MALAYSIA DEBT VENTURE BERHAD v PLATINUM TECHSOLVE SDN BHD & ORS

CaseAnalysis

[2020] MLJU 1421

Malaysia Debt Ventures Berhad v Platinum Techsolve Sdn. Bhd. & Ors [2020] MLJU 1421

Malayan Law Journal Unreported

COURT OF APPEAL (PUTRAJAYA)

YA DATO' SURAYA OTHMAN, YA DATO' HAS ZANAH MEHAT AND YA TUAN S. NANTHA BALAN JJCA

RAYUAN SIVIL NO. W-02(IM)(MUA)-1082-06/2019

13 May 2020

Kumar Kanagasingam and Chia Oh Sheng (Lee Hishamuddin Allen & Gledhill) for the Appellant.
Lavinia Kumaraendran and Mavinthra Jothy Thillainathan (Thomas Philip) for the Respondents.

S. Nantha Balan JJCA:

JUDGMENT OF THE COURTIntroduction

[1]This is an appeal against a discovery application which was granted in Suit No. WA-22M-300-07/2018 ("**Suit 300**"). The appellant in this appeal is Malaysia Debt Ventures Berhad ("**MDV**"). MDV is the plaintiff in Suit 300. The appeal is against an order of discovery of a specific document, namely a draft settlement agreement ("**the DSA**"). The discovery application was filed by the respondents – the defendants in Suit 300. The decision of the High Court is reported as *Malaysia Debt Ventures Berhad v Platinum Techsolve Sdn. Bhd. & Ors* *[2019] MLJU 1157*; [2019] AMEJ 1269. The discovery order has been stayed pending disposal of the present appeal.

[2]MDV filed Suit 300 to recover the amounts which are said to be owing under an Islamic financing facility. The

respondents counterclaimed and contended that based on the exchange of correspondence and discussions between MDV and the 1st respondent ("**R1**"), there was a concluded contract of settlement, albeit that a formal settlement agreement had not been executed.

[3]The background to the DSA is as follows. MDV and R1 had exchanged correspondence and held discussions with respect to a settlement of a debt under an Islamic financing facility which was due and owing to MDV. R1 was the counterparty to the proposed settlement.

[4]The terms of the proposed settlement were to follow the terms as stipulated in MDV's letter dated 19 February 2018. In that letter, MDV had also stipulated that they would prepare the settlement agreement and that it must be executed by 31 March 2018 ("**the deadline**").

[5]Thus, MDV instructed their external solicitors to prepare the DSA. The external solicitors prepared the DSA and sent it to MDV. The DSA was at all times in MDV's possession. R1 was not privy to the contents of the DSA. The DSA was never disclosed or forwarded to R1 for their perusal/approval.

[6]There is some controversy as to whether the DSA was internally discussed and approved by MDV's management and whether a decision had been made that the DSA was ready to be forwarded to R1. This is dealt with in the later part of the judgment. There is no doubt that R1 was aware that the settlement was to abide by the terms as per MDV's letter dated 19 February 2018.

[7]However, the parties ultimately did not execute any settlement agreement on or before the deadline or at all. By a letter dated 13 April 2018 MDV intimated to R1 that the settlement was no longer viable. MDV's gave their reasons for taking the stand as to the alleged non-viability of the settlement. MDV's said reasons are not relevant for present purposes, although they will be highly relevant for purposes of the trial.

[8]In seeking discovery of the DSA, the respondents' position was, *inter alia*, that even though the DSA was a solicitor's work product, there was (in this case) "no confidentiality" as to its contents, as the terms of the proposed settlement were known to the parties and in any event, the DSA was eventually to be extended to RI for their perusal and approval. As such, the respondents' position is that the DSA was not protected by privilege.

[9]MDV resisted the application for discovery on the basis that the DSA is neither relevant nor necessary for the fair disposal of their suit and/or the Counterclaim. MDV also maintained that the DSA is protected by legal professional privilege (*s.126 Evidence Act 1950*).

[10]One of the issues in this appeal is whether a solicitor's work-product (*in this case, the DSA*) which was prepared for and given to the client in "draft" form and which had not yet been disclosed or forwarded by the client (MDV) to the counterparty (R1), is privileged per *s.126 Evidence Act 1950* and therefore protected from disclosure. The

related question is whether the fact that R1 was aware of the terms that were to be included in the DSA disentitles MDV from asserting legal professional privilege over the DSA.

[11]MDV contends that the learned Judge erred in the analysis of the evidence and appreciation of the legal principles and should have found that the DSA is a privileged document which is protected from disclosure.

[12]MDV also contends that the learned Judge ought to have held that the DSA is not relevant and not necessary in order for the action and/or the Counterclaim to be disposed of fairly and justly.

[13]MDV's appeal herein is directed at the decision of the learned Judge of the High Court dated 29 May 2019 ("**the discovery order**") allowing the respondents' application (**Enclosure 38**) under Order 24 rule 7 of the *Rules of Court 2012* ("**ROC**") for discovery of the DSA which was prepared by MDV's external solicitors, Messrs. Azmi & Associates, and forwarded to MDV.

[14]On 13 May 2020, we allowed MDV's appeal and consequently set aside the discovery order. These are our reasons for allowing MDV's appeal.

[15]Suit 300 is predicated on the respondents' alleged default under an Islamic financing facility, more particularly under a novation agreement/letter of undertaking/corporate guarantee and personal guarantee, respectively. The respondents deny that there was any default whatsoever on their part. It is claimed by the respondents that they had (purportedly) reached a compromise/settlement with MDV.

[16]Although no formal settlement agreement had been executed by the parties, the respondents contend that the terms of the purported compromise/settlement are reflected in the correspondence that was exchanged between MDV and R1.

[17]The respondents contend that the execution of a settlement agreement (*which was to be prepared by MDV following the terms as stated in MDV's letter dated 19 February 2018*), was a mere formality.

Issues

[18]As stated earlier, the first issue that arises for consideration in this appeal is whether a solicitor's work-product such as the DSA which was prepared by MDV's solicitors and which (purportedly) had not yet been considered/approved by the MDV, and which had not been disclosed to R1 (as the counterparty), is privileged (per *s.126 Evidence Act 1950*) and therefore protected from disclosure.

[19]The respondents take objection to MDV's stand (*per counsel's submissions*) that the DSA had not yet been internally considered/approved by MDV's management as this was not specifically raised in MDV's affidavits and that there was no specific denial of the respondents' assertion (*per their letter dated 25 April 2018*) that the DSA was ready to be forwarded to R1 on 28 March 2018 or at the latest, by the following morning (29 March 2018).

According to R1, MDV's personnel had told them that once the settlement agreement was sent over, they are to quickly sign it so as to comply with the agreed stipulated timeline as stated in MDV's letter dated 19 February 2018.

[20]The second issue is whether the DSA was relevant and necessary to determine whether a compromise/settlement was reached between the parties since the respondents' own pleaded case (*per the Defence and Counterclaim*) is that the compromise/ settlement is based on the correspondence that had been exchanged and the discussions between parties, and that the terms of the purported compromise/ settlement are as stipulated in MDV's letter dated 19 February 2018.

Background

[21]On 17 July 2018, MDV commenced Suit 300 against the respondents claiming on a joint and several basis, a sum of RM108,772,652.67 which is said to be due and owing by R1, under an Islamic financing facility (as at 31 May 2018).

[22]The 2nd respondent, Graphene Nano Scheme PLC ("**R2**") is the corporate guarantor for R1's indebtedness under the Islamic financing facility. The 3rd to 5th respondents are the personal guarantors for R1's indebtedness under the Islamic financing facility.

[23]R2 is a private limited company which is incorporated in the United Kingdom with a Malaysian business address at Suite 2.2, Level 2, WORK @ Clearwater, Changkat Semantan, Off Jalan Semantan, Damansara Heights, 50490 Kuala Lumpur.

[24]R2 is a company that was previously listed on the Alternative Investment Market ("**AIM**") which is a sub-market of the London Stock Exchange ("**LSE**") that is designed to help smaller companies to have access to capital from the public market.

MDV's pleaded case

[25]Pursuant to a letter of offer dated 9th August, 2011 ("**Letter of Offer**"), MDV offered and Platinum Nanochem Sdn Bhd ("**PNSB**") accepted a facility amounting to RM 35,000,000.00 ("**Facility**") to finance, inter alia, the purchase of primary feedstock for the production of and delivery of 60,000 metric tons of palm methyl ester to Ambrian Energy GmbH and other approved project sponsors under the spot market contract.

[26]On 31 October 2011, MDV and PNSB entered into a Master Facility Agreement ("**Master Facility Agreement**"). The Letter of Offer was subsequently amended on numerous occasion, the amendment (which includes additional facility and restructuring of the Facility) of which were agreed by MDV and PNSB. On 29 April 2014, MDV and PNSB entered into a Supplemental Master Facility Agreement ("**Supplemental Master Facility Agreement**").

[27]On 15 July 2016, PNSB was wound up pursuant to *s.218 (1) (e)* of the *Companies Act 1965*. On 15 March 2017 the High Court granted leave to R2 to execute on behalf of PNSB, a Novation Agreement between MDV and R1.

On 30 August 2017, R2 (on behalf of PNSB), R1 and MDV entered into a Novation Agreement ("**Novation Agreement**").

[28]The first salient term of the Novation Agreement is that R1 will take over and assume all of the rights and obligations of PNSB under or in connection with the Facility and will duly and punctually perform all obligations and discharge all liabilities whatsoever under or in connection with the Facility and will be bound by the provisions of the Facility in all respects as if it was named as a party in the Facility instead of PNSB as from 30 August 2017.

[29]The next salient term of the Novation Agreement is that MDV will accept the obligations and liabilities of R1 under or in connection with the Facility in lieu of the liability of PNSB and will be bound by the terms of the Facility in every way as if R1 was named in the Facility as party thereto instead of PNSB as from 30 August 2017.

[30]The Facility and the Novation Agreement are, inter alia, secured by the following securities –

(a) Debenture dated 2 August 2017 executed by R1 in favour of MDV ("**Debenture**");

(b) Corporate Guarantee dated 2 August 2017 by R2 ("**Corporate Guarantee**"); and

(c) Personal Guarantee dated 2 August 2017 by the 3rd respondent ("**R3**"), 4th respondent ("**R4**") and the 5th respondent ("**R5**").

[31]In consideration of MDV agreeing to the Novation of the Facility to R1 and the grant of the Facility to R1, R2 executed a Letter of Undertaking dated 30 August 2017 ("**Letter of Undertaking**").

[32]The terms of the Letter of Undertaking, inter alia, are (a) that R2 irrevocably and unconditionally agree and undertake to directly deposit RM 2,000,000.00 to MDV latest by 30 August 2017 ("**the Undertaking**"); and (b) that the Undertaking is and shall be at all times be and remain irrevocable and shall not be (or be capable of being) revoked, modified or otherwise howsoever varied save and except with MDV's written consent or upon full settlement of the Facility.

[33]According to MDV, R1 defaulted in its repayment obligation under the Facility. R1 failed to respond to the letters of demand issued by MDV demanding payment of the amount of arrears outstanding under the Facility. The Facility was eventually cancelled by way of a letter dated 30 May 2018 issued by MDV's solicitor. Pursuant to that letter MDV demanded that R1 do pay the sum of RM108,634,507.73 ("**the Indebtedness**") under the Facility as at 24 May 2018, being the amount due and owing to MDV under the Facility.

[34]Further, pursuant to the Corporate Guarantee, a letter of demand dated 25 June 2018 was also issued to R2 demanding that R2 as guarantor, are to pay the Indebtedness which is due and owing under the Facility. R2 failed to comply with such demand.

[35]Pursuant to the Letter of Undertaking a letter of demand of was also issued to R2, demanding, inter alia,

payment in the sum of RM 2,000,000.00 being the amount due and owing to MDV under the Facility. R2 failed to comply with the demand.

[36]Pursuant to the Personal Guarantee, letters of demand were issued to R3, R4 and R5, as guarantors and demanding that they as guarantors, are to make payment of the Indebtedness which is due and owing under the Facility. R3, R4 and R5 failed to comply with the demand.

Respondents' pleaded case

[37]In their Defence and Counterclaim, the respondents denied that they were in default. In relation to the compromise/settlement they pleaded the following:-

> THE COMPROMISE BETWEEN THE PLAINTIFF AND THE 1ST & 2ND DEFENDANTS
>
> 20. The Defendants will contend that sometime in or about early 2018, the Plaintiff reached a compromise / settlement with the 1st and/or 2nd Defendants over the outstanding debt due under the Facility (the "Compromise"). The salient terms of the Compromise were *inter alia*:
>
> 20.1. The Plaintiff would grant the 1st Defendant a 33.3% discount on the outstanding debt due to the Plaintiff under the Facility wherein the final amount due would be £10,807,907.00 (the "Final Amount");
>
> 20.2. The settlement of the Final Amount would be carried out *vis-à-vis* the issuance of shares in the 2nd Defendant at £0.003 per share (through the Proposed RTO Exercise);
>
> 21. In the circumstances, the Defendants aver that by way of the Compromised, the Plaintiff had agreed to the proposed RTO Exercise.
>
> 22. The Defendants contend that notwithstanding the Compromise, at all material times, the Plaintiff had insisted for a formal settlement agreement to be executed, containing the terms and conditions as stated in the Plaintiff's letters issued on amongst others, 22.12.2017 and 19.02.2018. In this regard:
>
> 22.1. The formal agreement was to be prepared by the Plaintiff;
>
> 22.2 The Plaintiff had stated via its letter to the 1st Defendant dated 19.02.2017 that the deadline for the execution of the formal agreement was on or by 31.03.2018;
>
> 22.3. To that end, the Defendants and/or its representatives had constantly sought updates from the Plaintiff's representatives at the material time on the status of the said formal agreement for parties to execute;
>
> 22.4. At all material times, the Plaintiff had provided the Defendants with repeated assurances that the said formal agreement was in the mist of being prepared and/or drawn up including not limited to the Plaintiff's letter dated 27.02.2018;

22.5. To this end, the Defendants will rely on the correspondence exchanged and communications between the Plaintiff and the 1st and/or 2nd Defendants during the trial of this matter.

[38]Essentially, the respondents' position is that there is no default under the Facility as R1 and R2 had reached a compromise with MDV in relation to sums owed under the Facility.

[39]According to the respondents, in or about August 2017, R2 was approached by one Coulter Group Pty Ltd and its partners ("**Coulter Group**") with a business proposal for R2's participation in the development of technology-based modular building projects identified by the Coulter Group.

[40]In November 2017, the Coulter Group and R2 agreed that the business proposal was to be carried out by way of a reverse take-over exercise ("**RTO**").

[41]The material terms of the proposed RTO were inter alia that (a) R2 was to acquire the entire issued and paid up capital of CG-TekBuild Pte Ltd (a company incorporated by the Coulter Group to undertake the development of technology-based modular building projects) and thereafter for shares to be issued by R2 to the Coulter Group; and (b) it was a material term imposed by the Coulter Group as part of the RTO Exercise that MDV was to consent to a conversion of the outstanding debt which was to be carried out by the issuance of shares to MDV; and (c) MDV agreed to the debt conversion and the proposed RTO.

[42]A compromise was reached between MDV and R1 and R2 over the outstanding debt due under the Facility ("**the compromise**"). According to the respondents, it was a salient term of the compromise that MDV would grant R1 a 33.3% discount on the outstanding debt due to MDV under the Facility wherein the final amount due would be £10,807,907.00 ("**the Final Amount**").

[43]Further, under the compromise, the settlement of the Final Amount would be carried out *vis-a-vis* the issuance of shares in R2 at £0.003 per share (through the Proposed RTO). The respondents contend that it was envisaged between the parties that the terms of the compromise would be reduced in writing by way of a formal settlement agreement ("**the Settlement Agreement**").

[44]In the meanwhile, sometime in March 2018, R2 was delisted from the AIM. According to the respondents, the de-listing of R2 was a "strategic decision".

[45]What happened next is that, MDV retracted its consent to the proposed RTO on the basis that it was no longer viable due to R2's delisting from the AIM.

[46]The respondents take the position that it was not a term/condition of the compromise that R2 was to remain

listed on the AIM throughout the course of the proposed RTO. By reason of MDV's withdrawal of its consent to the debt conversion exercise, the Coulter Group withdrew from the proposed RTO.

[47]According to the respondents, MDV's unilateral act of withdrawing its consent to the proposed RTO was a breach of the compromise which caused loss and damage to respondents. The loss includes, inter alia, loss of profits and/or business opportunities arising from and/or in relation to the business *vis-à-vis* the proposed RTO and incur unnecessary expense towards fulfilment of the same.

[48]Thus, the respondents counterclaimed against MDV and seek special and general damages as specified in paragraphs 38 and 39 of their Defence and Counterclaim dated 30 August 2018.

[49]In so far as the allegation of a concluded compromise is concerned, MDV contends that they only agreed to consider R1's proposal to settle the amount outstanding under the Facility and that R1 failed to comply with the terms and conditions imposed by MDV. Consequently, MDV was not obliged to consider R1's settlement proposal.
The correspondence

[50]In order to appreciate the issues at hand, it is necessary to make reference to some of the important correspondence that were exchanged between the parties in relation to the purported compromise. Although there were some letters from MDV to R1 and *vice-versa* in December 2017/January 2018, the issue as regards the terms of the purported compromise turns very much on MDV's letter dated 19 February 2018.

[51]The MDV letter dated 19 February 2018 reads as follows:-

> PRIVATE AND CONFIDENTIAL
>
> Our Reference: DV814/PB/DCT/BL07/C05/1-2018
>
> 19 February 2018
>
> **Platinum TechSolve Sdn Bhd**
>
> (Company No. 1170427-V)
>
> Suite 9.2, Level 9, WORK @ Clearwater
>
> Changkat Semantan, Off Jalan Semantan Damansara Heights
>
> 50490 Kuala Lumpur
>
> Attention: **YBhg. Tan Sri Dato' Sri Abi Musa Asa'ari Bin Mohamed Nor**

Director

Dear YBhg. Tan Sri,

RE: PROPOSAL FOR THE ACQUISITION OF CG-TEKBUILD PTE LTD BY GRAPHENE NANOCHEM PLC ("REVERSE TAKE OVER" - RTO) AS PART OF THE SETTLEMENT AGREEMENT FOR THE OUSTANDING SUM UNDER FACILITES GRANTED BY MALAYSIA DEBT VENTURES ("MDV") TO PLATINUM NANOCHEM SDN BHD AND NOVATED TO PLATINUM TECHSOLVE SDN BHD ("FACILITIES").

We refer to the above, to our letters to you dated 22 December 2017 and 29 December 2017 and your letters to us dated 9 January 2018 and 29 January 2018.

We are agreeable to consider your proposal for the settlement of amount due under the Facilities subject to the following terms and conditions:

A. Fulfillment of the following conditions precedent prior to the execution of the settlement agreement between MDV and Platinum TechSolve Sdn Bhd:

   i) MDV's receipt of letter of guarantee and indemnity, in the form agreed by MDV, from the following guarantors ("Personal Guarantors") guaranteeing repayment of all amount due and owing by Platinum TechSolve Sdn Bhd to MDV under the Facilites as at 31 December 2017:

      1. Jespal Singh Deol a/l Balbir Singh (NRIC: 650929-10-5093).
      2. Sushil Sidhu a/l Joginder Singh (NRIC: 651017-08-5485)
      3. Anbanathan a/l Shanmugam (NRIC: 730114-10-6191)

   ii) Pledge of all shares held by the Personal Guarantors in Graphene Nanochem Plc ("GNC") in favour of MDV to secure all amount due and owing by Platinum TechSolve Sdn Bhd to MDV under the Facilities.

B. Proceeds from the disposal of Platinum performance Chem Sdn Bhd shall be excluded from the valuation for the proposed RTO. Any surplus from the sale proceeds, upon settlement of all amount due by Platinum Performance Chem Sdn Bhd to Bank Rakyat, shall be used to reduce the amount due and owing under the Facilities.

C. MDV's conversion of debt into equity must be at a minimum of 3 pence per share.

D. Receipt by MDV of satisfactory legal opinion from their solicitors with regards to MDV's conversion of debt into equity and other regulatory compliances.

E. Receipt by MDV of the report from the Nominated Advisor for the proposed RTO.

F. Any such other terms and conditions as MDV deems necessary.

G. The settlement agreement between MDV and Platinum Techsolve Sdn Bhd shall be executed latest by 31 March 2018.

Kindly let us know whether you agree to the above terms and conditions within 7 days from the receipt of this letter failing which the terms of this letter shall be deemed to have lapsed. We reverse all our rights.

Thank you. Yours faithfully

MALAYSIA DEBT VENTURES BERHAD

DATUK MD ZUBIR ANSORI YAHAYA

MANAGING DIRECTOR/ CHIEF EXECUTIVE OFFICER

C.C:/1 Graphene Nanochem Plc

[52]R1 responded via letter dated 26 February 2018, which reads as:-

26 February 2018

Malaysia Debt Ventures Berhad

Level 5, Menara Bank Pembangunan

Bandar Wawasan

1016, Jalan Sultan Ismail

50250 Kuala Lumpur

Attention: **Y. Bhg Datuk Md Zubir Ansori Yahaya Managing Director/Chief Executive Officer**

Dear Datuk,

PROPOSAL FOR THE ACQUISITION OF CG-TEKBUILD PTE LTD BY GRAPHENE NANOCHEM PLC ("REVERSE TAKE OVER ("RTO") AS PART OF THE SETTLEMENT AGREEMENT FOR THE OUSTANDING SUM UNDER FACILITES GRANTED BY MALAYSIA DEBT VENTURES ("MDV") TO PLATINUM NANOCHEM SDN BHD AND NOVATED TO PLATINUM TECHSOLVE SDN BHD ("FACILITIES").

We refer to the above matter, to our letter to you dated 9th January 2018, the presentation by the CG TekBuild Group to Malaysia Debt Ventures Berhad ("MDV") at the meeting 28th January 2018 and your letter to Platinum TechSolve Sdn Bhd ("PTS") dated 19th February 2018 ("MDV Letter").

We are agreeable to the terms of the MDV Letter for the settlement of the outstanding sum under the Facilities. For clarity the conditions precedent referred to in Item (A) of the Letter shall be subject to our letter dated 9 January 2018.

We look forward to the receipt of the draft settlement agreement and all other relevant documents from you for our review and further action. [Emphasis added]

Thank you. Yours faithfully,

for and behalf of **Platinum Techsolve Sdn Bhd**

Tan Sri Dato' Sri Abi Musa Asa'ari Mohamed Nor

Director

[53] MDV replied via letter dated 27 February 2018. The letter reads as follows:-

PRIVATE AND CONFIDENTIAL

Our Reference: DV814/PB/DCT/BL07/C05/2-2018

27 February 2018

Platinum TechSolve Sdn Bhd

(Company No. 1170427-V)

Suite 9.2, Level 9, WORK @ Clearwater

Changkat Semantan, Off Jalan Semantan

Damansara Heights

50490 Kuala Lumpur

Attention: **YBhg. Tan Sri Dato' Sri Abi Musa Asa'ari Bin Mohamed Nor**

Director

Dear YBhg. Tan Sri,

RE: PROPOSAL FOR THE ACQUISITION OF CG-TEKBUILD PTE LTD BY GRAPHENE NANOCHEM PLC ("REVERSE TAKE OVER" - RTO) AS PART OF THE SETTLEMENT AGREEMENT FOR THE OUSTANDING SUM UNDER FACILITES GRANTED BY MALAYSIA DEBT VENTURES ("MDV") TO PLATINUM NANOCHEM SDN BHD AND NOVATED TO PLATINUM TECHSOLVE SDN BHD ("FACILITIES").

We refer to the above, to our letters to you dated 22 December 2017, 29 December 2017 and 19 February 2018 and your letters to us dated 9 January 2018, 29 January 2018 and 26 February 2018.

Please be informed that the settlement terms shall be solely based on the terms of our letter dated 19 February 2018 ("Settlement Letter").

We shall proceed to prepare the settlement agreement for your execution based on the terms of the settlement letter. We reserve all our rights.

Thank you. Yours faithfully

MALAYSIA DEBT VENTURES BERHAD

DATUK MD ZUBIR ANSORI YAHAYA

MANAGING DIRECTOR/ CHIEF EXECUTIVE OFFICER

C.C:/1 Graphene Nanochem Plc

[54]Sometime in March, R2 became delisted from the AIM. This seems to have been the catalyst for the issuance of the MDV letter dated 13 April 2018, by which MDV "pulled the plug" on the purported settlement/compromise. The MDV letter reads as follows:-

13 April 2018

Platinum TechSolve Sdn Bhd

(Company No. 1170427-V)

Suite 9.2, Level 9, WORK @ Clearwater

Changkat Semantan, Off Jalan Semantan

Damansara Heights

50490 Kuala Lumpur

And/or

Platinum TechSolve Sdn Bhd

(Company No. 1170427-V)

Suite 1008, 10th Floor

Wisma Lim Foo Yong

No. 86, Jalan Raja Chulan

50490 Kuala Lumpur

Attention: YBhg. Tan Sri Dato' Sri Abi Musa Asa'ari Bin Mohamed Nor

Dear YBhg. Tan Sri,

Re: PROPOSAL FOR THE ACQUISITION OF CG-TEKBUILD PTE LTD BY GRAPHENE NANOCHEM PLC ("REVERSE TAKE OVER EXERCISE") AS PART OF THE SETTLEMENT AGREEMENT FOR THE OUSTANDING SUM UNDER FACILITES GRANTED BY MALAYSIA DEBT VENTURES ("MDV") TO PLATINUM NANOCHEM SDN BHD AND NOVATED TO PLATINUM TECHSOLVE SDN BHD ("FACILITIES").

We refer to the above matter and to our correspondences dated 20.10.2017, 22.12.2017, 29.12.2017, 19.2.2018, 27.2.2018, 28.3.2018 and your letters dated 9.1.2018, 29.1.2018, 26.2.2018.

2. Please take note that our agreement to consider your proposal for settlement, was dependent upon the Reverse Takeover Exercise which is no longer viable in light of the delisting of Graphene Nanochem Plc shares, and thus has now deemed to have lapsed.

3. Arising from the foregoing, we hereby reserve all our rights to take whatever action we deem fit under the terms and conditions of the Facilities.

Thank you. Yours faithfully,

MALAYSIA DEBT VENTURES BERHAD

NIZAM MOHAMED NADZRI

CHIEF EXECUTIVE OFFICER

[55]R1 sent a letter dated 25 April 2018 in response (*and as a rebuke*) to MDV's letter dated 13 April 2018. R1's letter reads as follows:-

25 April 2018

Malaysia Debt Ventures Sdn Bhd

Level 5, Menara Bank Pembangunan

1016, Jalan Sultan Ismail

50250 Kuala Lumpur

Malaysia

Attention: **Encik Nizam Mohamed Nadzri**

Dear Encik Nizam,

SETTLEMENT AGREEMENT FOR THE OUTSTANDING SUM UNDER FACILITIES GRANTED BY MALAYSIA DEBT VENTURES BERHAD ("MDV") TO PLATINUM NANOCHEM SDN BHD AND NOVATED TO PLATINUM TECHSOLVE SDN BHD ("FACILITIES") THROUGH CONVERSION OF THE DBT INTO EQUITY PURSUANT TO THE REVERSE TAKOVER EXERCISE OF GRAPHENE NANOCHEM ("GRAPHENE NANOCHEM") VIA ACQUISITION OF CG TEKBUILD OF CG TEKBUILD PTE LTD

We refer to the above matter and your letter dated 13 April 2018 which we find to be without merit or justification.

In this respect we refer to the following:

(a) our proposal for the settlement of the outstanding sum under the Facilities ("Outstanding Amount") through the conversion of the same into shares of Graphene NanoChem "(Debt Conversion") pursuant to the reverse takeover exercise of Graphene NanoChem through the acquisition of CG TekBuild Pte Ltd ("CG TekBuild") by Graphene NanoChem ("RTO Exercise"), as submitted and discussed with you by the Executive Committee of our parent company, Graphene NanoChem ("GNC ExCo.") on 29 November 2017 ("Settlement Proposal").

(b) your letter dated 22 December 2017 to us setting out your terms and conditions of the Settlement Proposal, which was accepted by us except for the condition for the shareholders of CG TekBuild to provide a put option to MDV which was not agreed to by the shareholders of CG TekBuild;

(c) your meeting with the representatives of CG TekBuild on 29 January 2018 in which the business plan of CG TekBuild in conjunction with the RTO was presented to your team;

(d) your letter dated 19 February 2018 to us setting out your terms and conditions of the Settlement Proposal ("Settlement Letter") which included your stipulation that the settlement agreement between MDV and Platinum TechSolve Sdn Bhd ("Platinum TechSolve") was to be executed by 31 March 2018 ("Settlement Agreement"), which was accepted by us;

(e) your letter dated 27 February 2018 to us, reiterating that the settlement terms shall be solely based on the Settlement Letter and that you shall be proceeding to prepare the Settlement Agreement based on the terms of the Settlement Letter;

(f) the telephone conversation between your officer, Mr. Ng Tse Khim and our Finance Director, Sushil Sidhu ("FD") on 28 February 2018 confirming that the Settlement Agreement will be provided to us the following week;

(g) the follow-up communications with your officers for the Settlement Agreement in which we had been continuously informed that the same was being drafted and was pending from your lawyers;

(h) your email dated 28 March 2018 and the telephone conversation on the same date attended by your Vice President, Legal & Secretarial, Puan Rozita Khamsiah Othman ("VP Legal"), your officer Mr. Mohammad Nizam Ishak and our Akma Abid in which your VP Legal had assured us that she already had the Settlement Agreement from your lawyers and the same was to be forwarded to us later in the evening or at the latest, by the following morning and we are to sign quickly to comply with the agreed stipulated timeline as stated in the Settlement Letter.

(i) the update on the RTO Exercise submitted to you by the GNC ExCo. on 9 April 2018.

As you are well aware, the Settlement Agreement was not delivered to us and despite our repeated follow-ups, there was no response from MDV. Furthermore, our FD's written request to MDV on the 4th of April 2018 for a meeting was met with no response from you or your team.

On the 13th of April 2018, you issued your purported termination letter on the ground that your agreement "was dependent upon the Reverse Takeover Exercise which is no longer viable in light of the delisting of Graphene NanoChem shares" ("Termination Letter"), which we find to be absolutely baseless and without any merit and for all intent and purposes was done in bad faith.

You are and have been at all times fully aware and cognizant that the entire RTO Exercise was predicated on your full agreement to the Debt Conversion for the RTO Exercise which you have at all material times knowledge of, consented and agreed to.

Effectively, without your PRIOR agreement for the Debt Conversion, it would be quite absurd and rather pointless for either us, Graphene NanoChem, CG TekBuild or its shareholders, to initiate the RTO Exercise and, for that matter, to invest the considerable time, effort, resources and expenses to execute and undertake the RTO Exercise which is already well underway.

You will note that it is on the sole premise of your agreement to the Debt Conversion that the RTO Exercise commenced that is being implemented and executed. You will also note that a substantial amount of work has been done to position Graphene NanoChem and CG TekBuild to both the capital market place and transaction partners as well to third parties to ensure the success of the RTO Exercise, all on the premise of your agreement to the Debt Conversion under the RTO Exercise. This entire exercise has caused not just Graphene NanoChem and CG Tekbuild, but also their respective shareholders to incur considerable amount of costs.

It is also to be noted that you had regularly insisted for the RTO Exercise not to be delayed and to be completed quickly. Again another substantiation of your agreement at all times to the Debt Conversion. Therefore it was incomprehensible for us to receive the purported Termination Letter based on a frivolous claim that the RTO Exercise is no longer viable on the basis delisting, which is untrue, due to many reasons, and in particular:

(1) there is legally and practically no difference in the process and procedures of admission on AIM, whether via a reverse takeover or an initial public offer route as both would require a fresh admission on AIM. Hence we fail to understand your claim of non-viability on the basis of delisting.

(2) the RTO Exercise was in no way impacted by the delisting pf Graphene NanoChem and was exercised after receiving full advise from the Nominated Adviser taking into account various considerations and factors with a view to what would be best for the RTO Exercise, which would consequently benefit MDV as a shareholder post the RTO Exercise;

(3) the viability of the RTO Exercise is dependent on the business to be acquired and not the listed or non listed status of Graphene NanoChem and being listed solely for the sake of being listed certainly does not add any value to the RTO Exercise;

(4) there is no change in plan with respect to the RTO Exercise and the shareholders of CG TekBuild are in full support with the delisting plan as part of the value building strategy for the new plc., the advantages of which were made known to you;

(5) the value of the Debt Conversion under the RTO Exercise remains intact hence there is no loss to MDV nor is MDV impacted by the delisting;

(6) our obligation to you is to deliver listed shares of Graphene NanoChem (or the new plc) upon completion of the RTO Exercise fulfilling the agreed Debt Conversion scheme and not before.

We believe that you are fully aware of the position of the company today and as you well know, the RTO Exercise provides you with the only solid opportunity to recover the Outstanding Amount with a potential upside for returns through capital appreciation of listed shares.

We have proceeded with the RTO Exercise and all incidental and ancillary work towards the same purely on the basis of your agreement to the Debt Conversion and the RTO Exercise and with your agreement to fully focus on completing the RTO Exercise in conjunction with Graphene NanoChem. Your sudden unjustified action in terminating and reneging on this agreement has caused and causing irreparable harm and prejudice to the RTO Exercise.

We consider your conduct to be a breach of the terms of the agreement in respect of the settlement of the Outstanding Amount and we reserve our right to seek and pursue all available legal and equitable remedies. In the meantime our rights in all regards are reserved.

Your faithfully,

for Platinum TechSolve Sdn Bhd

Akma Abid

c.c

Thomas Phillip

5-1, Jalan 22A/70A Wisma CKL,

Desa Sri Hartamas,

50480 Kuala Lumpur,

Malaysia.

Attn: Lavinia Kumaraendran / Tan Jee Tjun

[56]On 17 July 2018, MDV filed the Writ against the respondents. MDV applied (*Order 14 ROC*) for summary judgment against the respondents (Enclosure 10). On 21 December 2018, MDV's application for summary judgment was dismissed.

[57]Thereafter, the respondents attempted to obtain a copy of the DSA from MDV in lieu of or as a prelude to making a formal application for disclosure. To this end, the respondents' solicitors, Messrs Thomas Philip wrote to MDV's solicitors (*per letter dated 9 April 2019 p. 219-220 AR Jilid 2*) and asked for a copy of the DSA. The letter from Messrs Thomas Philip reads as follows:-

9th April 2019

Messrs Lee Hishamuddin Allen & Gledhill

Level 6, Menara 1 Dutamas, Solaris Dutamas

No. 1, Jalan Dutamas 1,

50480 Kuala Lumpur.

Dear Sir/Madam,

Kuala Lumpur High Court Suit No. WA-22M-300-07/2018

Malaysia Debt Ventures Berhad Plaintiff

Platinum Techsolve Sdn Bhd & 4 Ors Defendants

We refer to the above matter.

Reference is also made to the case management before the learned Judge in chambers this morning.

2. We are instructed by our clients to state as follows:

2.1 Sometime on or about 28.3.2018, it was brought to our clients' attention through your client's representative one Puan Rozita Khamsiah Othman that a draft copy of the Settlement Agreement which was to be executed by the

Plaintiff and the 1st Defendant was in fact prepared and was in your client's possession at the material time (the "**Draft Settlement Agreement**");

2.2 The above is reflected in correspondence exchanged between the parties at the material time;

2.3 Further, our clients had averred on affidavit evidence in relation to your client's application in Enclosure 10 to a telephone conversation on 28.3.2918 between our client's representative Cik Zailatul Akma binti Abid and the said Puan Rozita Khamsiah Othman during which it was confirmed that your client was in receipt of the Draft Settlement Agreement;

2.4 The abovementioned telephone conversation was not specifically addressed and/or disputed by your client in its affidavits in relation to Enclosure 10;

2.5 In spite of the aforesaid, we note to date that your client has failed and/or neglected to produce the said Draft Settlement Agreement for purposes of the present litigation.

3. Accordingly, we are further instructed to request for copies of the following documents to be extended to us for purposes of the ongoing proceedings:

3.1 The Draft Settlement Agreement in your client's possession (which we are instructed was prepared by Messrs Azmi & Associates) which was to be forwarded to our clients at the material time for their perusal and execution. (the "**said Document**")

4. Kindly let us know if your client would be willing to produce the said Document on a voluntary basis, failing which we have instructions to file a formal application towards discovery of the said Document.

5. Our client's request at this juncture of proceedings is necessitated in view of the said Document having not been included in the Common Bundle of Documents which were recently finalized and filed into Court (the latest volume of which was served on us this morning).

6. In view of the directions by the learned Judge his morning in relation to the above matter, kindly let us have your response on an urgent basis and in any event on or before 17.4.2019.

Yours faithfully,

Messrs Thomas Phillip

[58]MDV's solicitors (Messrs Lee Hishamuddin Allen & Gledhill) replied via letter dated 17 April 2019 (p. 221 AR Jilid 2). The reply was as follows:-

17 April 2019

Messrs. Thomas Philip

5-1, Jalan 22A/70A

Wisma CKL

Desa Sri Hartamas

50480 Kuala Lumpur

Dear Sirs,

Kuala Lumpur High Court Suit No. WA-22M-300-07/2018

Malaysia Debt Ventures Berhad …Plaintiff

Platinum Techsolve Sdn Bhd & 4 Ors …Defendants

We refer to the above matter and your letter dated 9th April 2019.

2. We are instructed by our client to state as follows.

3. Our client had in fact addressed and disputed on affidavit evidence the telephone conversation between your clients' representative, Cik Zailatul Akma binti Abid and our client's representative, Puan Rozita Khamsiah Othman.

4. Further, we wish to state that our client is not obligated to produce the Draft Settlement Agreement to your clients because the Draft Settlement Agreement is a **draft** and the same is protected by privilege.

5. In this regard, our client is also not obligated to include the Draft Settlement Agreement in the Common Bundle of Documents.

Yours faithfully,

Khairul Anwar Hairudin

Associate

Direct line: 603 6208 5899

Email: kah@lh-ag.com

The High Court's decision

[59]On 24 April 2019 the respondents applied (via **Enclosure 38**) for specific discovery of the DSA. On 29 May 2019 the learned Judge allowed Enclosure 38. The learned Judge's reasons for allowing Enclosure 38 are as follows:-

Findings of the court

[25] Based on paragraph 7 of the Plaintiff's affidavit enclosure 40 and the letter of the Plaintiff's solicitor dated 17 April 2019, it is not disputed that the Settlement Agreement exists and it is in the Plaintiff's custody, control and / or possession. It is also not disputed that the Settlement Agreement is a document.

[26] The crucial issue to be determined here is whether the Settlement Agreement is relevant to the issue in dispute in this instant case. The Plaintiff's cause of action against the Defendants is premised on the purported breach by the Defendants of the terms and conditions of the Master Facility Agreement, the Corporate Guarantee and the Guarantee. It is the Plaintiff's pleaded case that there was no compromise between the parties on the sum outstanding under the Facility. On the contrary the Defendants defence is that there is no such breach as the parties has reached a compromise in relation to the sums owed under the Facility. It is further pleaded by the Defendants that the Plaintiff had actively participated in furtherance of the compromise reached and the execution of the Settlement Agreement was in itself a formality.

[27] Given the pleaded case of both parties, the inevitable pertinent question or issue which automatically comes to mind is whether there is a compromise reached between the parties. The answer to this question will eventually determine the validity / veracity of both the Plaintiff's claim against the Defendants and the Defendants' counterclaim against the Plaintiff.

[28] Having considered the pleadings and affidavits of the parties this court is of the view that the Settlement Agreement which is a document prepared by the Plaintiff and in its possession is relevant as it will certainly assist this court to dispose this action fairly and justly. Such view is based on the following grounds –

(a) the Plaintiff via letter dated 13 April 2018 (Exhibit A-6 Defendants' affidavit enclosure 41) informed the 1st Defendant that the Plaintiff's agreement to consider the Defendants' proposal for settlement of the amount outstanding under the Facility was no longer viable due to the delisting of the 2nd Defendant. According to the Plaintiff this is an express condition imposed on the 1st Defendant for the Plaintiff to consider the proposal for the said settlement;

(b) Defendants contend that the terms of the compromise were reflected in the conduct and the correspondence exchanged between the parties between late 2017 and early 2018 and that it was never a term of the Compromise that the 2nd Defendant was to remain listed on the AIM throughout the course of the proposed RTO exercise;

(c) perusing the exchange of the correspondence between Plaintiff and the 1st Defendant, this court is of the view the documents does not appear to suggest that one of the condition of the Compromise is for the 2nd Defendant to remain listed on the AIM. This is based on the contents of the Plaintiff's letter dated 19 February 2018 (Exhibit MDV-1 to Plaintiff's affidavit enclosure 40 and which the Plaintiff alleges contain the settlement terms) and its insistence that the Settlement Agreement shall be executed by 31 March 2018. Via letter dated 27 February 2018 in response to the 1st Defendant's letter dated 26 February 2018, the Plaintiff reiterates the settlement terms as in

its letter dated 19 February 2018 and that it will forward the Settlement Agreement to the 1st Defendant for execution purposes;

(d) the Plaintiff's letters dated 19 February 2018 and 27 February 2018 and the 1st Defendant's letter dated 26 February 2018 clearly shows both parties have agreed to put in writing the terms of the settlement in the form of an agreement which was prepared by the Plaintiff and supposed to be forwarded to the 1st Defendant for execution purposes;

(e) looking at the said letters issued by the Plaintiff, it would appear that the terms and conditions that was agreed by the parties were, as the Plaintiff has plainly put it, solely based on the terms and conditions stated by the Plaintiff's in its letter dated 19 February 2018 and that those terms are to be incorporated in a settlement agreement which is to be prepared by the Plaintiff. As such, the Settlement Agreement prepared by the Plaintiff and intended to be forwarded to the 1st Defendant is crucially relevant to the Defendants' case that the Compromise was concluded and Plaintiff breached the Compromise.

The Settlement Agreement is equally relevant to the Plaintiff's case that there was no compromise reached and that the Plaintiff is entitled to enforce its rights for monies due and outstanding on the Facility against the defendants; and;

(f) the fact that it is merely a draft Settlement Agreement does not make it irrelevant. Based on the cases cited by the Defendants (*Abdul Rahim Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors* [2006] 5 MLJ 1; *National Feedlot Corp Sdn Bhd & Ors v Public Bank Bhd* [2018] MLJU 766 and *Chen Sheau Yang v SMC Healthcare Sdn Bhd* [2018] MLJU 1304), it can be summarised that a document which is in the form of a draft which has yet to be executed is relevant and necessary, if on the facts, such document will enable the parties to prove their case. However whether the draft Settlement Agreement is in fact a binding settlement between the parties and whether the said document is admissible or otherwise are issues to be determined at the trial.

[29] The other ground cited by the Plaintiff resisting the Defendants' application for discovery of the Settlement Agreement is that the Settlement Agreement is a privileged document as it is essentially an advice by the Plaintiff's solicitor to the Plaintiff. The learned counsel for the Plaintiff cited various cases (*Balabel and another v Air India* [1988] 1 Ch 317 *Manser v Dix* (1855) 1 K & J 451; *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171) to support its contentions that the draft Settlement Agreement is a privileged document and therefore protected from disclosure. Based on the cases cited, for a document to amount to "advice" the document must be made in confident for the purpose of legal advice and that such advice was specifically requested by the client to its solicitor. The document which contained the advice is a privileged and protected document because it is intended to be kept confidential between the client and its solicitor only.

[30] On the facts of the instant case this court is of the view the draft Settlement Agreement is not a privileged and protected document because it lack the element of "advice" for the following reasons –

(a) based on the Plaintiff's letter dated 19 February 2018 the Settlement Agreement is intended to incorporate the terms of the settlement as set out in the said letter. The first paragraph of the Plaintiff's letter made reference to its letter dated 22 December 2017 and 29 December 2017 (collectively referred to as "Plaintiff's December 2017 Letters") and to the 1st Defendant's letters dated 9 January 2018 and 29 January 2018 (collectively referred to as "1st Defendant's January 2018 Letters).

Perusal of the Plaintiff's December 2017 Letters and the 1st Defendant's January 2018 Letters shows that the Plaintiff and the 1st Defendant were in the midst of discussing the terms of settlement in relation to the outstanding sum under the Facility. This is evidently clear from the heading of all the letters which states *"RE: PROPOSAL FOR THE ACQUISITION OF CG-TEKBUILD PTE LTD BY GRAPHENE NANOCHEM PLACE ("REVERSE TAKE OVER" – RTO) AS PART OF THE SETTLEMENT AGREEMENT FOR THE OUTSTANDING SUM UNDER FACILITIES GRANTED BY MALAYSIA DEBIT VENTURES BERHAD ("MDV") TO PLATINUM NANOCHEM SDN BHD AND NOVATED TO PLATINUM TECHSOLVE SDN BHD ("FACILITIES");*

(b) thus the Plaintiff's December 2017 Letters and the 1st Defendant's January 2018 Letters were communications between 2 parties with a view to reach a settlement. The communications subsequently led to the Plaintiff's letter dated 19 February 2018 which sets out the terms of the settlement. It must be noted in the Plaintiff's letter dated 27 February 2018, the Plaintiff referred to its letter dated 19 February 2018 as the "Settlement Letter". Obviously the terms discussed and which are subsequently intended to be incorporated in the settlement agreement does not relate to the Plaintiff's communication with its solicitor; and

(c) the terms of settlement which were discussed and allegedly concluded between the Plaintiff and the 1st Defendant are not matters between the Plaintiff and its solicitor which is meant to be kept confidential between the Plaintiff and its solicitor. The draft Settlement Agreement although prepared by the Plaintiff was intended to be a joint document to be mutually agreed between the Plaintiff and the 1st Defendant. Such was the reason for the Plaintiff's readiness and willingness to forward the Settlement Agreement to the 1st Defendant for execution purposes. Taking into account the circumstances under which the Settlement Agreement was drafted and the purpose for which it was drafted, it could not be reasonably expected the Settlement Agreement amounts to "advice" which was requested by the Plaintiff to its solicitor.

[60]The learned Judge was ultimately impelled to the view that "*the [DSA] is relevant and necessary for this action to be disposed fairly and justly. The Settlement Agreement is not a privileged document protected from disclosure.*" As such, the learned Judge allowed the respondents' application for specific discovery of the DSA.

The arguments

[61]The first ground of objection that was advanced by MDV is that the DSA is protected by privilege. It was contended for MDV that they are entitled to refuse discovery of a document in their possession as it is subject to legal professional privilege –see: *Dato' Anthony See Teow Guan v See Teow Chuan & Anor* [2009] 3 CLJ 405;; *[2009] MLJU 97*;; *[2009] 3 MLJ 14* FC ("*See Teow Guan*") and *Yekambaran s/o Marimuthu v Malayawata Steel Bhd* [1994] 2 CLJ 581;; *[1993] MLJU 96* HC ("*Yekambaram*")

[62]In the present context, it was contended that the DSA, being a draft which had been prepared by MDV's solicitors for the purpose of discussion with MDV (*and was never sent to the respondents*) amounts to legal advice by MDV's solicitors to MDV and is subject to legal professional privilege. Therefore, it ought to be protected from disclosure in any event.

[63]It was argued that in law, confidentiality is implicit in such communication between MDV and their solicitors and extends to both the instructions given by MDV and any advice provided by the solicitors in relation to the DSA and/or any work-product generated by the solicitors.

[64]I shall now proceed to consider the cases that were referred to by counsel.

Skandinaviska

[65]Counsel for MDV framed his argument by referring to the decision of the Singapore Court of Appeal in *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2007] SGCA 9 ("***Skandinaviska***"). In *Skandinaviska*, the respondent's finance manager had committed massive fraud by making misrepresentations to the banks and procuring (*in the name of the respondent*) colossal amounts of financing facilities from the appellants (the banks).

[66]The banks sued the respondent for recovery of the debt arising under the financing facilities. The respondent's holding company appointed a special committee to oversee the fraud investigation and to take necessary steps to protect the interest of the holding company and the subsidiary - the respondent.

[67]The special committee appointed a law firm ("**D&N**") as legal advisers and an accounting firm ("**PWC**") as the special accountant, to prepare a draft report on the fraud investigation. The appellants applied for discovery of the draft PWC report. The question was whether the draft PWC report was protected by legal professional (advice) privilege pursuant to *s.128* of the *Evidence Act* (Singapore) (which is equivalent to *s.126* of the *Malaysian Evidence Act 1950*).

[68]The Singapore Court of Appeal held:-

> *Impact of modern developments on legal advice privilege*
>
> [47] The relationship between clients and legal advisers, especially in economic activities, has changed considerably since the legal privilege rules were formulated more than a century ago. Business has become much more complex, and so have the legal knowledge and skills that are required of lawyers to guide their clients safely in their commercial and investment ventures.
>
> Today, such clients not only need legal advice in the conduct of their business but also require multidisciplinary advice from different professions in many of the problems they face or encounter.
>
> Furthermore, the nature of the advice that lawyers may be asked to give may also extend to other fields of learning which go beyond what was traditionally legal advice. In the English Court of Appeal decision of *Balabel v Air India* [1988] 1 Ch 317 ("*Balabel*"), one of the most influential decisions on the nature of legal advice privilege in modern conditions, Taylor LJ (as he then was, and with whom Lord Donaldson of Lymington MR and Parker LJ agreed) said (at 330):

'Although originally confined to advice regarding litigation, the privilege was extended to non-litigious business. Nevertheless, despite that extension, the purpose and scope of the privilege is still to enable legal advice to be sought and given in confidence. In my judgment, therefore, **the test is whether the communication or other document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege.**

In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communication and meetings between the solicitor and client.

…

Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as "please advise me what I should do". But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, **legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context**'. [emphasis added]

[48] Taylor LJ's observations have been approved subsequently in numerous English and other Commonwealth judgments. In *Three Rivers No 6* ([24] supra at [111]), Lord Carswell said:

I agree with the view expressed by Colman J in *Nederlandse Reassurantie Groep Holding NV v Bacon & Woodrow Holding* [1995] 1 All ER 976, 982 that the statement of the law in *Balabel v Air India* does not disturb or modify the principle affirmed in *Minter v Priest*, that *all communications between a solicitor and his client relating to a transaction in which the solicitor has been instructed for the purpose of obtaining legal advice will be privileged, notwithstanding that they do not contain advice on matters of law or construction, provided that they are directly related to the performance by the solicitor of his professional duty as legal adviser of his client*.

[emphasis added]

[49] And, in the English High Court decision of *Guild (Claims) Ltd v Eversheds (a firm)* [2001] Lloyd's Rep PN 910, Jacob J (as he then was) had this to say (at [22]):

'I think that it is not possible to deal with the question of duty in relation to quasi-commercial matters in the abstract. Solicitors concerned with assisting parties in relation to commercial transactions are often faced with commercial considerations. *Ultimately, commercial matters are for the client but things are not so simple that one can say the solicitor's duty simply stops at questions of law*.

[emphasis added]

> [50] Other decisions where similar statements of approval of Taylor LJ's observations in *Balabel* include the English decision of *Nederlandse Reassurantie Groep Holding NV v Bacon & Woodrow (a firm)* [1995] 1 All ER 976 and *Three Rivers No 6* ([24] supra); the Federal Court of Australia decision of *DSE (Holdings) Pty Ltd v Intertan Inc* (2003) 203 ALR 348 as well as the Hong Kong decisions of *Time Super International Ltd v Commissioner of the Independent Commission Against Corruption* [2002] HKEC 821 and *Yau Chiu Wah v Gold Chief Investment Limited* [2003] 3 HKLRD 553 at [43].

Balabel

[69]Next, counsel for MDV referred to *Balabel and another v Air India [1988] Ch. 317*;; *[1988] 2 W.L.R. 1036*;; [1988] 2 All E.R. 246;; (1988) 138 N.L.J. Rep. 85;; [1988] 132 S.J. 699 CA ("***Balabel***"). In *Balabel*, the appellant was the lessee of commercial premises. The respondents were the under-lessees of the premises and claimed that, following negotiations, an oral agreement had been reached for the grant of a new under-lease on the expiration of their existing under-lease.

[70]The appellant disputed that an agreement had been reached and the respondents brought an action for specific performance. In order to obtain the note or memorandum required by s.40 of the Law of Property Act 1925 the respondents sought discovery of various documents. Essentially, the respondents sought discovery of (i) communications between the appellant and its solicitors other than those seeking or giving legal advice, (ii) drafts, working papers, attendance notes and memoranda of the appellant's solicitors relating to the proposed new under-lease and (iii) internal communications of the appellant other than from its foreign legal advisers.

[71]The appellant and its solicitors refused to disclose the requested documents on the ground of legal professional privilege and that claim was upheld by the master. On appeal, the judge allowed the appeal and ordered that certain specified documents be disclosed. The appellant appealed to the Court of Appeal and the appeal was allowed.

[72]The Court of Appeal opined that communications passing between a solicitor and their client in the course of a conveyancing transaction were privileged if the broad purpose of the communications was the obtaining of legal advice by the client as and when appropriate during and throughout the course of the transaction. It was not necessary for a document specifically to seek or contain advice in order to be privileged. The Court of Appeal also clarified that, not all communications in the ordinary business of a solicitor were privileged.

[73]At any rate, in *Balabel's* case, the Court of Appeal opined that the documents were privileged and the appeal was therefore allowed. At p.330 (Ch. Report), Taylor L.J. said,

> "Although originally confined to advice regarding litigation, the privilege was extended to non-litigious business. Nevertheless, despite that extension, the purpose and scope of the privilege is still to enable legal advice to be sought and given in confidence. In my judgment, therefore, the test is whether the communication or other document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches

to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege.

In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communication and meetings between the solicitor and client. The negotiations for a lease such as occurred in the present case are only one example. Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach.

A letter from the client containing information may end with such words as 'please advise me what I should do'. But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice.

Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context".

[74]At page 331, Taylor L.J. said:-

"Likewise in *Conlon v Conlons Ltd* *[1952] 2 All ER 462* privilege was held not to extend to a communication from a client to his solicitor authorising him to offer terms of settlement. Morris LJ said (at 466):

> 'It is, I think, plain that, if there are professional communications between a solicitor and his client of a confidential character for the purpose of getting legal advice, then, in general, there is privilege and protection. But that is not the case here. The interrogatories are directed to the three letters, and the plaintiff is invited to look at the three letters. When those letters are examined a fair and reasonable reading of them is: "My client authorises me to say to you that he will accept such and such an amount in settlement".
>
> That being so, an inquiry whether the plaintiff did or did not authorise his solicitor to write those letters is not an inquiry as to communications passing between the plaintiff and his solicitor confidentially. There is no suggestion in this case of asking for the disclosure of anything that the solicitors may have said to the plaintiff in regard to his claim generally or by way of giving advice as to the prospects of the action.
>
> The inquiry that is raised is whether the plaintiff did or did not authorise his solicitor to write certain letters which state that the plaintiff will accept a certain sum.'

[75]And in conclusion, Taylor L.J said (p.332):-

As indicated, **whether such documents are privileged or not must depend on whether they are part of that necessary exchange of information whose object is the giving of legal advice as and when appropriate**. Accordingly, I agree with the formulation made by the Chief Master in the present case, subject to the additional words which I have placed in brackets. He said:

> 'Once solicitors are embarked on a conveyancing transaction they are employed to ensure that the client steers clear of legal difficulties, and communications passing in the handling of that transaction are privileged [if their aim is the obtaining of appropriate legal advice] since the whole handling is experience and legal skill in action and "a document passing during a transaction does not have to incorporate a specific piece of legal advice to obtain that privilege".'

Judge Baker applied his more restrictive test to the documents in the present case. Those documents have been produced to this court. In the light of the principles stated above, I am of the opinion the appellant's claim that the documents are privileged should have been upheld.

Manser v Dix

[76]The next case that was relied upon by MDV is the decision by Sir W. Page Wood VC in *Manser v Dix* (1855) 1 K & J 451; 24 L.J. Ch. 497 HC. The subject matter of the suit concerned an action to impeach an agreement for the sale of certain leasehold hereditaments of the plaintiff.

[77]In that case, the plaintiff sought production of, inter alia, drafts of the agreement prepared by the defendant's solicitors. The High Court dismissed the application as it took the view that instructions by a client to his counsel for the preparation of the draft agreement though given long *ante litem motam* (before the suit) as well as the draft agreement which had been approved by counsel, are privileged. Page Wood VC said:-

> The documents of which production is now sought are instructions for the draft of the agreement, which resulted in the draft, and the original draft itself, and also the opinion of counsel upon certain alterations in the draft. Both the latter, as I have already intimated, I consider to be within the privilege. The question is whether the instructions for that draft are protected also. I can scarcely conceive any case more calling for protection at the hands of the Court. A party wishing to make his title secure consults his solicitor, being about to deal with trustees for sale of the property, the original owner of which, who made the conveyance in trust for sale, is not a party to the transaction; the intended purchaser wishing to be made sure, and knowing as everyone does the perils which surround a case of that kind, even where everything seems to have been formally done to authorise the trustees to make a title, sends instructions to this counsel. To say that these instructions are not privileged would be a refinement which I cannot make in a case of this description.
>
> If I were to order these instruction to be produced I should go the whole length of deciding that, in every case between [460] vendor and purchaser, if the purchaser raises a difficulty upon the title, he might be entitled to say that eighteen or twenty years before, when the same property was offered for sale, the person then selling had certain consultations with his solicitor or counsel, there being then no dispute, and as soon as the contract was concluded he sent instructions for a conveyance to his counsel, and that the purchaser in every such case would be entitled to see those documents.
>
> If that be the rule, I do not see how to prevent the enormous injustice of enabling every purchaser to obtain production and discovery of all objections to the title, and everything that has passed between the vendor and his solicitors with reference to the title.
>
> That would involve all the consequences so forcibly pointed out by the Lord Justice Knight Bruce in *Pearse v Pearse* (1 De

G. & S. 12) ; and having to choose between the view of that learned Judge and that of Lord Langdale, and considering the comparative expediency of the two course, I have no hesitation in saying that nothing could exceed the injustice of a Court of Equity taking the course of prying into all the transactions between a solicitor has always been considered liable to reprobation for disclosing, and which the Court always prevents him from disclosing if applied to in time ; and the concealment of which is the privilege of the client, not of the solicitor. If, therefore, a distinction can be drawn between this case and *Lord Walsingham v Goodricke* (3 Hare, 122), I shall not hesitate to follow the inclination of the learned Judge's mind in that case, and hold these documents to be within the privilege.

I think that the distinction is that the whole question in that case was not question upon the title, but whether there had been a contract or not, and the documents in question passed at a time when no one was apprehending (which is the word that seems best [461] to suit this case) any dispute, and the contract had never been concluded; **but in this case the consultations were between a man and his solicitors as to a proposed conveyance to him, in order to make himself quite secure. It was from a general apprehension against the whole world, and in order to secure himself; and the doubts and fears so suggested are just those which this Court ought to protect him from having to disclose**.

I think that this makes a sound distinction between the present case and *Lord Walsingham v Goodricke* (3 Hare, 122), and that I may grant this protection, notwithstanding the dicta in *Hawkins v Gathercole* (1 Sim. (N. S.) 150), which in *Warde v Warde* (Id. 18) the same learned Judge seems not to have acted upon, possibly on account of the very distinction which I am now making, that there was an apprehension of a dispute, though there was no actual dispute then existing. That decision was overruled by *Lord Truro*, on the ground that the solicitor had acted in the transaction for both the husband and wife as one and the same person; but he left untouched the other point.

Here, where the consultation has been against all possible claimants who may hereafter dispute the title, I think I am authorised to say that these documents are privileged.

Three Rivers

[78]Counsel then referred to the seminal decision of the House of Lords in *Three Rivers District Council and Ors. v Governor and Company of the Bank of England (No. 6) [2005] 1 AC 610*;; *[2004] UKHL 48*;; *[2005] 4 All ER 948*;; [2005] AC 610;; *[2004] 3 WLR 1274* HL ("***Three Rivers***"). The starting point is the collapse of the Bank of Credit and Commerce International SA ("**BCCI**") in July 1991 with a huge excess of liabilities over assets.

[79]The liquidators and creditors of BCCI, brought an action against the Bank of England ("**BOE**") for misfeasance in public office in respect of its supervision of BCCI before its collapse.

[80]The British government appointed Bingham LJ (*as he then was*) to conduct an inquiry ("**the Bingham inquiry**"). In preparation for the Bingham inquiry, the BOE set up a unit to deal with all communications between the BOE and the Bingham inquiry. The unit was known as the Bingham Inquiry Unit or "**BIU**".

[81]The BOE (through the BIU) retained external solicitors, namely Freshfields, and they in turn retained counsel.

Freshfields and counsel gave advice to the BIU as to the preparation and presentation of BOE's evidence to the Bingham inquiry.

[82]In so far as the legal action against BOE is concerned, pursuant to s.1(4) of the Banking Act 1987, the BOE had statutory immunity save where it is proven that they acted in bad faith.

[83]As such, the parties who had mounted the action against BOE had a high threshold to meet as they had to establish "bad faith" in order to attribute liability to BOE. The claimants therefore sought wide ranging disclosure of communications between the BIU and BOE's solicitors during the course of the Bingham inquiry.

[84]In *Three Rivers*, the House of Lords held that those communications were protected by legal advice privilege. Counsel for MDV referred in particular to the following passages from the judgment of Lord Rodger of Earlsferry:

> "[59] *In Balabel v Air India [1988] Ch 317*, *330* Taylor LJ reviewed the authorities and held that, for the purposes of legal advice privilege, "legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context."
>
> …
>
> [60] When, however, the BIU consulted the lawyers in Freshfields, and through them counsel, about the presentation of their evidence to the inquiry, it was not seeking their comments and assistance as bankers, accountants, rhetoricians or anything else: **it was seeking their comments and assistance as lawyers professing expertise in the field.**
>
> **Either expressly or impliedly, the BIU was asking them to put on legal spectacles when reading, considering and commenting on the drafts. In other words it was asking them to consider, as lawyers, how the Bank's evidence could be most effectively presented to Bingham LJ, given that he was inquiring into the Bank's discharge of their legal responsibilities under the Banking Acts. Such advice could come in many forms. For instance, the BIU could have expected Freshfields to draw attention to any implications, favourable or otherwise, which a particular line of evidence on one aspect of the Bank's supervisory obligations might have for a different aspect of their responsibilities.**
>
> Similarly, Freshfields would be in a position to point out matters which should not be laboured in evidence as they would be obvious to a senior judge like Bingham LJ with his ready grasp of the relevant law. Alternatively, they might highlight points that would be worth exploring more fully.
>
> Of course, your Lordships do not know which issues actually arose and were considered by the lawyers when reading the Bank's draft evidence - far less what comments Freshfields communicated to the BIU which eventually helped to shape the Bank's "overarching" statement to the inquiry. That does not matter. **What matters is that the BIU was instructing the lawyers in Freshfields to carry out a function which necessarily involved the use of their legal skills if it was to be performed properly**. The communications between the BIU and Freshfields were therefore concerned with obtaining "legal advice" in the broader sense in which, as Taylor LJ rightly said in *Balabel v Air India*, that term should be understood for this purpose. It follows that legal advice privilege applies to those communications. The appeal must be allowed.

[**Emphasis** added]

[85]Counsel for MDV said that the although in the present case it was known to the parties that the DSA was to be prepared as per the terms stated in the appellant's letter dated 19th February, 2018, the DSA was nevertheless covered by privilege. Counsel for MDV stressed that the issue of confidentiality should not be confused or conflated with privilege.

[86]It was submitted that a privileged document or communication is "always privileged", unless the privilege is expressly waived by client. It was argued that the loss of confidentiality does not equate to loss of privilege. Counsel referred to the decision of the Federal Court in *See Teow Guan* to underscore the point. It is appropriate now to turn to *See Teow Guan's* case.

See Teow Guan

[87]In *See Teow Guan*, the appellant, Dato' Anthony See Teow Guan who was the executive director/general manager of Kian Joo Can Factory Bhd ("**KJCF**") was sued for defamation. The 1st respondent, See Teow Chuan was the managing director of KJCF. The appellant and the finance director of KJCF met with the advocate and asked her to provide a legal opinion in regards to KL Metal Printing (M) Sdn Bhd, which was being operated by the respondents. The impugned document which gave rise to the claim for defamation was the legal opinion which the appellant had obtained from the advocate. The advocate rendered the legal opinion and addressed it to Kian Joo Can Factory Bhd for the attention of the appellant.

[88]The appellant subsequently published the legal opinion to various persons and in due course the 1st respondent obtained a copy of the same. The respondents claimed that the legal opinion was defamatory because it contained allegations that the respondents were dishonest and acted in breach of their duties as directors.

[89]At the trial of the defamation suit, the respondents sought to admit the legal opinion and called the advocate as a witness to answer questions on the legal opinion. The High Court (*See Teow Chuan & Anor v Dato' Anthony See Teow Guan* [1999] 4 MLJ 42;; [1999] MLJU 344;; [1999] 3 AMR 3731 HC) held that an advocate could not be compelled to disclose the communication she had received from the appellant due to the advocate – client privilege as provided for under s.126 of the *Evidence Act 1950*.

[90]However, on appeal, the Court of Appeal (*See Teow Chuan and Anor v Dato' Anthony See Teow Guan* [2006] 3 MLJ 97;; [2006] 3 AMR 461;; [2006] 2 CLJ 292;; [2006] MLJU 95 CA) treated privilege as co-extensive with confidentiality and held that on the facts the appellant had waived the confidentiality and the privilege attached to the legal opinion, and that therefore the communication between the advocate and the appellant was not protected under s.126 of the *Evidence Act 1950*. The Federal Court in *See Teow Guan* held that the legal opinion is a privileged document and once a document is privileged it is always privileged.

[91]In that case, the loss of confidentiality (*by reason of the publication of the impugned document*) did not occasion the loss of privilege because under *s. 126* of the *Evidence Act 1950* privilege ceases only where the client expressly consents to its disclosure.

[92]The opinion of the Federal Court on this point is encapsulated in the following paragraphs:-

> "[19] To lend support to the above findings the respondents submitted that the principle at common law "once privileged, always privileged" does not extend the privilege to protect a communication which is not confidential or has subsequently lost its confidentiality. The principle of confidentiality is co-extensive with that of legal professional privilege under the section. There can be no privilege without confidentiality. Once confidence ceases privilege ceases.
>
> [20] With respect, I do not agree. I agree with the appellant that the Court of Appeal, in taking the "**loss of confidentiality**" approach to determine loss of privilege, had failed to recognise the common law maxim "**once privileged, always privileged**"..."

[93]Thus, relying upon *See Teow Guan's* case it was argued for MDV that the fact that the respondents were aware that the DSA was to be drafted along the lines of what was stipulated in MDV's letter dated 19 February 2018, of itself, did not cause the DSA to cease being a privileged document. It was emphasized that MDV had never waived privilege *vis-à-vis* the DSA.

[94]In the present case, counsel for MDV argued that the learned Judge was plainly wrong in holding that privilege does not apply. Counsel said the learned Judge's reasoning that the DSA lacks the element of advice is plainly wrong because the benefit of legal advice is the only purpose why MDV's solicitors (and not just anyone else) were instructed to prepare the DSA.

[95]MDV's next ground of objection to the discovery of the DSA is that the document is wholly irrelevant and immaterial in light of the respondents' pleaded case.

[96]In this regard, it was pointed out that the respondents' Defence and Counterclaim is predicated on the allegation that a compromise had been reached between the parties based on the exchange of correspondence and discussions between the respondents and MDV, and that MDV had purportedly reneged on the compromise. It was also contended that the DSA has not been considered nor approved by MDV and was never sent to the respondents. It was therefore submitted for MDV that the DSA is irrelevant and unnecessary for the fair and expeditious disposal of the action.

[97]According to MDV, the learned Judge was plainly wrong to hold the DSA is relevant to MDV's case as MDV is not relying on it to advance their case. MDV's claim against the respondents is premised on, amongst others, the Letters of Offer, Facilities Agreement, Guarantees and Letter of Undertaking executed by the respondents. It is

contended that upon a proper analysis, the learned Judge should have held that the DSA is wholly irrelevant to the respondents' case.

[98]In this regard, it was argued that based on the respondents' own pleaded case and affidavit-in-support of Enclosure 38, the terms of the purported compromise are all reflected in MDV's letters dated 22 December 2017 and 19 February 2018 and as per the discussions at various meetings between the parties. As such, the DSA is neither relevant nor material to the respondents' claim that MDV had breached the terms of the purported compromise.

[99]Counsel emphasized that the DSA has never been approved by MDV nor forwarded to the respondents and does not form part and parcel of the correspondence exchanged between the parties and is therefore wholly irrelevant to the respondents' case that there existed a compromise between MDV, R1 and R2.

[100]It is undisputed that the DSA was never forwarded and/or accepted by the respondents. Hence, it was argued that the DSA therefore cannot in law or in fact be accepted by the respondents to form a contract.

[101]Thus, on settled principles, the DSA cannot amount to a contract between MDV, R1 and R2 nor is it evidence of a contract. In the result, it was submitted that the DSA is wholly irrelevant as it would not and could not advance the respondents' case as to the existence of a purported compromise.

[102]Next, counsel for MDV argued that even if the DSA is relevant, an order for discovery will only be granted if it is necessary either for disposing fairly of the matter or for saving costs.

[103]It was contended that the learned Judge also failed to appreciate that even if the DSA is relevant, discovery ought to be refused as it is plainly unnecessary for the fair disposal of the matter or for saving costs. The respondents' claim on the purported compromise is premised on the exchange of correspondence and the meetings between the parties. All the correspondence exchanged between the parties have been produced before the Court. The respondents also intend to call 4 witnesses to testify on their behalf.

[104]According to counsel, if necessity cannot be shown, then the application for discovery must be refused - Order 24 rule 8 *ROC*. Counsel for MDV argued that even if the DSA is held to be relevant, the respondents must nevertheless satisfy the threshold of necessity.

[105]In this regard, counsel for MDV referred relied on the following passages from the decision of the High Court in *Goo Saw Jin v Hwang Sze Yunn & Anor* *[2018] MLJU 367*;; [2018] 1 LNS 367 HC where it was posited:-

> [41] The next issue that was articulated for the defendants was the issue of "necessity". In this regard, Order 24 Rule 8 *ROC* provides that:-
>
> "Discovery to be ordered only if necessary (O. 24 r. 8)

8. On the hearing of an application for an order under rule 3, 7 or 7A, the Court, if satisfied that discovery is not necessary, or not necessary at that stage of the cause or matter, may dismiss or adjourn the application and shall in any case refuse to make such an order if and so far as it is of the opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs."

[42] On the issue of necessity, I have taken the liberty of referring to the case of *Bayerische Hypo-und Vereinsbank AG v. Asia Pacific Breweries (Singapore) Pte Ltd and other applications* [2004] SGHC 155 where the High Court of Singapore at paragraph 37 stated as follows:

"The **ultimate test is whether discovery is necessary for disposing fairly of the proceedings or for saving costs**. **An assertion that the documents are relevant will not be good enough. Equally, an assertion that the documents are necessary because they are relevant will not be enough**."

[43] Further, in paragraph 38 of the judgment, the Singapore High Court had considered Order 24 Rule 7 which is *pari. materia* with our Order 24 Rule 8 and stated that:

"The court is, by O. 24 r. 7, concerned with the discretion to refuse disclosure of a document **unless the necessity for disclosure is clearly demonstrated.**

[**Emphasis and underlining** added]

[106]Counsel for MDV submitted that in the present case, looking at all the circumstances, including the respondents' pleaded case (*per the Defence and Counterclaim*) it has not been established that discovery of the DSA is relevant and necessary for the fair disposal of the action, or even to save costs. Hence, it was submitted that in all the circumstances, the learned Judge was plainly wrong in allowing discovery of the DSA.

[107]I turn now to the arguments that were made on behalf of the respondents.

[108]For the respondents, it was argued first, in so far as the issue of privilege is concerned, that there is no confidentiality as to the terms that were to be incorporated in the DSA and therefore privilege does not apply. According to the respondents, the issue in this appeal is whether legal privilege applies to a document which was created for the dominant purpose of being extended to a counter-party in a commercial transaction.

[109]Secondly, it was argued that the DSA was relevant and necessary for the fair and expeditious disposal of the action in the High Court.

[110]On the issue of privilege, counsel (*adopting the learned Judge's findings*) said that the DSA is not a privileged document for, *inter alia*, the following reasons:

(a) MDV's letter dated 19 February 2018 states that the settlement agreement was to contain the terms recorded in the correspondence exchanged between the parties in December 2017 and February 2018;

(b) The aforesaid communication was between the parties with a view towards settlement. It is clear that the terms discussed and which were subsequently contained in the DSA does not relate to confidential communication between MDV and its solicitors;

(c) The terms of settlement discussed between the parties are not matters which were meant to be kept confidential between MDV and its solicitors;

(d) The DSA although prepared by MDV, was intended to be a joint document for the benefit of MDV and R1.

Asahi J

[111]According to the respondents' counsel, the findings of the learned Judge are supported by the Australian Federal Court case of *Asahi Holdings (Australia) Pty Ltd v Pacific Equity Partners Pty Ltd (No 2)* *(2014) 312 ALR 403* ("***Asahi***") where it was held [35] - [38] as follows:

> [35] It is uncontroversial that legal professional privilege protects the disclosure of documents that record legal work carried out by the lawyer for the benefit of the client where the dominant purpose for the creation of that work product was the giving or receiving of legal advice or where the work product was prepared in anticipation of or for the purposes of litigation. The relevant authorities are collected under principles (8) at [44] of *AWB Ltd v Cole (No 5)* (2006) 155 FCR 30; *234 ALR 651*;; *[2006] FCA 1234* per Young J.
>
> [36] In relation to documents that record legal work carried out for the benefit of the client, legal professional privilege extends beyond actual communications. As Gummow J pointed out in *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 569; 141 ALR 545 at 597, that extension is necessary to deny access:
>
> > …to any document prepared by a lawyer or client from which there might be inferred the nature of the advice sought or given.
> >
> > Examples include communications between the various legal advisers of the client, draft pleadings, draft correspondence with the client or the other party, and bills of costs.
>
> [37] The work product of the lawyer may be put to a number of different uses. It may be communicated to the client in order for the lawyer to provide legal advice. It may be used by the lawyer to facilitate the investigation, preparation and presentation of the client's case in anticipated or extant litigation. Legal professional privilege will attach to the documents made in furtherance of those uses.
>
> [38] However, **legal professional privilege does not attach to all the work product of a lawyer produced for the benefit of a client. Relevantly, legal professional privilege will not attach to documents whose purpose is to communicate the work product of the lawyer to persons other than the client, in circumstances where the lawyer/client confidentiality attached to the work product of the lawyer is not to be maintained**. Drafts of a pleading, witness statement, affidavit, legal submission or correspondence are all work product of a lawyer to which legal professional privilege will ordinarily attach when those documents are in draft form and in the hands of the lawyer, the client or their agent. Once in final form for the intended use

of being provided to others, legal professional privilege will not attach to the non-confidential communication of the finalised document provided to such persons.

[112]In amplification it was submitted that whilst the DSA was prepared by MDV's solicitors, at all material times it was envisaged by the parties (*through the appellant's letters dated 19 February 2018, 27 February 2018*) that the finalized draft of the settlement agreement was to be extended to R1. It was submitted that privilege cannot attach to a document in circumstances where there is an agreement to extend or circulate the said document.

[113]In support of this proposition, counsel referred to and drew an analogy with the Court of Appeal's decision in ***Dr Noor Aini bt Hj Sa' ari v Sa-Art Sae-Lee (also known as Sa-Art Phuakthim) & Anor*** **[2012] 1 MLJ 464**; **[2012] 3 CLJ 913 CA** ("***Dr Noor Aini's case***").

[114]In *Dr. Noor Aini's* case, the respondents had filed a claim for medical negligence against the appellant for her failure to take proper care of the 1st respondent during her period of pregnancy causing her to lose one of the twins before childbirth and birth of the 2nd respondent in a deformed state. The appellant consequently sought the consent of the 1st respondent to conduct a physical examination of the 2nd respondent resulting in the consultant report prepared by one Dr Malinee Thambyayah.

[115]The examination, for the purposes of assessing the 2nd respondent's current condition and prognosis, was agreed upon on the condition that the appellant's solicitors undertake to furnish a copy of the report to the respondents' solicitors. Subsequently, the appellant's solicitor released the consultant report with substantial parts of the same covered up.

[116]The appellant claimed privilege and that the respondents were not entitled to have sight of the whole report because they only agreed to provide a report in relation to "the condition and prognosis of the 2nd respondent". The respondents' application for the production of the consultant report in full by the appellant was allowed by the High Court. In that case, the Court of Appeal dismissed the appellant's appeal and held:-

> "[9] Accordingly, in our opinion, irrespective of the scope of O 34 r 7 of the RHC, the appellant is obliged pursuant to the agreement concluded by it with the respondents to make discovery of the consultant report in its uncensored state. In our view, **the appellant is, additionally, estopped from refusing to make discovery since they through their solicitors agreed to provide the consultant report subject to two conditions and both conditions have been complied with by the respondents**."

[117]In light of the Court of Appeal's ruling in *Dr Noor Aini's* case, it was submitted that since the terms to be incorporated into the DSA are to be as per the MDV letter dated 19 February 2018 and as MDV had undertaken to prepare the DSA and forward it to R1, MDV is estopped from refusing to make discovery of the DSA. The respondents submitted that it is not their case that the DSA amounts to a contract.

[118]In this regard, the respondents contend that the DSA is necessary and relevant to be disclosed as it forms a part of a series of contemporaneous documents that support their case that a compromise was concluded.

According to the respondents, the very act of MDV in preparing the DSA and its contents thereof, point to the conduct and subjective state of mind of the parties at the material time in February / March 2018.

[119]It was submitted that the contents of the DSA are crucial matters which will have to be tested under cross – examination of the MDV's witnesses during the trial of this action.

[120]In short, it is contended that the DSA contains information, which may directly or indirectly enable the respondents to advance their case or damage the case of the MDV or which may fairly lead to a train of inquiry which may have either of these consequences – see: ***Manilal & Sons (Pte) Ltd v Bhupendra KJ Shan (t/a JB International)*** **[1990] 2 MLJ 282 HC**.

[121]The respondents deny MDV's allegation that the application for discovery amounts to a 'fishing expedition'. On the contrary, the respondents say that they have identified with precision, the DSA as a specific document sought to be discovered (*as opposed to a general class of documents*) and that the DSA is a culmination of terms agreed to by the parties after a series of discussions.

[122]It was emphasized on behalf of the respondents that a party claiming legal privilege in respect of a piece of evidence, has the initial burden to satisfy the court that such privilege applies. See: ***Brink's Inc & Anor v Singapore Airlines Ltd & Anor*** **[1998] 2 SLR (R) 372 SGCA**.

[123]Thus the material issue to be determined in this appeal is whether the MDV has established that the DSA is protected by privilege. In deciding whether a piece of evidence is privileged, the court must examine the circumstances of the case objectively before deciding whether privilege attaches to such evidence.

[124]In this regard, counsel referred to ***Tenaga Nasional Bhd v Bukit Lenang Development Sdn Bhd*** **[2016] 10 CLJ 164**; **[2016] 5 MLJ 127**; **[2016] 4 AMR 345** ("***TNB v Bk Lenang***") where the Court of Appeal made it clear that privilege will not apply to "material facts".

[125]In that case, a survey report procured from a surveyor for the purposes of obtaining legal advice, was held not to be privileged as it contained matters of fact pertaining to the core issue of trespass in that case. The Court of Appeal opined **[32]**:-

> "Even if it is assumed that common law privilege is applicable in this case, we take the view that **there can be no privilege over material facts**. We agree with learned counsel for the respondent that the detailed survey plan contains facts relating to the appelant's infrastructure on and over the respondent's lands. These facts go to the core of the issue of trespass. Facts which are conveyed in communications subject to litigation privilege are not privileged."

[126]Counsel for the respondents then referred to the Court of Appeal's decision in ***Wang Han Lin & Ors v HSBC Bank Malaysia Berhad*** **[2017]10 CLJ 111**; **[2017] 1 LNS 1101 CA** which endorsed that part of the decision in *TNB v Bk Lenang* where it was held that privilege will not accrue over material facts.

"[41] The Court of Appeal went on to hold that even if common law privilege is applicable, no such privilege would accrue over material facts, such as the detailed survey plan which related to the appellant's own infrastructure on and over the respondent's lands. Matters of fact conveyed in communications subject to litigation privilege are not privileged. Neither was the survey plan procured by the appellant for the purposes of obtaining legal advice.

…

[60] In summary therefore, with the greatest of respect, I prefer the second line of reasoning adopted by the Court of Appeal in *Bukit Lenang* (above), namely that even if litigation privilege (based on the common law) was applied, the appellant there would not have succeeded in its contention that the survey report warranted protection under section 126 of the EA because the circumstances necessary to invoke litigation privilege was missing."

[127]It was argued that on the present facts, similarly, the DSA cannot be considered a privileged document as its contents relate to material facts, namely the terms of the settlement as set out in MDV's letters of 19 February 2018 and 27 February 2018.

[128]The central plank of MDV's argument is that the DSA is allegedly a first draft prepared by MDV's solicitors for the purpose of discussion with MDV and that the DSA has allegedly not been considered nor approved by MDV. As for MDV's contention that in law, such a draft amounts to 'legal advice' and is subject to legal privilege, the respondents argue that the benefit of legal advice is allegedly the only purpose why MDV's solicitors were instructed to prepare the DSA.

[129]The respondents' counsel said that the case of *Manser v Dix* (*supra*) (relied upon by MDV) is distinguishable to the present facts as that case concerned the issue of whether 'instructions' arising out of a draft agreement were privileged, whereas the present case concerns the preparation of a joint document which was to be executed by MDV and R1.

[130]It was submitted that the jurisprudence concerning legal advice privilege has matured and evolved considerably since *Manser v Dix* (decided in 1855) and that the current approach may be gleaned from the recent English Court of Appeal case of ***R (on the application of Jet2.com Ltd) v Civil Aviation Authority (Law Society of England and Wales intervening)*** **[2020] EWCA Civ 35**; **[2020] WLR(D) 51** ("***Jet2.com***") where the Court of Appeal posited that the party seeking to assert legal advice privilege must demonstrate that the dominant purpose of that communication or document with the external solicitor was to obtain or give legal advice.
Jet2.com

[131]In *Jet2.com*, the applicant took judicial review proceedings against the Civil Aviation Authority ("**CAA**") in relation to the latter's publication of a letter and a press release critical of Jet2's non-participation in a new consumer complaint scheme. Jet2 argued the CAA did not have the power to make the publications and that it did so for an improper purpose. Jet2 applied for disclosure of drafts of the letter and records of all relevant discussions

regarding the same. The CAA asserted relevant emails and drafts of the letter were protected by LAP because they were circulated to in-house legal advisers as well as company executives and discussed advice in relation to the drafts.

[132]In the judicial review proceedings, Mr. Justice Morris concluded that claims to LAP are subject to the dominant purpose test. He ruled that drafts of the letter should be disclosed, unless specifically drafted by the lawyers or for the dominant purpose of obtaining legal advice, but communications with lawyers that included advice on the letter (or emails between executives which might disclose that advice) were covered by legal advice privilege.

[133]On appeal, the CAA challenged a number of aspects of the ruling, including the finding that LAP is subject to the dominant purpose test. The Court of Appeal opined that the weight of the authorities supported the inclusion of the dominant purpose test.

[134]Further, the Court found the application of the dominant purpose test justified because it created welcome parity between the two limbs of privilege, in that the purpose test applies to litigation privilege and should apply to LAP.

[135]The inclusion of the dominant purpose test would also be in line with well-established case law in Australia, Singapore and Hong Kong, and it could be inferred that the principle has been workable in those jurisdictions. The Court of Appeal concluded that Morris J was correct in finding that **"*the proponent of the privilege must show that the dominant purpose of that communication or document was to obtain or give legal advice*." [96]**. The documents sought by Jet2 did not attract LAP, despite being circulated to in house-lawyers, because the dominant purpose was not to give legal advice.

[136]In *Jet2.com,* Lord Justice Hickinbottom at [42] opined that:

> "it is therefore necessary for the party seeking to rely on the right to withhold evidence to satisfy the criteria of each of four elements: there must be (a) a communication (whether written or oral); (b) between a client and a lawyer, or a lawyer and his client; (c) made in confidence; (d) for the purpose of giving or obtaining legal advice".

[137]He said that in that case, the focus of the appeal is whether the "purpose" in (d) must be the "dominant purpose". He examined several authorities on the topic and concluded:-

> 94. For those reasons, I do not consider that there is any good ground for not following the preponderance of authority which supports the inclusion of a dominant purpose criterion into LAP.
>
> 95. Further, in my view there are good grounds for including such a criterion.
>
> i) Although they do have some different characteristics, litigation privilege and LAP are limbs of the same privilege, legal professional privilege. It is uncontroversial that the dominant purpose test, grown out of *Grant v Downs*, applies to litigation privilege. For the reasons I have given, I am unpersuaded that *Eurasian* is correct to consider

the limbs as fundamentally different with regard to purpose. In my view, there is no compelling rationale for differentiating between limbs of the privilege in this context. The "dominant purpose" test in litigation privilege fixed by *Waugh* derives from Australian jurisprudence, which has since *Grant v Downs* treated the purpose test (whatever it might be) as applying to both limbs of the privilege.

ii) Whilst I accept that the position is not uniform, generally the common law in other jurisdictions has incorporated a dominant purpose test in both limbs of legal professional privilege, e.g., in addition to Australia above (considered above: see paragraphs 74-75), Singapore (*Skandinaviska Enskilda Banken AB v Asia Pacific Breweries* [2007] 2 SLR 367) and Hong Kong (*Citic Pacific Limited v Secretary of Justice* [2016] 1 HKC 157 at [51]-[62]).

This not only suggests that such a test is able to work in practice; but this is a legal area in which there is advantage in the common law adopting similar principles.

96. For those reasons, whilst I readily accept that the jurisprudence is far from straightforward and the authorities do not speak with a single, clear voice, I consider Morris J was correct to proceed on the basis that, for LAP to apply to a particular communication or document, the proponent of the privilege must show that the dominant purpose of that communication or document was to obtain or give legal advice.

[138]As for the cases relied upon by the appellant, counsel for the respondents said that the case of *See Teow Guan* dealt predominantly on waiver of privilege as opposed to setting out the test for determining whether a piece of evidence attracts privilege in the first place.

[139]As such, it was argued that the case is of little assistance to MDV. Referring to *Balabel* counsel said that it establishes that the test in determining whether legal privilege applies is whether the communication or document was made confidentially for the purposes of legal advice.

[140]As for *Skandinaviska* the issue was whether the element of confidentiality in the communications between a solicitor and client had been lost because the communications occurred in the presence of PWC who was a third party to the solicitor-client relationship. The Singapore Court of Appeal, went on further to hold that in deciding whether legal advice privilege applies, the 'dominant purpose' of the creation of the document must be considered.

[141]According to Counsel, the following authorities across the Commonwealth make clear that legal advice privilege would only apply where the dominant purpose of the creation of a document was for the giving or receiving of legal advice.

[142]In the leading High Court of Australia case of ***Grant v Downs*** **(1976) 11 ALR 577** the apex court there held that certain medical reports sought in discovery were disclosable as the dominant purpose of its creation were not for the obtaining of legal advice.

"……..a document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using

it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.

…

It seems to me to be preferable to test the status of each document according to the purpose of its production and not to erect categories of documents so as to facilitate some mechanical, almost computerized, resolution of the question of the right to withhold a document from inspection. For my part, I prefer the word "dominant" to describe the relevant purpose.

…

So far as concerns the document in the present case, I have no difficulty whatever in concluding that the evidence of Dr Barclay, which will be found recited in the reasons for judgment of other members of the court, fell far short of establishing that the dominant purpose of producing the report was to obtain advice or to aid the conduct of litigation then in reasonable contemplation."

[143]In *Brink's Inc* (*supra*) the Singapore Court of Appeal held as follows:

"It is established law that communications between the client and third parties attract legal privilege only if the document was obtained for the dominant purpose of obtaining legal advice upon pending or contemplated litigation.

…

The purpose of obtaining legal advice, to use the words of Lord Edmund-Davies in the *Waugh* judgment referred to above (at p 543), must be of clear paramountcy - dominant purpose is the touchstone. The privilege clearly should not attach to all professional advice taken merely on the basis that it is normal or procedural for the insurer to instruct such reports to be made in the immediate aftermath of an incident and for such reports to be forwarded to their solicitors."

[144]The respondents' counsel submitted that the principle in *Asahi Holdings* namely, that legal professional privilege only protects the disclosure of legal work carried out by the lawyer where the dominant purpose for the creation of that work product was the giving or receiving of legal advice, is relevant in the instant case with regard to the preparation of the DSA. This is evident from the various meetings and discussions took place between November 2017 – January 2018 in which the settlement terms were discussed and the exchange of correspondence between December 2017 and February 2018, containing the settlement terms and conditions and in particular, MDV's letter dated 19 February 2018.

[145]Counsel for the respondents emphasized that there is nothing on affidavit evidence to suggest that the DSA was prepared for the purposes of seeking legal advice. It was contended that MDV's letter of 19 February 2018 states expressly that the settlement terms had been agreed to and accordingly the DSA was to be prepared to reflect such terms.

[146]In the alternative, it was argued that if privilege attaches to the DSA, then the respondents' position is that the MDV had consented to the disclosure of the DSA and/or waived its claim to privilege by reason of the following:

(a) MDV's letter dated 27 February 2018 in which MDV informed R1 that the said agreement would be prepared and extended to R1 for execution;

(b) The telephone conversation between MDV's finance director and the 4th respondent on 28 February 2018 confirming that the settlement agreement would be forwarded to R1 the following week;

(c) The telephone conversation between MDV's vice president (legal & secretarial) and the deponent of the respondents' affidavits informing that the settlement agreement was ready and due to be forwarded to R1 the same day.

[147]The respondents emphasized that MDV has not offered an explanation to these matters and these unchallenged facts are indicative of MDV expressly waiving its claim to privilege (if any), over the DSA. The respondents contend that if MDV had taken the position that the DSA was privileged they ought to have indicated as such in their correspondence with R1. The respondents point to the fact that there is no statement to that effect in the correspondence.

[148]The respondent's Counsel argued that MDV is estopped from hiding behind the cloak of privilege and refusing disclosure of the DSA and they are bound to make good their agreement to extend the DSA within the meaning of the case of *Dr. Noor Aini.*

[149]As for relevance of the DSA, the respondents contend that in early 2018, MDV, R1 and R2 reached a compromise or settlement in respect of the debt due and owing under the Facility through an exchange of correspondence and various meetings between parties ("**the compromise**"). The respondents also contend that the terms of the compromise are concluded and reflected in the various correspondence exchanged between the parties.

[150]According to the respondents, notwithstanding the compromise, MDV had insisted that parties must execute a formal agreement to record the terms of the compromise set out in MDV's letters dated 22 December 2017 and 19 February 2018.

[151]It is alleged that MDV failed to forward the formal settlement agreement to R1 and R2 for execution and as a result, MDV had breached the compromise and caused the respondents to suffer loss and damage. The respondents contend that discovery of the DSA is necessary as the mere existence of the DSA will support their case that there was a compromise and that MDV had breached the terms of the compromise.

[152]In so far as the relevance of the DSA is concerned, it was argued for the respondents that the learned Judge

did not misdirect herself on the issue of relevance of the DSA as it is a document that is likely to throw light on the case at hand.

[153]Counsel emphasized that the learned Judge correctly held that based on the pleaded case of the parties, the crucial issue to be determined is whether a compromise was reached between the parties over the sums owed under the Facility. It was contended that the DSA is a relevant document in relation to the issue as to whether a compromise was reached between the parties.

[154]Counsel emphasized that in exercising her discretion to order discovery, the learned Judge made the following findings of fact and/or law:

(a) MDV's letters dated 19 February 2018 and 27 February 2018 and R1's letter dated 26 February 2018 clearly showed that the parties had agreed to reduce the terms of settlement in writing, in the form of an agreement;

(b) The agreement was to be prepared by MDV and forwarded to R1 for execution;

(c) The letters issued by MDV suggest that the terms of the compromise were solely based on the terms and conditions stated in the MDV's letter dated 19 February 2018;

(d) The settlement agreement (DSA) which was prepared by MDV and intended to be forwarded to R1 is crucial and relevant to the respondents' case that a compromise was concluded between the parties;

(e) Similarly, the settlement agreement (DSA) is equally relevant to MDV's case towards showing that no compromise was reached between the parties.

[155]In response to MDV's contention that the DSA was irrelevant as the document is merely a "draft" which was not executed by the parties, the respondents pointed to that part of the learned Judge's decision where she declined to accept MDV's contention for the following reasons:-

(a) The learned Judge held that the fact that the settlement agreement is merely a draft, does not make the document irrelevant. A document which is in the form of a draft can be relevant and necessary if on the facts, such document will enable the parties to prove their case;

(b) Whether the DSA amounts to a binding settlement and whether the said document is admissible or otherwise, are issues to be determined at trial of this action.

[156]Counsel for the respondents relied on the decision of the Federal Court in the case of ***Abdul Rahim Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors*** **[2006] 5 MLJ 1 FC** where the Federal Court (*in dealing with the significant differences between the contents of a "working draft" and the final facility agreement which was executed*), observed as follows:

"Reverting to the facts of the present case the trial judge had de-emphasized the importance of the working draft, agreed

upon by both the parties, after a series of negotiations. To him, it was merely a pre-contractual document that did not deserve much weight.

…

We however, take a diametrically opposing view on this. We find this working draft an important document, bearing in mind that it was the evidence of DW1, PW1 and PW2, of the importance of this working draft and the fact that the facility agreement was to formalize what was agreed upon by the parties, in the working draft."

Chen Sheau Yang

[157]The respondents also relied on the decision of the Court of Appeal in ***Chen Sheau Yang v SMC Healthcare Sdn Bhd*** **[2018] MLJU 1304**; **[2018] 1 LNS 1379 CA** ("***Chen Sheau Yang***"). In that case, the key question was whether there was a concluded contract between the plaintiff (as purchaser) and defendant (vendor) for the sale and purchase of a parcel of land which was owned by the defendant.

[158]The plaintiff's claim was for a refund of the deposit of RM4,160,000.00, out of RM5,200,000.00 which they had paid as deposit defendant. The defendant's counter claim was for a declaration that he is entitled to forfeit the whole deposit of RM5,200,000.00 and for damages to be assessed for losses and damages suffered as a result of the plaintiff's repudiation of the contract entered into between the parties and for alleged wrongful caveat of the subject land.

[159]The High Court ruled in favour of the plaintiff and held that there was no concluded contract for the purchase of the land. The Court of Appeal allowed the defendant's appeal and held that there was a concluded contract. In *Chen Sheau Yang's* case the plaintiff first issued a Letter of Intent to Purchase dated 26 April 2013 to the defendant for the purchase of the land.

[160]The express terms of the Letter of Intent, amongst others, stated that (a) the terms are subject to contract;(b) the terms shall remain in force and effect upon the defendant's acceptance until a formal sale and purchase is drawn up and signed; and (c) execution of the sale and purchase is subject to approval of the plaintiff's Board of Directors and satisfactory valuation by the plaintiff's valuer. On or about 30 May 2013, the plaintiff engaged the legal firm of Ronny Cham & Co to act for it in the transaction.

[161]On or about 27 July 2013, the plaintiff issued a cheque to the defendant for a sum of RM5.2 million and about two days later ie, on 29 July 2013, the plaintiff issued a Letter of Undertaking to the defendant which was accepted by the defendant.

[162]Thereafter Messrs. Ronny Cham & Co prepared a draft sale and purchase agreement and forwarded the draft agreement by letter dated 1 August, 2013 to their client (the plaintiff) for approval. Later on, Ronny Cham & Co

prepared another draft agreement and forwarded the draft agreement by a letter dated 13 January 2014 for the plaintiff's approval.

[163]By letter dated 25 February 2014, the plaintiff informed Ronny Cham & Co that they accepted the terms of the draft agreement and instructed the legal firm to forward a copy to the defendant for his approval. The plaintiff also informed the legal firm that the directors of the plaintiff would be executing the sale and purchase agreement on behalf of the plaintiff.

[164]The defendant informed Ronny Cham & Co by letter dated 26 February 2014 that he was agreeable to the terms of the draft agreement. Thereafter the defendant executed the finalised sale and purchase agreement and the memorandum of transfer which were given to Ronny Cham & Co together with the original title deed to the land.

[165]By letter dated 18 August 2014, the plaintiff informed the defendant that it had decided not to proceed with the execution of the said sale and purchase agreement. This was followed by a letter of demand dated 26 February 2015 from the plaintiff's solicitors demanding for a refund of the sum of RM5,200,000.00 and RM78,000.00 as legal costs.

[166]The plaintiff had objected to the admissibility of (i) the plaintiff's letter dated 25 February 2014 to Messrs Ronny Cham & Co, and (ii) Messrs Ronny Cham & Co's letter dated 26 February 2014 to the plaintiff. The plaintiff asserted legal professional privilege with respect to these letters.

[167]The Court of Appeal referred to *See Teow Guan's* case, where the Federal Court had ruled that to be a privileged communication under s.126 of the Evidence Act 1950, the communication must be of a confidential nature in the sense that it must communication pertaining to legal advice or communication with a view to obtain legal advice.

[168]The Court of Appeal held that the two impugned letters were not of a confidential nature and were not letters which contained legal advice and were not communication made to obtain legal advice. According to the Court of Appeal, the letter dated 25 February 2014 was a letter merely to inform the solicitors that the draft sale and purchase agreement was acceptable to them and instructed that a copy be forwarded to the defendant for his approval.

[169]And as for the letter dated 26 February 2014, the Court took the view that it was a letter from the solicitors informing the plaintiff that the defendant had finalised and signed the draft sale and purchase agreement and the memorandum of transfer. The Court of Appeal opined that the two letters were not confidential and cannot be privileged and ought to be admitted as evidence.

[170]According to the respondents in certain instances, a draft agreement in itself can amount to a valid and binding

contract between the parties if either or both parties had acted upon the said agreement. Ultimately, the weight to be attached to the DSA is a question that can only be determined at trial.

[171]Counsel for the respondents relied on the following cases in relation to the argument that a draft document could in certain circumstances constitute the evidence of a contract. See: ***EMS Bowe (M) Sdn Bhd v KFC Holdings (M) Bhd & Anor*** **[1994] 4 MLJ 424 HC** and ***Nowran Begam binti Mohamed Saliff (Pentadbir Harta Pusaka Mohamed Ihsan bin Saiyed Abu Thahir, si mati) v Nantha Kumar Devar a/l Sangaran & Anor (CTRM Aviation Sdn Bhd, intervener)*** **[2016] MLJU 226 HC**.

Analysis & Conclusions

[172]It would be convenient to first deal with the question of relevancy of the DSA. The starting point in the discussion is the case of ***Yekambaram***, where Edgar Joseph Jr said (page 585 of the CLJ report) that:

> The essential elements for an order for discovery are threefold; namely, first there must be a "document", secondly, the document must be "relevant" and thirdly, the document must be or have been in possession, custody or power of the party against whom the order for discovery is sought.

[173]Further, in regards to the critical question of "relevance" Edgar Joseph Jr said (at page 585 of the CLJ report):

> As to "**relevance**", our Rules of the High Court limit discovery to documents which are "relevant to" or "relate" to the factual issues in dispute. More particularly, the discovery obligation applies to documents "relating to matters in question in the action" [Rules of the High Court, O. 24, r. 1(1)] or "relating to any matter in question in the cause or matter" [O. 24, r. 3(1)]. **In practice, relevance is primarily determined by reference to the pleadings but there need not be a pleading for a matter to be said to be in issue.** (See *Phillips v. Phillips* [1879] 40 LT 815, 821.
>
> In this context, **relevance is defined broadly**. It does not extend to documents relevant merely to a party's credibility unless that itself is a fact in issue. (See *George Ballantine & Sons Ltd. v. Dixon & Son Ltd.*[1974] 1 WLR 1125). If, however, the document's relevance is to a fact in issue, not simply to credibility, it has long been settled that relevance of an indirect kind suffices.
>
> The classic authority, on the test for relevance in the context of discovery is *Compaignee Financiere du Pacifique v. Peruvian Guano Co. [1882] 11 QBD 55* where Brett LJ said this (p. 63):
>
> It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may - not which must - either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary.
>
> I have put in the words "either directly or indirectly", because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences...

> The observation of Edward Bray in his highly regarded work on discovery at p. 18 as to the test of "**materiality**" merits quotation; there he says this:
>
> ... for the purpose of testing the materiality of the discovery to a particular issue... **it is the case of the party seeking the discovery that must be assumed to be true**, and not that of the party from whom the discovery is sought.

[174]The learned Judge in the present case opined that the DSA was relevant and necessary in the context of MDV's claims as well as the counterclaim.

[175]It is imperative to note that MDV's claim against the respondents is premised on, amongst others, the Letters of Offer, Facilities Agreement, Guarantees and Letter of Undertaking executed by the respondents and the DSA plays no part in the matrix of documents *vis-a-vis* MDV's claim. The DSA does not form part of the documents that MDV is relying upon for purposes of the claim against the respondents. Next, as for the Counterclaim, based on the respondents' own pleaded case (*per the Defence and Counterclaim*) and the affidavit filed in support of Enclosure 38, is that the purported compromise was concluded and reached through the exchange of correspondence and various meetings between the parties and the execution of the settlement agreement was a mere formality.

[176]No doubt, in terms of the *Yekambaram* test, there is of course no dispute that the DSA exists and was/is still in MDV's possession. However, there is no evidence to establish that the DSA which is in MDV's possession, is a version which had been approved by MDV.

[177]It is speculative to assume that the DSA was the finalised document. Indeed, it could well be a version which was work in progress and still had to be discussed between MDV and its solicitors.

[178]No doubt, in R1's letter 25 April 2018 reference was made to discussions with MDV's personnel who had represented that the DSA is ready to be forwarded to R1 and that they must sign it quickly.

[179]Further, we are mindful that the respondents have relied in particular to the following paragraphs of R1's letter to MDV which is apparently constitutes evidence of the fact that the DSA was ready to be forwarded to the respondents. The paragraphs in that letter read as follows:-

(d) your letter dated 19 February 2018 to us setting out your terms and conditions of the Settlement Proposal ("Settlement Letter") which included your stipulation that the settlement agreement between MDV and Platinum TechSolve Sdn Bhd ("Platinum TechSolve") was to be executed by 31 March 2018 ("Settlement Agreement"), which was accepted by us;

(e) your letter dated 27 February 2018 to us, reiterating that the settlement terms shall be solely based on the Settlement Letter and that you shall be proceeding to prepare the Settlement Agreement based on the terms of the Settlement Letter;

(f) the telephone conversation between your officer, Mr. Ng Tse Khim and our Finance Director, Sushil Sidhu ("FD") on 28 February 2018 confirming that the Settlement Agreement will be provided to us the following week;

(g) the follow-up communications with your officers for the Settlement Agreement in which we had been continuously informed that the same was being drafted and was pending from your lawyers;

(h) your email dated 28 March 2018 and the telephone conversation on the same date attended by your Vice President, Legal & Secretarial, Puan Rozita Khamsiah Othman ("VP Legal"), your officer Mr. Mohammad Nizam Ishak and our Akma Abid in which your VP Legal had assured us that she already had the Settlement Agreement from your lawyers and the same was to be forwarded to us later in the evening or at the latest, by the following morning and we are to sign quickly to comply with the agreed stipulated timeline as stated in the Settlement Letter.

[180]And, there was also no letter by MDV to repudiate (or rebut) the assertions which were made in R1's said letter. However, counsel for MDV submitted that the relevant paragraphs of the respondent's affidavit which made references to the said letter had been denied by MDV. As such, counsel for MDV said that there was no admission to the matters stated in the respondents' affidavit, and by extension, R1's said letter.

[181]In our view, although there is no positive averment in MDV's affidavits that the DSA has never been approved by MDV's management, there is equally no compelling evidence that the DSA had been approved and/or that the MDV had unequivocally agreed to forward the version of the DSA (*which was still in their possession*) to R1.

[182]The respondents' contend that MDV has not tendered any evidence to demonstrate that the DSA was "not final' or "not approved" by their management. In this regard, the respondents relied on the contents of their letter dated 25 April 2018. To MDV which asserts that they (respondents) were told by MDV's officers that the DSA would be forwarded to the respondents for execution. No doubt MDV has not credibly repudiated the contents of that letter. But the important point here is that there is no way of knowing whether the DSA would have been accepted or acceptable by the respondents. This is particularly imperative as MDV's letter of 19 February 2018 makes it abundantly clear (*via paragraph F*) that they (MDV) are at liberty to add "*Any such other terms and conditions as MDV deems necessary*".

[183]As such, going by what has been asserted in R1's letter dated 25 April 2018 and the stand taken via the affidavits filed in support of Enclosure 38, it seems to be that R1 will execute the DSA, regardless of its contents.

[184]We find this to be quite untenable, particularly in light of R1's own letter dated 26 February 2018 where it was stated, "*We look forward to the receipt of the* ***draft settlement agreement*** *and all other relevant documents from you* ***for our review and further action****"*. This can only mean that the DSA was to be reviewed by R1 and there could well be discussions between MDV and R1 resulting in changes to the final version of the settlement agreement. Again, it is important to emphasize that at all times MDV had retained the discretion to add to the DSA, such other terms as

they thought fit. Hence, without R1 knowing what is contained in the DSA and without having agreed to the terms as stated therein, it is way too speculative to conclude that R1 would have agreed to the DSA in its entirety.

[185]In our view, regardless of the truth of what was stated in R1's letter, it is indisputable that the DSA is not part and parcel of the correspondence exchanged between the parties and is therefore wholly irrelevant to the respondents' case that there existed a compromise between the MDV, R1 and R2.

[186]In this regard, it is important to keep in mind that the respondents have pleaded that the terms of the purported compromise are all reflected in the MDV's letters dated 22 December 2017 and 19 February 2018.

[187]In view of the case as pleaded by the respondents, we fail to see how the DSA is relevant and material to the respondents' claim that MDV had (allegedly) breached the terms of the purported compromise. From the standpoint of the pleadings, it is clear the respondents' position is that there was a compromise/ settlement that was reached between the MDV and the respondents notwithstanding that no formal settlement agreement was executed; and the terms of the purported compromise/ settlement were reflected in the correspondence exchange between parties. As such, premised on the position as contended by the respondents, the DSA which was prepared by the MDV's solicitors and yet to be considered and approved by the MDV and which had yet to be forwarded to the respondents, cannot be relevant or necessary to determine the issue as to whether a compromise/ settlement was reached.

[188]The learned Judge concluded that "*the fact that it is merely a draft Settlement Agreement does not make it irrelevant*". She said, "*a document which is in the form of a draft which has yet to be executed is relevant and necessary, if on the facts, such document will enable the parties to prove their case. However whether the draft Settlement Agreement is in fact a binding settlement between the parties and whether the said document is admissible or otherwise are issues to be determined at the trial*". The learned Judge relied on *Abdul Rahim Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors* [2006] 5 MLJ 1 FC; *National Feedlot Corp Sdn Bhd & Ors v Public Bank Bhd* [2018] MLJU 766;; [2018] 1 LNS 804 HC and *Chen Sheau Yang v SMC Healthcare Sdn Bhd* [2018] MLJU 1304 CA.

[189]It is necessary to examine these cases to elicit the legal propositions that were established. The first case is *Abdul Rahim Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors.* It is imperative to note that, that case had nothing to do with privilege or relevancy for purposes of discovery.

[190]In fact, the issue in that case was whether the Bank had misled the borrower into thinking that the terms as per the "working draft" (which contemplated 2 drawdowns) were the same as the final version of the facility agreement which was executed by the borrower.

[191]In *National Feedlot Corp Sdn Bhd & Ors v Public Bank Bhd* the plaintiffs applied pursuant to Order 34, r. 2(2)(i) ROC 2012 to file additional documents intended to be used at the continuation of the trial of the action. One of the

documents was titled as "*Tricor National Feedlot Corporation Sdn Bhd Ground Business Valuation*" and the document appeared to be a "*Draft Report for Discussion Only*".

[192]The defendants objected to the document being tendered in evidence as the plaintiffs have failed to state with certainty as to why the document is essential to their claim. Further, according to the defendant, as the document appears to be only a draft, the document is undated and incomplete and the maker of the same is unknown, the document should not be permitted to be part of the documents for trial. The learned trial Judge nevertheless allowed the document to be placed in a supplementary bundle of documents.

[193]Again, it is important to note that this was not a case regarding discovery of documents. In that case the "draft" document was being tendered for purposes of the damages aspect of the plaintiffs' claim. Hence, the issue of relevancy and privilege did not arise for consideration.

[194]Next, in *Chen Sheau Yang*, the plaintiff (purchaser) objected to their own letter to their solicitor, and the solicitor's letter to the plaintiff being tendered. They claimed that those letters were "privileged". The Court of Appeal opined that those letters were not privileged as the letter dated 25 February 2014 was a letter merely to inform the solicitors that the draft sale and purchase agreement was acceptable to them and instructed that a copy be forwarded to the defendant for his approval. And as for the letter dated 26 February 2014, the Court took the view that it was a letter from the solicitors informing the plaintiff that the defendant had finalised and signed the draft sale and purchase agreement and the memorandum of transfer.

[195]The respondents also relied on *Dr Noor Aini's* case, to fortify their argument that where there is an understanding between the parties that a document (e.g. DSA) which is brought into existence will be extended to the parties, then the party who brought the document into existence is estopped from refusing to make discovery since they agreed to provide the document to the other side. That was a medico-legal case where the document in question was a paediatric consultant's report on the condition and prognosis of the 2nd respondent (infant).

[196]The defendants wanted certain parts of the report redacted. The Court of Appeal said that the defendant is bound to give a copy of the report to the plaintiffs' side without it being redacted.

[197]The situation in the present case is vastly different from the cases relied upon by the respondents which are all specific and peculiar to their own facts. In our view, a solicitor's work product e.g. the DSA cannot be equated to a medical report (per *Dr Noor Aini's* case). We are satisfied that the cases relied upon by the learned Judge to justify disclosure of a draft document (DSA) are based on totally different factual circumstances. The present case is one where the respondents have applied to obtain discovery of the DSA. Thus, the respondents bear the burden of establishing that the DSA is relevant for purposes of the Counterclaim.

[198]Further, it is also imperative for the respondents to establish that the DSA is necessary. Relevance cannot be conflated with necessary, as what is relevant may not be necessary.

[199]In our view, the question as to whether the document for which disclosure is sought is necessary is an important and we might, add pivotal component for the order of discovery under Order 24 Rule 7 ROC. Indeed, Order 24 Rule 8 ROC also makes it imperative that the Court to refuse discovery if it is satisfied that discovery was not necessary.

[200]Order 24 Rule 7 reads as follows:-

7. Order for discovery of particular documents (O. 24 r. 7)

(1) **Subject to rule 8**, 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 he may already have made or been required to make a list of documents or affidavit under rule 3.

(3) An application for an order under this rule shall 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) dversely affect his own case;

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

(iii) port another party's case; and

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

(i) dversely affect his own case;

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

(iii) port 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 3 has first been obtained in respect of that party, unless, in the opinion of the Court, **the order is necessary or desirable.**

[201]Order 24 Rule 8 reads as follows:-

8. Discovery to be ordered only if necessary (O. 24 r. 8)

On the hearing of an application for an order under rule 3, 7 or 7A, the Court, **if satisfied that discovery is not necessary, or not necessary at that stage of the cause or matter**, may dismiss or adjourn the application and shall in any case refuse to make such an order **if and so far as it is of the opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs**.

[202]In our view, the proper approach to the question of whether discovery is "**necessary**" may be gleaned from the case of ***Bayerische Hypo-und Vereinsbank AG v Asia Pacific Breweries (Singapore) Pte Ltd and other applications*** **[2004] SGHC 155**; **[2004] 4 SLR (R) 39** ("***Bayerische***") where the High Court of Singapore at paragraph [37] stated as follows:

"The ultimate test is whether discovery is necessary for disposing fairly of the proceedings or for saving costs. An assertion that the documents are relevant will not be good enough. Equally, an assertion that the documents are necessary because they are relevant will not be enough."

[203]Further, in paragraph [38] of the judgment, the Singapore High Court had considered Order 24 Rule 7 which is *pari. materia* with our Order 24 Rule 8 and stated that:

"The court is, by O. 24 r. 7, concerned with the discretion to refuse disclosure of a document **unless the necessity for disclosure is clearly demonstrated.**

[204]As stated earlier, the burden was on the respondents to establish to the satisfaction of the Court that the DSA is not just relevant but also that it is necessary for disposing the matter fairly and for savings of cost as well.

[205]The statement by the learned Judge that, *"whether the draft Settlement Agreement is in fact a binding settlement"* reveals quite plainly that DSA was being regarded as being part of the mix of documents which established in binding contract of settlement which is now the respondents' case. Having considered all the circumstances, we are on the view, that it has not been established that it is necessary for the DSA to be disclosed for purposes of fairly disposing the matter for savings of costs.

[206]We are fortified in our view that it matters not one jot what the DSA says as regards the terms of the purported settlement. The respondents are of course entitled to contend at the trial that the existence of the DSA supports their theory that there was a concluded contract of settlement. Beyond that, the respondents have to stand or fall on the several correspondence and discussion as pleaded in the Defence and Counterclaim.

[207]Indeed, it bears repeating that it is not even the respondents' pleaded case that the DSA is part of the building block which forms the basis for the assertion that there is a settlement agreement which had been (purportedly) concluded between MDV and R1. The respondents' pleaded case is that based on the exchange of

correspondence and the discussions between the representatives from MDV and R1, there is a concluded settlement agreement.

[208]Thus, based on the respondents pleaded case (*per the Defence and Counterclaim*) the contents of the DSA are irrelevant as to whether there was (or was not) a concluded settlement agreement.

[209]On that premise and analysis, it becomes quite clear that the DSA is neither relevant nor necessary for the fair disposal of the trial. And most certainly, discovery of the DSA will not lead to savings of cost. Rather, it is more likely that costs will escalate as discovery of the DSA could well lead to further applications including but not limited to an application to amend the Defence and Counterclaim.

[210]Quite obviously, the trial judge will have to hear the evidence and decide whether a concluded settlement agreement was reached between MDV and R1 as a result of negotiations conducted orally or by correspondence or whether the creation and execution of a formal contractual document embodying the entire agreement is a condition precedent to the formation of a binding contract, or only an unessential means of recording an already concluded contract.

[211]This will turn largely on the intention of the parties and whether or not agreement has been reached on all of the essential terms of the purported contract of settlement. That is plainly for the trial judge to deal with after having seen and heard the evidence. Hence, as far as relevancy is concerned, looking at the respondents' pleaded case, it is not the respondents' case that there is a concluded settlement agreement because there was a DSA which they are aware of. The respondents' case is that there is a settlement agreement based on the exchange of letters and communication between parties.

[212]The DSA is plainly not a building block for the existence of a concluded settlement agreement. The fact that the settlement agreement was drafted mainly goes to the conduct of MDV in the context of the letters which were exchanged. The question as to whether there was a concluded settlement agreement is at large and it is for the trial Judge to decide based on the pleaded case and the existing evidence. Thus, we find that the DSA is not relevant and not necessary for this purpose.

[213]No doubt, the proposed compromise or settlement was to follow the terms stipulated in MDV's letter dated 19 February 2018. But, as mentioned previously, that very letter stipulates that the settlement is subject to "*any such other terms and conditions as MDV deems necessary*". What exactly are the "other terms and conditions" which are deemed necessary word only be known to or would have been discussed between MDV and their legal advisers.

[214]In the upshot, on the basis of our analysis and the reasons articulated above, we are impelled to the view that the learned Judge was in the circumstances, plainly wrong in ruling that the DSA was relevant and necessary and in granting the discovery order. We turn next to the issue of privilege.

[215]In so far as the question of legal professional privilege is concerned, the starting point is whether the giving of instructions by MDV to their external solicitors and the formulation of the DSA based on MDV's instructions encompasses or comes within the ambit of "legal advice".

[216]It was argued on behalf of the respondents that the legal advice must be the dominant purpose for the creation of the DSA (see: *Jet2.com*) and in the present case MDV has not demonstrated that legal advice was the dominant purpose for the creation of the DSA.

[217]Having examined the legal authorities referred to by the parties, it is clear that the proper approach to the nagging question of whether legal professional privilege attaches to the DSA is to ask whether the document which was prepared by MDV's solicitors is part of that necessary exchange of information whose object is the giving of legal advice as and when appropriate (per Taylor LJ at p.332 in *Balabel's* case). In our view, it is unrealistic and illogical to suggest that there is no legal advice component in the formulation of the DSA by MDV's external solicitors.

[218]The fact that the DSA was drawn up by MDV's external solicitors is of itself inherently and innately indicative that there was legal advice involved as a legal document can only be drawn up by those who have the necessary legal expertise and knowledge. The fact that the external solicitors had drafted the DSA is self-evident that the document is the product of legal advice in the sense as alluded to above

[219]In our view, legal advice *vis-à-vis* a solicitor's work product concerning non-litigation work e.g. agreement or conveyancing or other transactional document must necessary be interpreted and construed broadly and not narrowly.

[220]Thus, even if a legal document does not strictly qualify as legal advice or as a piece of legal opinion, the document would nevertheless be protected by legal professional privilege, as long as it is an internal legal work product which was produced on the client's instructions and which is only disclosed to the counterparty once the client was satisfied that the document is "ready" for disclosure to the other side. As long as the document remains as a draft, with the solicitors, or with the client, it is protected by privilege. The privilege is waived only upon the conscious or deliberate act on the part of the client in disclosing the document directly to the counterparty or through intermediaries such as their solicitors. It is necessary to reiterate that the privilege is recognise in law because "*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 client's 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*" (see: *Skandinaviska* [23])

[221]In this regard, we are impelled to the conclusion that the decision in *Asahi* is of little assistance as it did not consider the principle that was enunciated in *Manser v Dix* where it was stated quite clearly that draft conveyancing documents including the instructions for the formulation of the draft are covered legal privilege.

[222]In our view, the learned Judge had erred in relying upon *Chen Sheau Yang's* case as the facts of that case are quite different. In that case, the terms as per the draft sale and purchase agreement had already disclosed/ had already been exchanged and agreed upon and the finalized sale and purchase agreement had already been executed by the defendant.

[223]The issue of privilege was raised in respect of letters which were written by the plaintiff's solicitors to their own client. The contents of the letters did not indicate that there was any legal advice. Rather, the letters showed that the terms had been finalized and that the defendant had signed the agreement. In the present case, the DSA was still with MDV. Of course, the respondents contend that they were told that the DSA was ready to be forwarded to them and that they (R1) had to execute it promptly. In our view, the fact that certain personnel in MDV may have informed the respondents that the DSA was approved and ready to be sent over to R1 is neither here nor there.

[224]As mentioned previously, MDV had the discretion to add or modify any of the terms or conditions as they deemed fit and the fact that they chose not to send the DSA did not dilute their position as they had given themselves the upper-hand in terms of what was to go into the DSA.

[225]It was for MDV, quite possibly based on legal advice or upon any relevant commercial or strategic considerations, to decide the shape and content of the DSA.

[226]In our view, the DSA was at all times a "draft" which was a solicitor's work product and since MDV had not disclosed it to R1 (the counterparty), it remained within the protective umbrella of legal professional privilege and was never waived or lost. Further, the fact that the DSA has to be crafted on the basis of the terms stipulated in MDV's letter dated 19 February 2018 does not in any way detract from its status as a solicitor's work product which was given to MDV by their own solicitors and which remained confidential until such time that it was disclosed to R1, who may or may not even have agreed to the terms and content of the DSA and might have proposed amendments or modification. Of course, all of this is highly speculative as there is no certainty one way or the other, whether R1 would have agreed to the DSA in the form that was eventually presented to them.

[227]The fact that the proposed settlement was to be based on the terms contained in MDV's letter dated 19 February 2018 does not mean that confidentiality is lost or waived since the final work-product (the DSA) was still in MDV's custody and was not disclosed to R1. Indeed, on this issue it may be seen from the case of *See Teow Guan* that publication of the impugned document and the fact that others had viewed the document, did not result in a waiver of privilege. Hence, by parity of reasoning in the present case, the fact that it was known to all sides that the

settlement agreement was to be based on MDV's letter of 19 February 2018 cannot be a basis for the contention that legal professional privilege was waived or lost.

[228]As such, for the reasons discussed above, we are convinced that the DSA which was prepared by MDV's solicitors, Messrs Azmi & Associates was based on MDV's instructions and the document was a "work in progress" (in "draft" form) and that legal professional privilege attaches to the DSA, albeit that the respondents were aware of the existence of the DSA and/or that it should be crafted on the terms as indicated in MDV's letter dated 19 February 2018.

[229]It is clear that MDV's privilege *vis-à-vis* the DSA was never waived. Indeed, the privilege is waived only when the document is forwarded to the respondents. That did not take place.

[230]Thus, the absence of confidentiality, in the sense that the respondents having knowledge that the DSA was to be based on the terms as per MDV's letter dated 19 February 2018 did not cause the privilege to be lost (per *See Teow Guan's* case).

[231]In the result, it our view that the DSA remains privileged until such time that it is considered and approved by MDV and is thereafter disclosed to the respondents. Since the DSA was never forwarded to R1, MDV is entitled to assert legal professional privilege over the documents which was their own solicitor's work product.
Result

[232]The appeal is allowed. The decision of High Court Judge dated 29 May 2019 is hereby set aside. The order of costs of RM3,000.00 which was awarded by the High Court is also set aside. The respondents are ordered to pay costs of RM15,000.00 to the MDV as costs here and below (*subject to allocatur fee*).

Order accordingly.
