IN THE MATTER OF POTENTIAL LEGAL PROCEEDINGS INVOLVING ECOSTUFF LTD

INSTRUCTIONS TO

ADVISE IN WRITING

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1. Counsel is instructed by the well-known law firm, GreenLegal, on behalf of Ecostuff Ltd ("Ecostuff"), an English company whose business comprises the manufacture of a range of ecologically-friendly products ranging from paper straws which safely dissolve in water (but not too quickly) to vegan pet food for dogs and cats. Ecostuff prides itself on its compassionate and collaborative corporate philosophy, and on never having had a legal dispute with a dissatisfied customer.

2. In April 2014, Ecostuff entered into a five-year contract, renewable by agreement, to sell vegan pet food to a Singapore company by the name of Pets First Pte Ltd ("Pets First"), including a premium brand by the name of "Doggy Tofu". The contract was governed by Singapore law, but provided that both parties submitted to the jurisdiction of the courts of England and Wales, as well as to the jurisdiction of the Singapore Supreme Court.

3. In February 2018, complaints started being made to Ecostuff by Pets First that customers in Singapore were claiming that cans of Doggy Tofu contained trace elements of meat. Pets First said that, if this proved to be the case, it would have no option but to stop doing business with Ecostuff as soon as possible. The board of Ecostuff was very concerned both by this threat, and by the potential damage to its reputation in the market for high-quality vegan products. It instructed GreenLegal,

therefore, to conduct an investigation into the position, focussing on the team of three responsible for the Doggy Tofu brand. The head of that team was a Ms Chum, who was an executive member of the board. The two others were a Mr Pitt-Bull and a Ms Bark. Mr Pitt-Bull no longer worked for the company, having taken early retirement in December 2017. In January 2018, Ms Bark had given three months' notice of leaving Ecostuff, and had been told by the company that, although she would be paid until the end of March 2018, she should not come into work during her period of notice.

4. The interviews with these three individuals all took place in February 2018, with interview notes being taken by GreenLegal. In each case, what was said by the individual in question gave no specific reason to believe that meat could be an ingredient of Doggy Tofu; but damaging admissions were made about the general laxity of the company's quality control systems.

5. Following this investigation, Ecostuff told Pets First of the review that had been undertaken, and that it did not believe there was any problem with Doggy Tofu. However, Pets First continued to receive complaints from customers, and in January 2019 it refused to pay for a substantial three-month consignment of pet food, and said it did not want any more.

6. On 15 March 2019, Ecostuff called a board meeting, to be attended by GreenLegal, to discuss the dispute with Pets First. The meeting took place in three stages. First, in advance of GreenLegal turning up, the members of the board had a general discussion about the dispute, including how best to avoid resort to litigation by obtaining a commercial settlement with Pets First. Secondly, GreenLegal then attended the meeting, and gave general advice about the legal position. Finally, the board again had

a further discussion about how best to settle the dispute given the advice received. Minutes were taken of all three parts of the board meeting, and inevitably they include in all three parts some damaging admissions, including about Ecostuff's lax quality control procedures.

7. The board also asked GreenLegal to take more detailed statements from Ms Chum, Mr Pitt-Bull and Ms Bark, which we did in April 2019. Ms Chum and Ms Bark effectively said the same as before, but Mr Pitt-Bull went so far as to say that, having thought about it more, it was quite likely that Doggy Tofu would have been contaminated with meat. We reported this to Ecostuff in an email, but independently Mr Pitt-Bull emailed the board directly to explain his change of view, copying us in.

8. Ecostuff has now got to the position where it is seriously considering commencing legal proceedings against Pets First. This firm, however, has concerns about the damaging nature of some of the contents of the interview notes taken in February 2018, the minutes of the board meeting which took place on 15 March 2019, and the statements and emails of April 2019.

9. Given that Ecostuff would have the option of suing Pets First in either the English Court or the Singapore Court, you are asked to advise in writing on the extent to which the notes, minutes, statements and emails referred to in the preceding paragraph would be regarded as privileged under Singapore law and under English law, since this could well be a factor which influences where to bring proceedings.

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I. EXECUTIVE SUMMARY

1. I summarise in the following table our conclusions on whether the interview notes, the minutes as well as the statements and emails are privileged.

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<tr><td>Interview Notes</td><td>Arguably privileged</td><td>Not privileged</td><td>Arguably privileged</td><td>Not privileged</td></tr>
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2. On balance, it is more likely that a Singapore Court would find that the material is covered by legal advice privilege and/or litigation privilege. I therefore advise Ecostuff that it commence its action in Singapore.

II. INTERVIEW NOTES

Interview Notes (English Law)

3. The interview notes are unlikely to be privileged under English law.

(a) It is unlikely that the interview notes would be protected by legal advice privilege.

(i) LAP would apply to protect confidential communications made between a client and his lawyer that is made for the purposes of giving or obtaining legal advice or assistance: *Balabel v Air India* [1988] 1 Ch 317 at 330 (per Taylor LJ).

Communications between an employee of a corporation and the corporation's lawyers are not covered by LAP unless that employee was tasked with seeking and receiving such advice on behalf of the client (*Three Rivers (No. 5)*, cited in *ENRC v SFO* at [123]), or if it could be said that the employee was expressly or impliedly authorised by or on behalf of the client entity to give instructions to or receive legal advice from the lawyer: *Bankim Thanki QC* (gen ed), *The Law of Privilege* (OUP, 3rd Ed, 2018) at [2.22].

(ii) In the present case, it does not appear that Ms Chum, Mr Pitt-Bull and/or Ms Bark were tasked with seeking and receiving advice from GreenLegal. Rather, GreenLegal was instructed to interview these individuals as part of an investigation into whether Doggy Tofu products *contained* non-vegan elements.

(iii) It is also highly unlikely that any of the Doggy Tofu team would be considered the "*client*" for the *purposes* of LAP.

(iv) First, that Ms Chum was "*executive member of the board*" is insufficient. Something more would be needed to show that she had the requisite authorisation to be considered a "client" for the purposes of legal advice privilege. The case of *Three Rivers (No. 5)* is instructive on this point. There, the Court of Appeal held (at [31]) that communications between the Governor of the Bank of England and the Bank's lawyers, "*however eminent [he or she] may be*", were not privileged.

(v) Second, by the time the interview notes were taken in February 2018, Mr Pitt-Bull was already retired and is a former employee. In *ENRC v SFO* [2018] EWCA Civ 2006, the Court of Appeal observed that "*information obtained from ex-employees falls into the same category as that obtained from third parties*"

(at [139]). Such information would not be protected by LAP: Charles Hollander QC, *Documentary Evidence* (Sweet & Maxwell, 13th Ed, 2018) at [17-05]

(vi) Third, as for Ms Bark, she had served her notice and was told by the company that she should not come into work during her period of notice. In the circumstances, a finding that Ms Bark had been expressly or impliedly authorised her to seek or receive legal advice on Ecostuff's behalf would be contradictory to the express instructions that she had been given: *The Law of Privilege* at [2.30]

(vii) In the premises, I advise that the interview notes would not be protected by LAP under English Law.

(b) It is also unlikely that the interview notes would be protected by litigation privilege.

(i) For LTP to apply, Ecostuff must demonstrate that the interview notes came into existence once litigation was within reasonable contemplation or had commenced: *Three Rivers (No. 6)* [2005] 1 AC 610 at [52] (per Lord Edmund Rodger). This is a threshold question, for if no litigation is contemplated no party can invoke the privilege and the other elements of LTP do not even arise for consideration.

(ii) However, there is no indication that this ingredient is established in this case. Ecostuff had been told by Pets Firsts that it would "*have no option but to stop doing business with Ecostuff as soon as possible*". Ecostuff was concerned by this threat as well as the potential damage to its reputation and, as a result, Ecostuff had instructed GreenLegal to conduct the investigation which generated the interview notes. It is insufficient to simply establish that litigation was a mere possibility or that there was a distinct possibility that someone might at some stage bring proceedings: *Starbev GP Ltd v Interbrew Central European Holdings BV* [2013] EWHC 4038 (Comm)

(c) However, it might be the case that the interview notes are privileged under the heading of lawyers' working papers.

(i) The decisions of *Balabel* and *Three Rivers (No. 5)* had (although without argument) accepted that a lawyer's working papers were privileged. This is also well recognised in the authorities: *The Law of Privilege* at [2.56]; *Phipson on Evidence* at [23-65].

(ii) However, recent authority suggests otherwise. It was held in *In re RBS Rights Issue Litigation* [2017] 1 WLR 1991 that the lawyers' working papers privilege would apply only where the papers would give a clue to the advice which had been given by the solicitor (at [99] – [101]). The starting point is of course that if the Court is of the view that the interviews with the Doggy Tofu team are not privileged communications, it would follow that the notes of those interviews would also not be privileged: *RBS* at [103]-[104].

(iii) That said, *RBS* is a problematic authority. Hildyard J seemed to have overlooked the test for legal advice privilege, which is simply whether the communication or other document was made confidentially for the purposes of legal advice: *Balabel* at p.330. It also applied two authorities (*Lyell v Kennedy* (No.3) (1884) LR 27 Ch D 1 and *Ventouris v Mountain* [1991] 1 WLR 607) outside of the contexts to which they were meant to be applied. Both *Lyell* and *Ventouris* were cases where privilege extended to copies of the documents made by lawyers that betrayed the trend of the advice the lawyer gave to the client. It could be argued that the present case is different, being one where the lawyer simply needed to ascertain the facts as a preparatory step before rendering his legal advice.

(iv) I thus advise that it is arguable that the interview notes might be privileged under English law.

Interview Notes (Singapore Law)

4. The Singapore position on LTP is similar to the English position and so for the same reasons mentioned above at paragraph [3(b)], the interview notes are unlikely to be covered by LTP under Singapore law: *Skandinaviska* at [70]-[77]

5. In addition to the argument on a lawyers' working papers privilege, there is an additional argument that is available under Singapore Law that the interview notes are protected by LAP:

(a) In contrast with *Three Rivers (No. 5)*, in Singapore, communications between third parties and lawyers may be protected by LAP.

(b) In *Skandinaviska Enskilda Banken Singapore Branch v APB (Singapore) Pte Ltd* [2006] 3 SLR(R) 441, the Singapore Court of Appeal considered whether information obtained from a third party for the dominant purpose of obtaining legal advice from his legal adviser was privileged. The Court of Appeal endorsed the approach of the Federal Court of Australia in *Pratt Holdings v Commissioner of Taxation* (2004) 136 FCR 357 (at [41]-[43]), which held that the important consideration was not the nature of the third party's legal relationship with the principal but the nature of the function it performed. If that function was to enable the principal to make the communication with the third party necessary to obtain legal advice it required, privilege may attach to that communication.

(c) The *Pratt* principle may not be wholly applicable in the present case. Neither *Pratt* nor *Skandinaviska* concerned the findings arising from internal investigations. The Court of Appeal also only endorsed the *Pratt* principle in relation to cases of large commercial fraud: *Skandinaviska* at [62]. Most importantly, the rationale of the *Pratt* principle is to allow parties to obtain the expert advice they needed to protect themselves from future

frauds and/or to determine the rights or liabilities in connection with the fraud. That is a policy issue that has no application to the present case to which the *Pratt* principle is said should be extended to, which involves communications made for the purposes of a fact-finding investigation.

(d) Nevertheless, it is submitted that the *Pratt* principle is potentially applicable to all third-party input genuinely sought for the dominant purpose of legal advice: *Professor Jeffrey Pinsler, Evidence and the Litigation Process* at [14.041]. Even though the *Pratt* principle has not been applied to cases such as the present one, the Court of Appeal's observations on it would still be strong persuasive authority. I therefore advise that interview notes are privileged under Singapore Law.

III. MINUTES

6. Whether under English law or Singapore law, it is clear that the minutes contain a mix of communications which are both privileged and not privileged.

7. On the one hand, the minutes of the first stage of the meeting on 15 March 2019 are not privileged under English or Singapore law:

English Law

(a) LAP would likely not apply to the notes about the commercial settlement because it would not appear that the minutes were communicated or intended to be communicated to GreenLegal for the purposes of obtaining legal advice. For the same reason, the exception to communications which were intended to be communicated but were not in fact communicated does not apply: *Three Rivers (No. 5)* at [21].

(b) LTP would also not apply to this part of the minutes. Ecostuff cannot show that these minutes were created with the dominant purpose of being submitted to GreenLegal: *Birmingham and Midland Motor Omnibus Company v London and North Western*

Railway Co [1913] 3 KB 850, at 856. Further, the more modern authority of the Court of Appeal of England and Wales in *WH Holdings v E20 Stadium LLP* [2018] EWHC 2784 (Ch) (at [8], [18]-[21]) held that documents concerned with the settlement or avoidance of litigation are not covered by LTP where the documents neither seek advice or information for the purpose of conducting the litigation.

Singapore Law

(c) The conclusion under Singapore law would also be the same. LAP would not apply because the minutes were not made for the purposes of legal advice nor were the minutes actually conveyed or intended to be conveyed to the lawyer: *Comptroller of Income Tax v ARW* [2017] SGHC 16 at [43], citing *Balabel* at 330.

(d) It is also unlikely that LTP would apply, given that the minutes were not created for the dominant purpose of litigation: *Comptroller of Income Tax v ARW* at [35].

8. On the other hand, unlike the minutes of the first stage of the meeting, the minutes of the second and third stages would likely be privileged under both English and/or Singapore law.

(a) The second stage is privileged because it contains GreenLegal's legal advice to the Ecostuff's board, who were clearly authorised to receive legal advice: *Balabel* at 330.

(b) The third stage is also likely to contain privileged material because the board had discussed the advice received from GreenLegal and, in the circumstances, the minutes are capable of revealing the privileged advice received by GreenLegal. The general principle is that documents which evidence the privileged communication (i.e. documents which reproduce, summarise or paraphrase the privileged advice) are also privileged: *Financial Services Compensation Scheme v Abbey National Treasury Services* [2007] EWHC 2868 (Ch) at [21].

9. The issue is therefore whether the minutes, containing in part unprivileged and in part privileged material, are privileged when looked at as a whole.

10. The law is no different in England and in Singapore. Where part of a document contains privileged matter and the remaining unprivileged, it is not necessary to disclose the privileged matter: *Phipson on Evidence* at [23-49]. Where the document concerns a single subject matter and satisfies either the test for legal advice privilege or the test for litigation privilege, privilege can be claimed for the entire document: *The Law of Privilege* at [4.03]; *Skandinaviska* at [99]. The correct procedure is to disclose the document, redacting or blanking out the unprivileged parts: *The Law of Privilege* at [4.03].

11. Specifically, under Singapore law, the Court of Appeal has held that parties "*should be slow to claim privilege for entire documents where there is only partial or even trifling reference to legal advice*". In the Court of Appeal's view, the entire section may be privileged depending on whether the extent to which the unprivileged part is separable from and is not integral to the privileged part of the document. Where the privileged part could be said to have become embedded and/or intertwined with the unprivileged parts, privilege may attach: *Skandinaviska* at [98]-[100].

12. The question is therefore one of degree. For instance, where one considers the minutes of the third stage, more information would be necessary before I can advise as to whether it is appropriate to redact the unprivileged parts or the entire section (see paragraph [10] above).

13. In the circumstances, depending on how the minutes were recorded, Ecostuff may be able to claim privilege over and redact the parts containing the information and advice obtained from GreenLegal: Phipson *on Evidence* (Sweet & Maxwell, 19th Ed, 2018) at [23-50]. I therefore advise that, under English and Singapore law, the minutes would be disclosable with the second stage and/or third stage redacted.

IV. STATEMENT AND EMAILS

14. There are three relevant communications. First, the statements taken from Ms Chum, Mr Pitt-Bull and Ms Bark. Second, the email from GreenLegal to Ecostuff. Third, Mr Pitt-Bull's email to Ecostuff.

The Statements

15. As mentioned above at paragraph 3, the detailed statements from Ms Chum, Mr Pitt-Bull and Ms Bark are not covered by LAP under English law. Further, unless the statements could be said to fall under the *Pratt* principle, it would also not be covered by LAP under Singapore law.

16. However, it might be that LTP may apply instead. In this regard, it is immaterial that Mr Pitt-Bull and Ms Bark were no longer employees of Ecostuff. Communications between lawyers and third parties are covered by LTP: *Wheeler v Le Marchant* (1881) 17 Ch D 675 at 680-681.

17. First, Pets First had in January 2019 taken steps to repudiate the contract between it and Ecostuff and Ecostuff was considering commencing legal proceedings against Pets First. This suggests that the first element of LTP (that there was a "reasonable prospect" of litigation) has been satisfied. While evidence which merely states that litigation was and remains contemplated by that person is unlikely of itself to be sufficient (*The Law of Privilege* at [3.51]), the case here shows that, because of Pets First's repudiation, litigation was no longer "*a mere possibility*" but was rather in "*active contemplation*": *Plummers Ltd v Debenhams plc* [1986] BCLC 447, 457 (per Millet J). Pets First's purported repudiation could also "*well give rise to litigation in the future*": *Westminster International BV v Dornoch Ltd* [2009] EWCA Civ 1323.

18. This conclusion is the same under Singapore law. The detailed statements could be said to have been created as part of a series of preparatory steps for litigation: *Comptroller of Income Tax v ARW* at [38]

19. Second, it was after Pets First had repudiated the contract with Ecostuff that Ecostuff decided to ask GreenLegal to take the statements from the Doggy Tofu team. It would be reasonable to therefore argue that the second requirement for LTP is satisfied i.e. that the communication was made with the dominant purpose of obtaining information in connection with or to aid in the conduct of actual or anticipated litigation: *The Law of Privilege* at [3.82]; *Comptroller of Income Tax v ARW* at [28].

20. That said, establishing this second element on the facts of the case is hardly a slam-dunk. Ecostuff must show that that the information was sought *for the purpose* of litigation. While litigation need not be the sole purpose, it cannot simply be "*a purpose*" and must be the dominant one: *The Law of Privilege* at [3.91]. Litigation has to be the primary objective: *Comptroller of Income Tax v ARW* at [40]. That is not apparent on the facts of the case.

21. In this connection, it would be arguable that a document that appears to have been prepared for two purposes should be properly construed as a single overarching privilege purpose. For instance, in *Highgrade Traders Ltd* [1984] BCLC 151, the Court of Appeal held LTP would apply to a report commissioned by insurer on a cause of a fire to ascertain both the cause of the fire as well as to obtain the advice of their lawyers because the two purposes were inseparable. In that case, it was accepted by the Court of Appeal that had the cause of the fire been fraudulent, litigation would follow: see C. Siyuan & Lionel Leo, *The Law of Evidence in Singapore* (Sweet & Maxwell, 2nd Ed, 2018) at [8.097]

22. It is submitted that *Highgrade Traders* is equally applicable on the facts of our case. Litigation would necessarily follow depending on the statements from the Doggy Tofu team. That was the entire point of the exercise, so the dominant purpose of litigation is made out. I would therefore advise that, on balance, LTP would apply.

The GreenLegal – Ecostuff email

23. Assuming that the detailed statements were covered by LTP, the email from GreenLegal to Ecostuff would be also privileged: *Colin Passmore, Privilege* (Sweet & Maxwell, 3rd Ed, 2013) at [3-005]; P. Matthews and H. Malek QC, *Disclosure* (Sweet & Maxwell, 5th Ed, 2016) at [11.35]

Mr Pitt-Bull's email to Ecostuff

24. Mr Pitt-Bull's email to Ecostuff is not covered by LAP as it is not a lawyer-client communication: *Balabel*. The only relevant question is therefore whether it is covered by litigation privilege.

25. Under English law, the general rule is that LTP attaches to a communication between the client and a third party for the purposes of being laid before the client's lawyer in connection with anticipated litigation: Paul Matthews and Hodge Malek QC, *Disclosure* (Sweet & Maxwell, 5th Ed, 2016) at [11.44]. Put another way, could it be said that Ecostuff was acting as an agent of GreenLegal in receiving the email from Mr Pitt-Bull? (see *The Law of Privilege* at [3.19]). The law is that client–third-party communications, even after litigation is contemplated, in which the client is not effectively the lawyer's agent, are not within this privilege: *Disclosure* at [11.44].

26. It is therefore unlikely that LTP would attach to Mr Pitt-Bull's email. The facts simply do not bear this out. The fact that Mr Pitt-Bull had copied GreenLegal in his email is neither here nor there and cannot establish that Ecostuff had received Mr Pitt-Bull's email as GreenLegal's agent.

27. Further, the entire point of agency is that the agent can "drop out of the picture". The client must be the "*means of communication*": *Privilege* at [4-004]. Yet, the facts of the case point in the other direction – Mr Pitt-Bull had emailed Ecostuff of his own accord *after* Mr Pitt-Bull had already communicated his position to GreenLegal. It does not make sense to describe Ecostuff in these circumstances as the "*means of communication*" because the communication was *already made* to GreenLegal. I therefore advise that email is not covered by LTP under English law.

28. Separately, it might also be said that the email was created for Mr Pitt-Bull's own purposes. The relevant dominant purpose can be either belong to the maker of the communication or document, or of the person or authority under whose direction it was produced or brought into existence: *Grant v Downs* (1976) 135 CLR 674, followed in *Waugh v British Railways Board* [1980 AC 521 at 677. On the former view, it would be the case that Mr Pitt-Bull did not draft his email for the purpose of the litigation with Pets First – he had already left the company and so

that would not be within his contemplation. On the latter view, the fact that the email was unsolicited means that it could not be said that Ecostuff and/or GreenLegal had authorised its production. On either view, there is no dominant purpose.

29. The conclusion in paragraphs 26 to 28 above are unlikely to be any different under Singapore law, but the point has not been tested. It is pertinent to note that the test in *Grant v Downs* (as followed in *Waugh*) is equally applicable in Singapore: *Skandinaviska* at [75]-[76]. For the same reasons, LTP would likely not attach to the email under Singapore law.
