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LEGAL PROFESSIONAL PRIVILEGE AND GARNISHEE PROCEEDINGS

This article considers selected aspects of legal professional privilege: its role in the context of garnishee proceedings; the scope of the "communication" that falls within its protection; and the requirement of "confidentiality" in the communication sought to be protected. These issues were raised recently in *Chua Su Yin & Co. v. Ng Sung Yee & Anor.*

THE rule which protects against compulsory disclosure of lawyer-client communication is central to legal representation. Despite its importance, there is hardly any local judgment on the topic. It is doubtful that the lack of litigation in this area is due to the clarity in which legal professional privilege has been codified in Singapore. The codification has, in fact, raised more issues. It remains uncertain whether the scope of this statutory privilege differs from its common law counterpart and it is also unclear how the statutory formulation accomodates, if at all, certain common law concepts. Some of these issues were considered recently, in the context of a garnishee application, by the Malaysian judiciary in *Chua Su Yin & Co.* v. *Ng Sung Yee & Anor, and other Appeals.*[1] This case should be of persuasive value before a Singapore Court since the relevant statutory provisions in both jurisdictions are *in pari materia.*

The respondent had entered judgment against a developer company for late delivery of houses built by the latter. The appellant, a law firm,[2] was acting for the same developer in the sale of units comprised in a (presumably different) development project. The respondent alleged that the appellant was holding, as stakeholder, retention monies paid by the purchasers of the units in accordance with the Housing Developers (Control and Licensing)

1 [1991] *2* M.L.J. 348. There were altogether eight appeals (Civil Appeals Nos. 37 to 41 and 48 to 50 of 1988) but they dealt with the same issues, which will be explored later. It was agreed at the outset of arguments that the Court make a ruling only in Civil Appeal No. 48 of 1988 and that the decision will bind all parties in the other appeals.

2 It is unclear whether the garnishee application was brought against any particular solicitor or against the partnership. The latter is suggested by the title of the action. However, in the judgment, references were, except on one occasion ("garnishee solicitors" in the second last paragraph), in the singular form and the gender references were inconsistent: "she" and "her" at p. 349; "he" and "his" in the second last paragraph of the judgment. For consistency, the feminine pronoun will be used for the appellant throughout this article.

Regulations 1982. The respondent sought to execute his judgment against the developer by garnishing the retention monies and the appellant was duly served with a garnishee order to show cause.

At the hearing before the magistrate, the appellant raised the preliminary objection that "she was not in a position to say whether in fact there was or there was no money belonging to the judgment debtor *[i.e.,* the developer] held by her in view of section 126 of the [Malaysian] Evidence Act 1950",[3] which provides for legal professional privilege. The equivalent provision in the Singapore Evidence Act[4] is section 128. (Hereinafter, references to statutory provisions, unless otherwise stated, shall be in relation to the Malaysian Evidence Act, followed by the equivalent provision in the Singapore Evidence Act within square brackets.) The objection was overruled by the magistrate and the appellant appealed to the High Court where Abu Mansor J. rejected the appellant's claim for legal professional privilege and dismissed the appeal.

I. RELEVANCE OF PRIVILEGE

According to Abu Mansor J., "[t]he only question coming for decision ... is whether a client's money held in trust by a solicitor in his client's account can be an appropriate subject of garnishee proceedings in view of ... section 126 [section 128]."[5] This formulation intertwines two issues. The first is substantive, namely, whether the retention monies allegedly held by the appellant was in law a "debt due or accruing due" from her to her client, the judgment debtor, and therefore fit to be attached by garnishee proceedings. The second issue (which should logically precede the first) is evidential, that is, whether there was evidence to establish that retention monies were in fact held by the appellant as stakeholder.[6] The judgment dealt with the second issue but did not deal with the first. The first issue would, presumably, only fall to be decided after the preliminary objection has been ruled upon.

It would seem that legal professional privilege is relevant, if at all, only to the second issue to the extent that it allows the appellant to withhold evidence relating thereto. It is a rule of evidence and not a substantive defence; it is unlike, for example, the privilege that may be raised in a defamation suit. As will be argued, the only purpose that the claim of privilege may serve in this case came very close to being a defence to the garnishee application.

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3 *Ibid.*, at p. 349. The Malaysian Evidence Act was revised in 1971: Malaysian Act 56 of 1971.

4 Cap. 97, 1985 Rev. Ed.

5 Above, note 1, at p. 348.

6 A confusion of these two issues is also evident in the argument advanced on behalf of the respondent. See, above, note 1, at p. 349.

To begin with, it is clear that the lawyer's "duty to the Court and to his client [require] that he raise the question of privilege and not abandon it until thoroughly satisfied that he [has] been rightly directed by the Court."[7] This, however, presupposes that there is an attempt by someone to compel disclosure of privileged material.[8] In *Chua Su Yin*, the compulsion is not entirely obvious. Furthermore, leaving aside the lawyer's obligation to raise privilege, would the privilege have helped the appellant's case? Before proceeding to consider these questions, some understanding of garnishee procedure is necessary.

The basic principle of this particular mode of execution of judgment is laid down in Order 33 rule 1(1) of the Malaysian Subordinate Courts Rules, 1980 ("MSCR"), which were the governing rules in *Chua Su Yin* since the case was commenced at a subordinate court. Order 33 rule 1(1) of the MSCR is identical to Order 49 rule 1(1) of the Malaysian Rules of the High Court, 1980 ("RHC"), the Singapore Rules of the Supreme Court, 1970 ("RSC") and the Singapore Subordinate Courts Rules, 1986 ("SSCR"). They state:

> Where a person (... "the judgment creditor") has obtained a judgment or order for the payment by some other person (... "the judgment debtor") of money, ... and any other person within the jurisdiction (... "the garnishee") is indebted to the judgment debtor, the Court may, subject to the provisions of this Order and of any written law, order the garnishee to pay the judgment creditor the amount of any debt due or accruing due to the judgment debtor from the garnishee, or so much thereof as is sufficient to satisfy that judgment or order and the costs of the garnishee proceedings.

There is a two-stage procedure for obtaining a garnishee order. First, the judgment creditor has to apply *ex pane* by summons supported by an affidavit for a garnishee order *nisi* to be issued against the garnishee.[9] The judgment creditor needs to set up only a *prima facie* case in relation to whether any debt is due or accruing due from the garnishee to the judgment debtor. The deponent of the supporting affidavit has to state (i) that, to the best of his information or belief, the garnishee is indebted to the judgment debtor and (ii) the sources of his information or grounds for his belief.[10]

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7 *Re United States of America* v. *Mammoth Oil Co.* (1925) 56 Ont.L.R. 635 at p. 646 *per* Ferguson J.A. See also *R.* v. *C.C.C., Exp. Francis & Francis* [1989] 1 A.C. 346 at p. 376; *R.* v. *Craig* [1975] 1 N.Z.L.R. 597.

8 That the privilege does not otherwise come into operation, see Newbold, "Inadvertent Disclosure in Civil Proceedings" (1991) 107 L.Q.R. 99; Zuckerman, "Legal Professional Privilege and the Ascertainment of Truth" (1990) 53 M.L.R. 381 at p. 383.

9 O. 33 rr. 1(2), 2 of MSCR; O. 49 rr. 1(2), 2 of RHC, RSC and SSCR.

10 O. 33 rr. 2(b) of MSCR; O. 49 r. 2(b) of RHC, RSC and SSCR.

He need not, however, quantify the debt" or state how it was incurred.[12] The reason is that the judgment creditor is unlikely to be privy to the dealings between the judgment debtor and the garnishee, and he would usually not know the exact details of the debt.[13] Further, as Lord Hannen noted in *Vinall* v. *De Pass:* "[The affidavit] is not for the purpose of proof at all - it is to lay a foundation for calling the debtor, the garnishee, before the tribunal in order to ascertain whether he can deny that which is alleged against him, simply that he is indebted."[14]

The garnishee order *nisi, interalia,* notifies the garnishee of the application for a garnishee order against him and orders him to attend Court on the return date whereon he can, if he denies that any debt is due or accruing due to the judgment debtor, show cause why the order should not be made absolute and the order *nisi* should be discharged.[15] The garnishee order *nisi* must be served on the garnishee,[16] the effect of which is to provisionally bind in the hands of the garnishee the debt specified in the order.[17]

The second stage of the proceedings takes place on the return date, when the matter comes before the Court for further consideration, (and this was the stage of proceedings in *Chua Su Yin* from which the appeal was made). Order 33 rule 4(1) of the MSCR (which is equivalent to Order 49 rule 4(1) of the RHC, RSC and SSCR) provides: "Where on the further consideration of the matter the garnishee does not attend or does not dispute the debt due or claimed to be due from him to the judgment debtor, the Court may ... make an order absolute ... against the garnishee."

It has been said that, at the second stage, the garnishee "can do little else than pay or dispute the debt."[18] If the garnishee does not attend[19] or does not dispute that some debt is due or accruing due from him to the judgment debtor, the Court may make an order absolute against him.[20] If he does dispute the debt, the Court can either deal with the arguments

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11 *Lucy* v. *Wood* [1884] W.N. 58.

12 *Vinall* v. *De Pass* [1892] A.C. 90; affirming the decision of the Court of Appeal *sub. nom. De Pass* v. *Capital and Industries* Corp [1891] 1 Q.B. 216; *Coren* v. *Barne* (1889) 22 Q.B.D. 249.

13 "[I]nasmuch as the judgment creditor must rely on any information that he can get from the judgment debtor, it would be an absolute denial of justice if he could not get this [garnishee] order without swearing to the amount of the debt.": Field J. in *Lucy* v. *Wood,* above, note 11. See also *Vinall* v. *De Pass,* above, note 12, at p. 99.

14 Above, note 12 at p. 99.

15 Form 89 of MSCR and SSCR; Form 98 of RHC and RSC.

16 O. 33 r. 3 of MSCR; O. 49 r. 3 of RHC, RSC and SSCR.

17 O. 33 r. 3(2) of MSCR; O. 49 r. 3(2) of RHC, RSC and SSCR.

18 *Granger* v. *Granger* [1919] V.L.R. 288 at p. 293.

19 Which is taken as a tacit admission that the amount claimed is due and owing: *Randall* v. *Lithgow* (1884)12 Q.B.D. 525 esp. at p. 529.

20 O. 33 r. 4(1) of MSCR; O. 49 r. 4(1) of RHC, RSC and SSCR.

summarily or instead, order a trial of any question necessary for determining the liability of the garnishee.[21]

In *Chua Su Yin,* technically, the judgment creditor was not compelling the appellant to reveal the information which she sought to protect. The respondent/judgment creditor had already discharged the burden of showing a *primafacie* case that some debt was due or accruing due from the appellant/ garnishee to the developer/judgment debtor when he obtained the order *nisi.* The order *nisi* having been issued and served, the burden was on the appellant to deny that any[22] debt was due or accruing due to her client, the developer. The stand she took was, to put it colloquially, "Sorry, I cannot tell you anything because of privilege." It is submitted that this does not amount to disputing the debt under Order 33 rule 4(1) of the MSCR. In truth, the appellant's case is that she was unable to dispute (or, for that matter, admit) the debt. Even if she could, she would have to plead more than a bare denial to persuade the Court not to make the order absolute. According to Willes J. in *Newman* v. *Rook,*[23] "the mere assertion by the garnishee that he disputes the debt amounts to nothing: there is no substantial dispute until some real answer or defence is set up." In *Chua Su Yin,* there was, it is submitted, no denial of debt by the garnishee,[24] much less the setting up of any defence to the debt.[25] If the claim of privilege had been a valid one, the appellant would have faced a dilemma: she could not reveal the stakeholding because of privilege but if she did not reveal it, an order absolute may be made against her.

There is one possible way out of this potential impasse and this could be the motive behind the preliminary objection. The Court has a residual discretion to refuse to make a garnishee order absolute where it would be inequitable to do so.[26] Perhaps the appellant was urging the Court to exercise that discretion in her favour because, if her preliminary objection was valid (the merits of which will be considered later), she could not defend herself

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21 O. 33 r. 5 of MSCR; O. 49 r. 5 of RHC, RSC and SSCR.

22 It is not sufficient for the garnishee to dispute the specific debt alleged. He has to deny that any debt at all is due or accruing due to the judgment debtor: *Vinall* v. *De Pass,* above, note 12.

23 (1858) 4 C.B. (N.S.) 434 at p. 440.

24 Indeed, at p. 350 of the case, Abu Mansor J. seems to have drawn the inference from the appellant's conduct that she must be holding some retention sums.

25 If the appellant does hold the alleged retention monies, she could, to protect her own interest, have proceeded under O. 33 r. 6 of the MSCR (which is equivalent to O. 49 r. 6 of the RHC, RSC and SSCR), bring the Court's attention to the stakeholding and leave the purchasers to state their claim to the monies if they so wish. But this begs the question whether the appellant could so draw the Court's attention in view of the privilege.

26 This discretion exists because of the equitable nature of this mode of execution and is reflected in the word "may" in O. 33 rr. 1(1), 4(1) and 5 of the MSCR which is equivalent to O. 49 rr. 1(1), 4(1) and 5 of the RHC, RSC and SSCR. See the Supreme Court Practice, 1991 ed., Vol. 1, para. 49/1/4 for comments on the equivalent English rule.

without infringing the law and violating the duty of secrecy owed to her client. Was it therefore the appellant's argument that to make an order absolute against her would be inequitable in the circumstances and therefore it ought not to be made?[27]

The Court, regrettably, did not concern itself with the relevance of the privilege. It was not forced to do so since the preliminary objection was, in any event, dismissed. To the reasoning of the judgment we now turn.

II. REASONING

The reasoning is contained in three short paragraphs[28] but is rested on a fair number of considerations, most of which, unfortunately, were either not elaborated upon or not fully discussed. Briefly, the grounds for rejecting the claim of privilege can be analysed, for the purpose of discussion, as follows:

(a) On the facts of the case, there was no "communication" which could be protected under section 126(1) [section 128(1)]. Even if there was such communication, it was between the purchasers and the appellant. Section 126(1) [section 128(1)] is restricted, in its application, to communication between solicitor and client. Since the purchasers were not the clients of the appellant, the communication passing between them did not fall under the protection of section 126(1) [section 128(1)]. Further or alternatively;

(b) Even if the matter sought to be discovered was lawyer-client communication, it was not of a confidential nature.

1. *Communication*

Abu Mansor J. asserted,[29] without elaboration, that there was absence of communication. Presumably, the learned Judge was suggesting the inapplicability of the first limb of section 126(1) [section 128(1)] which provided: "No advocate [or solicitor] shall at any time be permitted, unless with his client's express consent, to disclose any communication made to

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27 Compare a situation where it is the client's position which is affected. In such an instance, the Court is less sympathetic to similar arguments because the client, unlike the lawyer, has the power to waive the privilege and there is perhaps less justification to allow him to insist on both the privilege and the benefit of the doubt: *New Tuck Shen* v. *P.P.* [1982] 1 M.L.J. 27 at p. 30.

28 Above, note 1, at pp. 349 to 350.

29 Above, note 1, at last sentence of p. 349; quoted in context in the text ascribed by note 46 below.

him in the course and for the purpose of his employment as such advocate [or solicitor] by or on behalf of his client...." (Words in square brackets can be found in the Singapore but not the Malaysian provision.)

Communication between lawyer[30] and client is central to legal professional privilege[31] since its objective is the promotion of candour in such communication.[32] Where no lawyer-client communication is at stake, the policy behind the privilege does not necessitate its exclusionary application to keep material evidence from judicial scrutiny. The common law therefore draws a distinction between "communication" on the one hand and "fact"[33] or "act"[34] on the other, the former deserving privilege but not the latter. Evidence as to whether a lawyer holds or has paid or received moneys on behalf of a client has been judicially regarded as evidence of an objective fact[35] or an act or transaction,[36] and not a communication. Hence, at common law, such evidence is not protected from disclosure by the privilege. The solicitor may be compelled to disclose the trust account ledgers and other related records, with such lawyer-client communication or legal advice as may be recorded therein expunged.[37]

Chua Su Yin would seem to suggest that the position is the same under the first limb of section 126(1) [section 128(1)].[38] It does not protect the

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30 The term "lawyer" is used in the loose sense. The applicability of the privilege is not dependent on whether the lawyer was acting as counsel or as solicitor. Note that s. 129 [s. 131] prohibits the compulsion of the client to disclose confidential communication to his "legal professional adviser", aphrase which is wider than "advocate" or "solicitor". See Pinsler, *Evidence, Advocacy and the Litigation Process* (1992), pp. 189 and 196. Note also that s. 126 [s. 128] extends to interpreters and clerks or servants [employees] of advocates [and solicitors] so that communication between them and the client may also be privileged: s. 127 [s. 129].

31 In this article, reference to the privilege does not include the privilege that applies to communication with third parties, unless specifically referred to.

32 *Annesley* v. *Earl of Anglesea* (1743) 17 How. St. Tr. 1129 at p. 1241; *Greenough* v. *Gaskell* (1833) 1 Myl. & K. 98 at p. 103; *Bolton* v. *Corp. of Liverpool* (1833) 1 Myl. & K. 88 at p. 94; *Anderson* v. *Bank of British Columbia* (1876) 2 Ch.D. 644 at p. 649; *Public Prosecutor* v. *Haji Kassim* [1971] 2 M.L.J. 115; *Chua Su Yin & Co v. Ng Sung Yee*, note 1, at p. 349.

33 Cross, *Evidence* (7th ed., 1990), p. 441; Phipson, *Evidence* (14th ed., 1990), p. 508; Tan, *Law of Advocates and Solicitors in Singapore and West Malaysia* (1991), p. 256.

34 8 Wigmore, *Evidence*, paras. 2306 to 2309 (McNaughton rev. 1961); Sarkar, *Law on Evidence*, (13th ed., 1990), pp. 1244-1245; Tan, above, note 33, pp. 257-258.

35 *Re Furney, a debtor* [1964] A.L.R. 814 at p. 816; *Ostrower* v. *Genereux* (1985) 5 C.P.C. 35 at p. 39.

36 *Re Ont. Securities Com'n and Greymac Credit Corp.* (1983) 41 O.R. (2d) 328 at p. 337; *Re Borden & Elliot and the Queen* (1977) 70 D.L.R. (3d) 579 at pp. 587-588; *Ostrower* v. *Genereux* (1985) 5 C.P.C. 35 at p. 39; *Re USA* v. *Mammoth Oil Co.* [1924] 2 D.L.R. 66 at pp. 76-77, affirmed on appeal reported in (1925) 56 O.L.R. 635

37 See the cases cited in the two footnotes immediately above and additionally, *Re Packer and Ors.* (1984) 84 A.T.C. 4363 at p. 4366.

38 What about the second limb of s. 126(1) [s. 128(1)]? It extends the prohibition of disclosure to stating "the contents or condition of any document with which (the lawyer) has become

appellant from revealing her receipt of retention sums from the purchasers and her holding of such sums because the payments were not communications but were either facts or acts.

However, to simply classify something as a fact or an act so as to avoid attracting the privilege is to side-step analysis of the meaning of communication. It is imprecise to draw the communication versus fact/act distinction in terms of an "either or" categorisation of the subject matter of a claim for privilege, as some cases have done.[39] They are not mutually exclusive. Communication can itself be a fact or can be through acts and what is sought to be communicated is, in most instances, one's perception of facts or of acts which have occurred. The meaning of communication is complex because it is susceptible of being conceptualised both as a process (that is, the act of communicating) as well as a subject matter of that process (namely, that which was communicated).[40] On analysis of the relevant common law cases, a number of propositions can be extracted. These propositions would be helpful in interpreting the scope and meaning of "communication" in the first limb of section 126(1) [section 128(1)] (and for that matter, section 129 [section 131], which prohibits the client from being compelled to disclose to the Court his confidential communication with his legal professional adviser):

(i) *The client must have taken part in a process of communication with the lawyer*

This involves some form of activity, be it speech, writing or conduct.[41] The circumstances in which the client's words or conduct may be said to

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acquainted in the course and for the purpose of his professional employment". Does this prohibit the appellant from revealing the holding of retention sums because to do so would be disclosing the contents of such a document, namely, the appellant firm's accounts ledger? The meaning of "acquainted" in the second limb does not seem wide enought to cover, within the scope of that limb, documents created by the lawyer as his own record of transactions that he was personally involved in.

39 See, *eg.*, Sir C. Pepys' judgment in *Sawyer* \. *Birchmore* 3 My. & K. 572 at p. 577 : "These authorities shewed that ... the witness [a former solicitor of the defendant] was bound to answer questions seeking information as to matters of fact, as distinguished from matters of confidential communication." (Referred to by Baggallay L.J. in *Kennedy* v. *Lyell* (1883) 23 Ch. D. 387 at pp. 401 to 402.) Similarly, see: *Re Furney, a debtor* [1964] A.L.R. 814 at p. 816; *Re Ont. Securities Com'n and Greymac Credit Corp.* 41 O.R. (2d) 329 at pp. 337, 338, 340; *Ostrower* v. *Genereux* (1985) 5 C.P.C. 35 at p. 39.

40 The Concise Oxford Dictionary, 8th ed., defines "communication" as "a) the act of imparting, ... b) an instance of this ... the information etc communicated." *Cf.* the distinction between "communication" and "information" in medical professional privilege in some Commonwealth countries: Peiris, "Medical Professional Privilege in Commonwealth Law" (1984) 33 I.C.L.Q. 301 at pp. 320-322.

41 One of the clearest example of communication by conduct is the use of sign language. Some early cases seem to suggest that conduct is inevitably a fact patent to the senses and not a communication but this loses sight of the mental element involved in the act of communication: Wigmore, above, note 34, para. p. 2306, *cf.* Lord Ellenborough in *Robson* v. *Kemp* (1803)

communicate depend on whether the client *intended* to *actively* convey any message or information by his words or conduct.[42] This is not an easy determination in relation to acts, which may or may not have a communicative purpose. For example,[43] a lawyer may notice, at a meeting with his client, who is charged with criminal assault, that the client has a cut on his arm. If the knowledge of the cut was gained only as a matter of incidental observation by the lawyer, it is not privileged. Suppose, however, that the client had deliberately rolled up his sleeve to show the cut to the lawyer. The existence of the wound was, in the true sense of the word, communicated to the lawyer and provided other elements of the privilege are satisfied, the lawyer cannot disclose his knowledge of it.[44]

The common law cases which held that payment is not a communication over-generalized. It is submitted that payment is a form of communication. The rejection of privilege in the said cases can be explained on the basis that the payments/communications did not involve the client (the payments being made to or received from a third party), or if they did, they lack one or more of the characteristics required by the privilege, for example, confidentiality. Similarly, in *Chua Su Yin,* when the purchasers handed over the retention sums to the appellant, they were clearly communicating their provision of stakeholding under their respective sale and purchase agreements to the appellant. However, those communications did not come from the appellant's client, *i.e.,* the developer/judgment debtor. In that sense, there was no lawyer-client communication. Abu Mansor J. recognised as much when he said:

> The persons who made the payment, the purchasers, are not the agent[45] or client of the garnishee solicitors who had been engaged by the developers.... I am of the view ... that there is absence of communication or any relationship between the solicitor garnishee and purchasers. The privileged communication the solicitor garnishee is required to protect, if any, is the communication of his client, the developer, to him. In our present context *the communication is from a person not really his client.*[46] [Emphasis mine.]

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5 Esp. 53 at p. 55 : "One sense is privileged as well as another. He cannot be said to be privileged as to what he hears, but not to what he sees, where the knowledge acquired as to both has been from his situation as an attorney."

42 See, generally, Wigmore, above, note 34; *Evidence, Its History and Policies,* an original manuscript by Stone, revised by Wells (1991), p. 580.

43 See McCormick, *Handbook of the Law of Evidence* (2nd ed., 1972), p. 183; Tentative Draft No. 1 (1988), *Restatement (Third), The Law Governing Lawyers,* pp. 18-20.

44 Assuming that his testimony is relevant and is needed because the wound has healed without any scar at the time of trial.

45 *Quaere,* did the judge mean "principal"?

46 Above, note 1, at pp. 349-350. See *Spenceley v. Schulenburgh* (1806) 7 East. 357 at p. 358. This is subject to agency law; communication between the client's agent and the lawyer may also be privileged: *Carpmael* v. *Powis* (1846) 15 L.J.Ch. 275.

(ii) *The process of communication must assume certain characteristics*

One of the main focuses of the law in this area is in defining the characteristics that the process of communication must assume in order for the privilege to apply. For example, the communication must be confidential[47] (which will be discussed later) and it must be in the course and for the purpose of the lawyer's employment. These characteristics indirectly define the scope of the communication that can be protected by the privilege[48] and is thus related to the next proposition.

(iii) *If the characteristics mentioned in (ii) above are present, the privilege protects from disclosure, generally speaking, that which was so communicated*

The privilege protects from disclosure the contents of the client's communication to the lawyer even if they are information of acts or facts.[49] While it is generally true that the privilege protects from disclosure the contents of the client's communication to the lawyer, this has to be qualified by the fifth proposition below. (In so far as the lawyer's communication to the client is concerned, the privilege seems to be restricted to that part of the communication which may properly be called "advice" under the third limb of section 126(1) [section 128(1)].)

It may not be an easy task to identify the content of a communication. Difficulties may arise in determining the message or information that was

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47 It is submitted that the lack of this element (rather than the lack of lawyer-client communication) explains the principle that the identity of the client is not privileged. When a client introduces himself to the lawyer, he is communicating his identity. Generally *Rosenberg* v. *Jaine* [1983] N.Z.L.R. 1 at p. 6; *Re USA* v. *Mammoth Oil Co.* [1925] 2 D.L.R. 66 at p. 76; *Greenough* v. *Gaskell* (1833) 1 My. & K. 98 at p. 108; *Bursill* v. *Tanner* (1885) 16 Q.B.D. 1 at p. 5; *cf. Southern Cross Commodities* v. *Crinis* [1984] V.R. 697.

48 As shown in cases like *In re Sarah Getty Trust* [1985] 1 Q.B. 956 and *Balabel* v. *Air India* [1988] 2 All E.R. 246, where the extent of what can be protected by the privilege was dependent on the extent to which the process of communication had the characteristic of being for the purpose of giving or seeking legal advice.

49 Implicit in s. 126(l)(b) [s. 128(1)(b)] and s. 126(2) [s. 128(2)]. See also *Susan Hosiery Ltd. v. Minister of National Revenue* [1969] 2 Ex.C.R. 27 ; *Dusik* v. *Newton* (1983) 1 D.L.R. 568 at p. 573; *cf. Bramwell* v. *Lucas* (1824) 2 B. & C. 745, where the client asked his lawyer for information of facts, and not legal advice, (as opposed to the client conveying information of facts to the lawyer for advice) and the exchange was held not to be privileged. It is submitted that this case does not establish that a communication is not privileged if it is of facts. The true ground of the decision was that the lawyer was not consulted in a professional capacity, as was so interpreted in *Clarke* v. *Clarke* (1830) 1 M.& Rob.3 at p. 6 and *Greenough* v. *Gaskell,* above, note 47 at pp. 114-115. But note that it is doubtful if the lawyer's communication of facts to the client not amounting to or not forming part of his legal advice is privileged under the third limb of s. 126(1) [s. 128(1)]. See Chin, *Evidence* (1988), p. 184, discussing *In re Sarah Getty Trust,* above, note 48.

intended to be communicated. Take for instance the well established principle that a lawyer's knowledge of his client's handwriting is generally not privileged.[50] That knowledge may be gained indirectly from reading hand-written correspondence from the client. However, the information sought to be conveyed, and therefore the communication that is capable of being protected under the privilege, was the content of the correspondence and not the nature of the client's handwriting. Compare this with the case where the client purposefully reveals to his lawyer a specimen of his handwriting. The information that is intended to be communicated is not so much the content of what he has written but the nature of his handwriting and the lawyer, assuming the process of communication has all the necessary characteristics, cannot testify as to whether a particular document placed before him is in the hand of his client."

In relation to documents, it has been correctly observed: "[A] distinction must be drawn between documents transmitted by the client to the solicitor *qua* communication, that is, which exist solely as a means of transmitting knowledge to the solicitor, and documents transmitted *qua* document, that is, which exist independently of the communication and are sent merely for perusal or custody."[52] An example of the former is a letter written by the client to the lawyer. Documents falling under this category may obviously be privileged since they are the very content of lawyer-client communication. The second category is more problematic. A client sends a contract to his lawyer for advice. The content of the contract was communicated to the lawyer (through the act of showing him the contract) and he may not divulge his knowledge of it[53] by virtue of both the first limb (which prohibits disclosure of the client's communication to the lawyer) and the second limb of section 126(1) [section 128(1)] (which prohibits the lawyer from stating the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment). However, the contract itself is not a communication from the client to the lawyer[54] - arguably it is a communication between the parties to the contract

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50 *Dwyer* v. *Collins* (1852) 7 Ex. 639 at p. 646; *Evidence, Its History and Policies,* above, note 42, p. 580 citing *Hurd* v. *Moring* (1824) 1 C. & P. 372 and *Duchess of Kingston's Trial* (1776) 20 How. St. Tr. 372.

51 See Wigmore, above, note 34, p. 590.

52 *Evidence, Its History and Policies,* above, note 42, p. 579.

53 *Brard* v. *Ackerman* (1803) 5 Esp. 119.

54 *Government of the State of Selangor* v. *Central Lorry Service & Construction Ltd.* [1972] 1 M.L.J. 102 at p. 103. Caveat: a pre-existing document handed by the client to lawyer or vice-versa may itself constitute lawyer-client communication in exceptional cases. The document may have been edited by the client or lawyer so that it conveys to the recipient of the edited document the thoughts of the editor or his impressions of the original documents. The edited document becomes, as it were, a communication unto itself. See *Ventouris* v. *Mountain* [1991] 3 All E.R. 472 at pp. 479, 481 and 484.

- and it is therefore not protected under the first limb of section 126(1) [section 128(1)] and is subject, at least at common law, to discovery and inspection.[55] It is submitted that the common law position is unaffected by the second limb of section 126(1) [section 128(1)] because, as is implicit in the word "state", the second limb operates only in the context described earlier of the lawyer being called to disclose his knowledge of the contents or condition of the document. It should not apply to the discovery and inspection of a document that is not in itself a privileged communication since the lawyer is not being compelled to state his knowledge of the contents or condition of the document but merely to discover *(i.e.,* to reveal the existence of) and produce that document for inspection by the opponent. That aspect of the trial process is governed by the different regime of the law of discovery under the applicable Court rules.[56] In short, the privilege attaches to documents that constitute lawyer-client communication but does not attach to other documents that pass between them or with a third party (although, the documents that so pass, or documents gathered for the purpose of litigation may, in certain circumstances, come under the common law privilege covering third party communication or the so-called "litigation privilege", which perhaps, applies in Singapore and Malaysia).[57]

Apart from the contents of communication, the privilege arguably also extend to the belief or opinion formed on the basis of lawyer-client communication,[58] such belief and opinion being so inextricably linked to the communication that it must be considered part of it. It should also extend to the process of lawyer-client communication, the issue then being not so much what was communicated but whether the client had consulted the lawyer[59] or whether the lawyer had spoken to the client about what is already known.[60]

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55 That if documents are not privileged in the hands of the client, they do not become so simply because they have been delivered to the lawyer is well established: *R* v. ***Petersborough*** *Justices, ex pane Hicks* [1977] 1 W.L.R. 1371; ***R*** v. *King* [1983] 1 All E.R. 929. There was an aberration from this principle in *R* v. *Board of Inland Revenue, ex pane Goldberg* [1988] 3 All E.R. 248 which held that a copy of a pre-existing document (the original of which is not privileged) may become privileged if the copy was made by the client and passed to the lawyer for the purpose of seeking legal advice. The position was swiftly set back on the right course by the Court of Appeal in *Dubai Bank* v. ***Galadari*** [1989] 3 All E.R. 769 and *Ventouris v. Mountain,* above, note 52. For commentaries, see Zuckerman, (1990) 53 M.L.R. 381 and Tapper, (1991) L.Q.R. 370.

56 On how legal professional privilege fits into the scheme of discovery rules, see Williams, "Discovery of Civil Litigation Trial Preparation in Canada" (1980) 58 Can. Bar Rev.1.

57 See Pinsler, above, note 30, p. 194. It may be that to accomodate the protection of third party communications under the laws of Singapore and Malaysia, one has to go beyond the Evidence Act and look instead to the rules on discovery.

58 ***Lyell*** v. *Kennedy (No. 2)* (1883) 9 App. Cas. 81, esp. at pp. 86-87,91-92,93.

59 *Rosenberg* v. *Jaine* [1983] N.Z.L.R. 1. *Cf. R* v. *Woods* (1982) 65 C.C.C. (2d) 554 at p. 561.

60 ***Dusik*** v. *Newton,* above, note 49.

(iv) *The privilege does not protect from disclosure matters knowledge of which was obtained by the lawyer otherwise than through communication with his client*[61]

Such knowledge falls into two main categories: the first is knowledge acquired through communication with a person other than a client[62] and the second is knowledge not acquired through communication with any person at all.[63] The second category is a case where one may say the lawyer had personal knowledge of the matter sought to be discovered.[64] The following falls under this category: The lawyer's knowledge that a deed of his client bears a blot of red ink on its back, which was not "communicated" to him in the sense described in the first proposition above;[65] the knowledge that there is a tombstone at a particular place gained at a personal inspection of the site;[66] the lawyer's possession of a particular document handed to him by the client.[67]

(v) *The privilege protects from disclosure not the content of lawyer-client communication per se but the communication of the content*[68]

The substantive aspect of communication cannot be divorced from its process aspect. What the privilege seeks to facilitate is the process of communication between the client and the lawyer and it does so by protecting the secrecy of what transpired between them. The privilege has no

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61 See generally:- *Evidence, Its History and Policies*, above, note 42, pp. 579-580; Sheppard, *Evidence* (1988), para. 1038; Ligertwood, *Australian Evidence* (1988), para. 5.27; *Dwyer* v. *Collins*, above, note 50, at p. 1107.

62 This problem was discussed under the first proposition above. It provides one possible explanation of *Brown* v. *Foster* (1857) 1 H.& N. 735, in that the entries to the cash book was communicated to counsel by the prosecution and not the client. See also *Sparke* v. *Middleton* (1664) 1 Keble 505.

63 See *Bramwell* v. *Lucas* 2 B. & C. 745 at p. 747, and the cases cited by counsel thereat.

64 *Lord Say & Seal* (1712) 10 Mod. 40 at p. 41; *Doe v. Andrews* (1778) 2 Cowp. 845 at p. 846; *Sandford* v. *Remington* (1793) 2 Ves. Jun.189. In contrast to "communication", Courts have attached to this category phrases like "facts patent to the senses" which is taken to mean "anything which could be seen with the eyes or heard with the ears": *per* Cotton L.J. in *Kennedy* v. *Lyell* (1883) 23 Ch.D. 387 at p. 407. This is unhelpful as communication, too, can be seen with the eyes or heard with the ears.

65 *Phelps* v. *Prew* (1854) 3 El. & Bl. 430 at pp. 437, 439; *cf. Wheatley* v. *Williams* (1836)1 M.& W.538.

66 *Lyell* v. *Kennedy (No. 2)* (1883) 9 App. Cas. 81; *Greenough* v. *Gaskell* (1833) 1 My. & K. 98 at p. 104.

67 *Dywer* v. *Collins*, above, note 50; *Bevan* v. *Waters* (1828) M. & M. 235

68 Generally *Susan Hosiery Ltd.* v. *Minister of National Revenue*, above, note 49 at p. 35; *Dusik* v. *Newton*, above, note 49; Ligertwood, above, note 61, para. 5.27; Sheppard, above, note 61, para. 1038.

justification in concealing relevant facts where the sanctity of that process remains inviolate by their revelation.

To illustrate: Client (C) tells lawyer (L) in confidence to hand over a certain document to X, and *L* does so. *L* cannot reveal *C*'s instructions since that is privileged communication. However, *L* may be compelled to disclose to whom he (L) actually handed the documents because that is a matter within his personal knowledge; he is not asked to reveal what *C* told him: *Banner* v. *Jackson*.[69] However, if *L* has no personal knowledge of the whereabouts of the document and he knows of it only from communication with *C*, *L* cannot disclose the location of the document since that inevitably entails disclosing C's communication with him: *Cotman* v. *Orton*.[70]

This leads to a general problem. The lawyer may have knowledge of the matter sought to be discovered from communication with his client as well as by some other means as referred to in the fourth proposition above. The matter then is not privileged from disclosure although, in disclosing it, the lawyer may not say that he heard the same thing from his client: The substance of lawyer-client communication is not privileged independently of the process.[71] In *Lewis* \. *Pennington*,[72] the Master of the Rolls held:

> ... the mere fact of a client having made a confidential communication to his solicitor did not protect the solicitor from giving discovery, if he had acquired the same knowledge before or after such confidential communication, under such circumstances that he would be bound to discover it. The mere fact that a solicitor had confidential communications made to him did not merge the other sources of information.[73]

The privilege protects from disclosure the communication; it does not attach to its subject-matter outside the context of such communication. Hence, "the plaintiff must disclose, to the best of her knowledge, information, and belief, what she knows about the matter, and she cannot protect herself by saying that she has told what she heard to her solicitors."[74] In relation to a lawyer's communication with a third party in anticipation of litigation, it has been held, and this should be of equal validity in relation to lawyer-client communication, that "the facts ... that happen to be reflected in such

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69 (1874) 1 De G. & Sm. 472

70 (1840) 9 L.J.Ch. 268; also *Turquand v. Knight* (1836) 2 M. & W. 97.

71 For a good illustration, see *Lyell* v. *Kennedy*, above, note 58, esp. at p. 87. It concerned a different context. The discovery was sought from the client and not the lawyer.

72 (1860) 29 L.J.(Ch.) 670.

73 This view, it is submitted, should not extend to a situation where the alternative source of knowledge would not have been gained but for the communication with the client.

74 Lindley L.J. in *In re Thomas Holloway* (1887) 12 P.D. 167 at p. 171; similarly, see *Manser* v. *Dix* 1 K. & J. 451 at p. 454.

communications or materials are not privileged from discovery if, otherwise, the party would be bound to give discovery of them."[75] That does not mean, as noted earlier, that a lawyer-client communication is not privileged simply because it concerns facts.[76]

2. *Confidentiality*

In *Chua Su Yin*, even if the information which the appellant sought to protect constituted lawyer-client communication, it would not be privileged. Abu Mansor J. proceeded on the premise that confidentiality is a necessary element of the legal professional privilege prevailing in Malaysia. The learned Judge held : "On one's reading of section 126 [section 128] ... it would appear the evidence the section seeks to protect is the breach of matters told in confidence by a client to his legal adviser...."[77] He then went on to find the following in relation to the communication in the case before him: "I find it is not a class of communication which the law was designed to protect. In my view it is communication which the purchaser would want to be made public.... I agree with the argument of [counsel] for the respondents that there is no secrecy to be protected."[78]

The premise will be considered, followed by an examination of the soundness of the learned Judge's determination on the facts.

The desirability for legal professional privilege to be circumscribed by the requirement of confidentiality cannot be seriously doubted for without it, the privilege loses its legitimacy. The basic tenet of the privilege is the protection of lawyer-client confidence. Where such confidence is not at stake, the professional relationship alone is no reason to exclude relevant evidence from judicial purview, thereby obstructing the search for truth. *Chua Su Yin* is to be welcomed for reaffirming[79] that this well-entrenched common law element of the privilege is a requirement under section 126(1) [section 128(1)]. It is consistent with the trend in other jurisdictions where the privilege is contained in statutory provisions which, similar to those found in the Evidence Acts of Singapore and Malaysia, do not expressly restrict protected communication to that which are confidential but are nonetheless interpreted to be so restricted. In terms of policy, it is desirable that the position be the same in Singapore.[80] The problem faced by the

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75 *Susan Hosiery Ltd. v. Minister of National Revenue,* above, note 49, at p. 34.

76 Above, note 49.

77 Above, note 1, at p. 349.

78 Above, note 1, at p. 350.

79 See the earlier Malaysian High Court case of *Government of the State of Selangor v. Central Lorry Service & Construction Ltd.*, above, note 54.

80 See the view of the Singapore Law Society expressed in its circular dated 29 June, 1973, which is reproduced as item no. 26(a), of chapter 1 of the Practice Directions and Rulings (1989).

Courts in these jurisdictions, and which will face the Singapore Court when the issue is raised before it, lies in accomodating this requirement in the framework of their statutory formulation. On a literal interpretation of section 126(1) of the Malaysian Evidence Act ("Malaysian E.A.") and section 128(1) of the Singapore Evidence Act ("Singapore E.A."), it may be argued that confidentiality was intended not to figure in the privilege that operates in both jurisdictions. One may attempt to buttress this argument by pointing out that section 126(1) of the Malaysian E.A. and section 128(1) of the Singapore E.A. refer to "any" communication and the adjective "confidential" is omitted in contradistinction to section 129 of the Malaysian E.A. and section 131 of the Singapore E.A. respectively.[81]

Against such contrary indicators, how do we legally justify reading the element of confidentiality into section 126(1) [section 128(1)], recognising as we do that this is desirable? There are many methodological difficulties.

The Indian Courts have attempted to seek justification on the wording of the relevant provision itself.[82] In the Bombay case of ***Memon Hajee*** v. *Abdul Karim*,[83] Westropp C.J. had occasion to examine section 126(1) of

[81] It may additionally be pointed out, by way of contrast with s. 126(1) [s. 128(1)], that s. 124 [s. 126] (which provides for the privilege concerning official communications), expressly require that the communications be "made ... in official confidence". See *Re Loh Kah Kheng (deceased)* [1990] 2 M.L.J. 126

[82] In *Minter* \. *Priest* [1930] A.C. 558, Lord Atkin said (at pp. 580-581): "The main question in this case is whether the words complained of were confidential communications between solicitor and client.... It is I think apparent that *if the communication passes for the purpose of getting legal advice it must be deemed confidential.* The protection of course attaches to the communications made by the solicitor as well as by the client. If therefore the phrase is expanded to professional communications passing for the purpose of getting or giving professional advice, and it is understood that the profession is the legal profession, the nature of the protection is I think correctly defined." [Emphasis mine.] Could it be that Stephen, the drafter of the Indian Evidence Act (see note 84 below), on which both the Malaysian and Singapore E.A. were based, did not include the word "confidential" in his formulation of legal professional privilege because he thought that the requirement that the communication must be "in the course and for the purpose of professional employment" already incorporates the notion of confidentiality? It is submitted that confidentiality is, and should be, a distinct element. It does not require much imagination to conceive of the possibility of a communication being in the course and for the purpose of a lawyer's employment and yet is not confidential. Such a communication does not deserve the protection of the privilege. Stephen himself acknowledged this, in a judicial capacity, in *R* v. *Cox & Railton* (1884) 14 Q.B.D. 153 at p. 169: "In order that the [privilege] may apply *there must be both professional confidence and professional employment*, but if the client has a criminal object in view in his communications with his solicitor one of these elements must necessarily be absent." *(cf.* s. 10(1) of the U.K. Police and Criminal Evidence Act 1984 where confidentiality is not expressed in the definition of "items subject to legal privilege" but it has nonetheless been considered by the majority of the House of Lords as generally encapsulating the common law privilege: *R* v. *C.C.C., Ex. p. Francis & Francis* [1989] 1 A.C. 346.)

[83] (1878) 3 B. 91. In this case, the communication between the lawyer and the defendants in the presence and within the hearing of the plaintiff was held not to be privileged because, *inter alia,* it could not have been intended to be confidential.

the Indian Evidence Act 1872[84] which is *in pan materia* with section 126(1) [section 128(1)]. His Lordship held: "[C]ommunications to be protected by that section must, we think, be confidential. The words used in it are, indeed, 'any communication,' & c., but the word 'disclose' shows ... that the privileged communication must be confidential or private."[85]

Westropp C.J.'s attempt at justification, while commendable, is unconvincing and, indeed, introduces a whole new dimension to the confidentiality element which is incongruent with that known to the common law. The word "disclose", if one stretches its meaning to its limit, may import a certain element of secrecy: Arguably, a lawyer *(L)* does not "disclose" a fact to *T* (third party) if *T* already knows that fact. Therefore, if the fact told by *C* (client) to L is not a secret, in that it is known to the world, *L,* in giving away that information to *T* is not making a "disclosure". This approach is unsatisfactory for the secrecy requirement has reference to the quality of the lawyer-client (as opposed to lawyer-third party) communication and the intention with which that communication is passed by the client to the lawyer and not the state of knowledge of the recipient of that communication from the lawyer. Take this example: *C* gives *L* a map of his land to show to all would-be purchasers. Clearly, *C* does not intend the map to be confidential and, at common law, *L*'s knowledge of the contents of the map is not privileged, regardless of whether *T,* to whom *L* shows the map, has seen it before.[86] However, if *T* happens to be ignorant of the contents of the map before it was shown to him, then might that not be a disclosure according to Westropp C.J.'s analysis?

Another approach is to simply say that the provision is based on the implicit assumption that the communication, to gain protection under section 126(1) [section 128(1)], must be confidential in nature. The Malaysian cases, in so far as they do not explain how confidentiality is legally relevant, seems to have adopted this stand. This approach has been more explicitly adumbrated in another jurisdiction. The Supreme Court of Oregon, in the case of *State ex. rel. North Pacific Lumber Co.* v. *Unis.*[87] was faced with the

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84 Which reads: "No barrister, attorney, pleader or vakil shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such barrister, pleader, attorney or vakil, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment."

85 Above, note 83 at p. 93. The other judge hearing the case, Sargent J., reasoned along the same line at p. 95. This reasoning was followed by Candy J. in *FramjiBhicaji* v. *Mohansing Dhansing* (1893) 18 B. 263 at pp. 271-272.

86 *Doe d. Marriott, clerk* v. *Marquess of Hertford* 19 L.J.Q.B. 526

87 579 P. 2d.l291 (1978). On the American position generally, see McCormick, above, note 43, p. 187; Wigmore, above, note 34, para. 2292.

task of interpreting Oregon Revised Statutes, 44.040(1)(b), which states: "An attorney shall not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon, in the course of professional employment." Denecke C.J. made the following observation:

> On its face, the statute provides absolute protection to all communications to and advice given by an attorney in the course of professional employment, permitting testimonial disclosure only with the client's consent. We have not, however, applied the privilege so literally.... [A]lthough the statute is not limited by its terms to communications which the client intended at the time to be confidential, we have held that the policy underlying the privilege does not require its application where the circumstances indicate that the client did not intend the particular information or communication to be confidential.[88]

Such a broad-based approach to statutory interpretation does seem rather lacking in legitimacy as it appears to be anchored not on any recognised canon of construction but on good sense alone. The case at hand is not one of ambiguous or vague statutory enactment but rather one of an omission in a statutory provision, which might even seem to be intentional. The general rule is against creating or supplying a *casus omissus*. The Court's duty is to interpret statute, not to alter it. So opined the Privy Council in *Crawford* v. *Spooner*:[89] "We cannot aid the legislature's defective phrasing of an Act, we cannot add and mend, and, by construction, make up deficiencies which are left there."[90] While it may be said of common law that in areas where

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88 579 P. 2d. 1291 (1978), at p. 1293, citing *Stark Street Properties* v. *Teufel* 562 P. 2d. 531 (1977), and *Baum* v. *Denn* 211 P. 2d. 478 (1949).

89 (1846) 6 Moo. P.C. 1, at p. 8.

90 This typifies the conservative approach. It is doubtful if the purposive approach would lead to a different result. Maxwell, *The Interpretation of Statutes* (12th ed., 1969), p. 228: "... the courts are very reluctant to substitute words in a statute or to add words to it, and it has been said that they will only do so where there is a repugnancy or something which is opposed to good sense." See, also, Craies, *Statute Law* (7th ed., 1971), pp. 69-73. There are exceptions to this general rule but they are the rare cases of obvious drafting errors or where some essential details have been omitted: Craies, pp. 109-112; Bennion, *Statutory Interpretation* (1984), pp. 337-346. Cross, *Statutory Interpretation* (2nd ed., 1987), p. 47 (elaborated at pp. 96-111): "The judge may read in words which he considers to be necessarily implied by words which are already in the statute and he has a limited power to add to ... statutory words in order to prevent a provision from being unintelligible, absurd or totally unreasonable, unworkable, or totally irreconciliable with the rest of the statute." Confidentiality is not implied by the words of s. 126(1) [s. 128(1)]. See note 82 and the discussion on *Memon Hajee* above. Neither would s. 126(1) [s. 128(1)] be unintelligible etc. without reference to confidentiality.

the reason underlying the law is not applicable, the law does not apply, the same cannot be said of statutory law.[91]

The Evidence Act must, generally, stand on its own.[92] Reference to the common law is not acceptable if thereby the true and actual meaning of the Act is varied or denied effect.[93] However, where the Act is silent or fails to be explicit it is to be presumed that the legislature did not intend to depart from well-established principles of law.[94] In Singapore, this proposition is reinforced by section 2(2) of the Singapore E. A. which states: "All rules of evidence not contained in any written law, so far as such rules are inconsistent with any of the provisions of this Act, are repealed." The implication is that common law principles which are not inconsistent with the Evidence Act may continue to apply. That the communication must be confidential before it attracts legal professional privilege was recognised by the common law before the Evidence Acts of both Singapore and Malaysia were passed.[95] To the extent that section 126(1) of the Malaysian E.A. and section 128(1) of the Singapore E.A. do not expressly negate that requirement, there is, arguably, no inconsistency if the confidentiality element continues, after the passing of the respective Acts, to be the law in both jurisdictions.[96]

Given that communication must be confidential to attract privilege, was the communication in the instant case confidential?

To answer that question, one has to know the precise nature of this element. The position at common law, to summarise Wigmore[97] and McCormick,[98] is this: The client may not presume confidentiality in his relationship with his lawyer; neither need he make an explicit request for secrecy. The communication would be confidential so long as the circumstances, other than the mere existence of a lawyer-client relationship, makes it reasonable for the client to assume that the lawyer has understood that he had intended the communication to be of that nature.

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91 Bennion, above note 90, pp. 345-346.

92 On the approach to interpreting the E.A., see generally, Chin, above, note 49, pp. 5-9.

93 *Mahomed Syedol Ariffin* v. *Yeoh Ooi Gark* [1916] 2 A.C. 575 at p. 581.

94 *P.P.* v. *Yuvaraj* [1969] 2 M.L.J. 89 at p. 90.

95 *Eg., Parkhurst* v. *Lowten* (1819) 2 Swanst. 194 (1819); *Griffith* v. *Davies* (1833) 5 B. & Ad. 502; *Taylor* v. *Blacklow* (1836) 3 Bing. N.C. 235.

96 This approach seems to find favour with some Indian judges who are of the view that the legislature did not intend s. 126 of the Indian Evidence Act of 1872 to depart from the common law position on confidentiality. See *Framji Bhicaji* v. *Mohansing Dhansing*, above, note 85, at p. 279 and *Bhagwani Chotihram* \. *Deooram* (1932) 143 I.C. 345 at p. 347. While this seems, under the statutory constraints, to be the most acceptable interpretation, one has to confess that it is not entirely convincing. There appears to be a degree of inconsistency when the effect of introducing the requirement of confidentiality is to narrow the literal application of s. 126(1) [s. 128(1)].

97 Wigmore, above, note 34, p. 600. See also the cases cited therein.

98 McCormick, above, note 43, pp. 187-188.

According to Abu Mansor J., the communication in issue in *Chua Su Yin* was not privileged because the purchasers would want the payment to be made public. In view of the nature of the transaction, it would appear obvious that the purchasers did not intend the payments to be kept confidential from the developer/judgment debtor and other possible parties to the sale transactions such as financiers. It is only in that context that it is comprehensible why the learned Judge held that "... on the face of [the communications, *i.e.*, the payments, they] should and ought to be published as suppressing it would result in no proof that the purchasers had paid and how much."[99] Is it proper to extrapolate, apparently without the benefit of evidence from the purchasers, that they did not intend the payments to be kept a secret from parties other than the party or parties to the sale transactions as well? Might it not be more sound to base the decision on the ground that, whatever the actual intention of the purchasers might be, it was not reasonable, in the circumstances of the case, to expect the appellant to understand that they intended the payments to be kept secret?

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[99] Above, note 1, at p. 350.

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