mr Laing, it went on to say that it would have, in any case, concluded that Mr Laing and Burkle had separate retainers with Mr Kelly. This was because in order to have joint retainers, Burkle would have had to agree, expressly or by implication, to this position. There was no such agreement. Thus, if Mr Kelly was in fact giving legal advice to Mr Laing and receiving instructions from both Mr Laing and Burkle, they were separate instructions and there was no intention for the advice given to one party to be given to the other.

163 The plaintiff also relies on *Nationwide Building Society v Various Solicitors* [1999] PNLR 52. In that case, the defendants had been retained to act for the lenders and had also acted for the borrowers in the same transaction. One of the issues that arose was the extent to which the documents in the defendants' files for the borrowers were immune from production to the lender on grounds of legal professional privilege in favour of the borrowers. Blackburne J held that a solicitor who acts for both borrower and lender in a transaction owes separate duties of confidence to each client. The question is whether the communication in question is confidential, and if it is, what information contained in the communication the borrower has authorised the solicitor to disclose to the lender (at 14).

Decision

164 I am of the view that the AR had placed undue weight on the fact that the plaintiff was copied in all the correspondence between RWY and the defendants. It is sufficient that there were

independent communications between RWY and the plaintiff. Mr Yip's evidence is that while he had copied the plaintiff on all his communications with the defendants, he did not copy the defendants on his correspondence with the plaintiff. [note: 46]

165 No joint privilege will arise where one of the parties to the alleged joint retainer consults the lawyer on an individual and exclusive basis. In such circumstances, that party will be able to maintain privilege against the other in respect of such communications: *The Law of Privilege* at para 6.03. Similarly, in *Burkle v Laing*, there were independent confidential communications between Burkle and Mr Kelly, but none between Mr Laing and Mr Kelly.

166 The defendant drew my attention to the case of *Doran Constructions Pty Limited (in Liquidation)* [2002] NSWSC 215 ("*Doran*"). In *Doran*, a solicitor was consulted by a group of companies ("the Group") and their directors in relation to a debt substitution transaction. The purpose of the transaction was to tidy up the Group in terms of inter-group loan accounts. It was held by the New South Wales Supreme Court that there was a joint retainer despite the argument that there were opposing interests within the Group (at [79]). This case, however, is distinguishable on the basis that it concerned a joint meeting where all the relevant parties were present. It would thus make no sense if each sentence spoken in the course of the joint meeting had to be individually analysed for the purposes of privilege (at [71]).

167 In the present case, there was no joint meeting; only correspondence between RWY and the defendants that the plaintiff was copied in. The defendants were not kept in the loop when it came to correspondence between RWY and the plaintiff. Even if it could be said that RWY was acting for the defendants, it was in a very limited way. There is no evidence that the plaintiff had meant for its communications with RWY to be given/made known to the defendant. No consent from the plaintiff, whether express or implied, can therefore be inferred from the circumstances. The defendants are therefore not entitled to seek disclosure of communications between RWY and the plaintiff that they were not privy to.

**Conclusion**

168 To conclude, I find that RWY had acted only for the plaintiff at all material times. Even if RWY had acted for the defendants as well, I find that it was pursuant to an independent retainer. Accordingly, the Documents are privileged and do not have to be disclosed. For the reasons above, I allow the plaintiff's appeal with costs here and below to the plaintiff to be taxed if not agreed.

169 The Court records its appreciation for the helpful submissions and, in particular, the further submissions tendered by learned counsels.

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[note: 1] YHW Affidavit at [1].

[note: 2] Plaintiff's Statement of Claim, para 1.

[note: 3] Plaintiff's Statement of Claim, para 1.

[note: 4] Plaintiff's Statement of Claim, para 2.

[note: 5] Plaintiff's Statement of Claim, para 2.

[note: 6] Third Party's Statement of Claim, para 4.

[note: 7] Third Party's Statement of Claim, para 4.

[note: 8] Third Party's Statement of Claim, para 5.

[note: 9] Third Party's Statement of Claim, para 5.

[note: 10] Plaintiff's Statement of Claim, paras 11 and 22.

[note: 11] Third Party's Statement of Claim, para 9.

[note: 12] Plaintiff's Statement of Claim, para 26.

[note: 13] Plaintiff's Statement of Claim, para 27.

[note: 14] Plaintiff's Written Submissions, para 20.

[note: 15] Ms Lee's 18th Affidavit.

[note: 16] Ms Lee's 15th Affidavit, para 39.

[note: 17] Plaintiff's Bundle of Documents, p 89

[note: 18] Plaintiff's Bundle of Documents, p 89

[note: 19] Affidavit of Chris Chia dated 2 June 2015, at para 16.

[note: 20] Plaintiff's Written Submissions, para 82.

[note: 21] Defendants' Written Submissions, para 37(c).

[note: 22] Defendants' Written Submissions, para 4.

[note: 23] Affidavit of Mr Yip, para 78.

[note: 24] Plaintiff's Bundle of Documents, p 360.

[note: 25] Plaintiff's Bundle of Documents, p 359.

[note: 26] Defendant's Written Submissions, para 59.

[note: 27] 16th Affidavit of Lee Sin Peng, para 17.

[note: 28] 18th Affidavit of Lee Sin Peng, paras 25 and 26.

[note: 29] 16th Affidavit of Lee Sin Peng, para 20.

[note: 30] 16th Affidavit of Lee Sin Peng, para 23.

[note: 31] 16th Affidavit of Lee Sin Peng, paras 23 and 24.

[note: 32] Affidavit of Mr Yip, para 81.

[note: 33] Plaintiff's Written Submissions, para 115.

[note: 34] Affidavit of Mr Yip, paras 28 – 33.

[note: 35] Affidavit of Mr Yip, para 32.

[note: 36] 16th Affidavit of Lee Sin Peng, p 133.

[note: 37] Affidavit of Mr Yip, paras 57 and 65.

[note: 38] Affidavit of Mr Yip, para 65

[note: 39] 16th Affidavit of Lee Sin Peng, paras 21 and 22

[note: 40] Affidavit of Mr Yip, para 45

[note: 41] Affidavit of Mr Yip, para 23

[note: 42] Affidavit of Mr Yip, para 65

[note: 43] Plaintiff's Bundle of Documents, p 101–102.

[note: 44] Plaintiff's Bundle of Documents, p 102.

[note: 45] 20th Affidavit of Lee Sin Peng, para 21.

[note: 46] Affidavit of Mr Yip, para 37.