Comptroller of Income Tax
v
ARW and another
(Attorney-General, intervener)

[2017] SGHC 180

High Court — Suit No 350 of 2014 (Summonses Nos 940 and 987 of 2017)
Aedit Abdullah JC
25, 26 April 2017

Constitutional law — Attorney-General — Role

Civil procedure — Parties — Joinder

Civil procedure — Further arguments — Extension of time

Civil procedure — Further arguments — Further evidence

Civil procedure — Privileges — Inspection by the court

25 July 2017 Judgment reserved.

Aedit Abdullah JC:

Introduction

1 Following an earlier decision of this Court granting the 1st Defendant's application for discovery against the Plaintiff of various categories of documents, the Plaintiff sought leave to: (a) request for further arguments out of time, and (b) adduce further affidavits as evidence in support of those further arguments. In addition, the Attorney-General ("the AG") sought leave to

intervene in the summonses for discovery, further arguments, further evidence, and all related applications and appeals. Having heard and considered the arguments, I allow the AG's application to intervene. I also allow the Plaintiff's application for an extension of time to request further arguments, and part of his application to adduce further evidence in support thereof.

Background

2 In Summons No 1465 of 2015, the 1st Defendant sought discovery of various documents relating to an investigatory audit conducted by the Plaintiff's officers against the 1st Defendant and a related company ("the Discovery Application"). The Plaintiff resisted the application primarily on the basis of legal professional privilege, invoking both legal advice privilege and litigation privilege. On 31 January 2017, I issued a judgment granting discovery, finding that neither legal advice privilege nor litigation privilege was made out: see *Comptroller of Income Tax v ARW and another* [2017] SGHC 16 ("the Judgment"). In the course of the discussion in the Judgment, it was mentioned (at [52]) that the Plaintiff's real claim appeared to be a form of privilege protecting the fruits of the audit, review and related internal discussions conducted by law enforcement agencies, but that the Plaintiff had not invoked either s 125 or s 126 of the Evidence Act (Cap 97, 1997 Rev Ed) ("EA"), and that neither would seem in any event to be made out.

3 On 9 February 2017, following the release of my judgment in respect of the Discovery Application, the Plaintiff filed an application for leave to appeal, *vide*, Summons No 661 of 2017 ("the Leave to Appeal Application"). On 27 February 2017, the Plaintiff filed a Notice of Change of Solicitor. The newly appointed solicitors later informed the Court that they would take over conduct

of only this discovery application and all related applications and appeals; the substantive matter remains in the conduct of the former solicitors.

4 On 1 March 2017, the Plaintiff filed Summons No 940 of 2017, in which it sought leave to file its request for further arguments in the Discovery Application out of time, and to adduce two affidavits in support of the Discovery Application and the Leave to Appeal Application ("the Further Arguments Application"). The further arguments sought to be made related to: (a) public interest privilege under s 126(2) of the EA, (b) official secrecy under s 6(3) of the Income Tax Act (Cap 134, 2008 Rev Ed) ("ITA"), and (c) legal professional privilege. The two affidavits are from: (a) Mr Tan Tee How, who is the Commissioner of Inland Revenue, the Chief Executive Officer of the Inland Revenue Authority of Singapore ("IRAS") and the Comptroller of Income Tax, deposing to the injury and prejudice that would be caused to the public interest if disclosure of the documents concerned were to be ordered, and (b) Ms Christina Ng Sor Hua ("Ms Ng"), an officer of the IRAS, providing the background facts relating to the internal audits previously conducted by IRAS in relation to the Defendants' tax avoidance arrangements.

5 On 3 March 2017, the AG filed Summons No 987 of 2017 for leave to intervene in the Discovery Application, the Leave to Appeal Application, the Further Arguments Application, and all related applications and appeals ("the Intervention Application"). The main thrust of its application was that the AG, as the guardian of the public interest, is obliged and entitled to intervene in these applications to argue its position on the issue of public interest privilege.

6 The various matters created a knot of inter-related applications. The better view may be that, putting aside the Leave to Appeal Application, the

Intervention Application must be logically subsequent to the Further Arguments Application: if there are no further arguments, there would be nothing to intervene in. But the AG also sought to be joined in the Further Arguments Application on the basis that it had an obligation and entitlement to protect the public interest and thus desired the further arguments to be made. One option would have been to leave matters to the Court of Appeal. However, in the interests of efficiency, I considered that it would be best to cut this Gordian knot by taking all the matters – aside from the Leave to Appeal Application – in hand at the same time. Otherwise, taking the matters in a sequential manner as described above, while logical, would prolong these interlocutory proceedings in a suit that had itself arisen out of even earlier litigation (see *Comptroller of Income Tax v AQQ and another appeal* [2014] 2 SLR 847).

Issue 1: The Intervention Application

7 Taking first the Intervention Application, the contention was primarily between the AG and the 1st Defendant; the Plaintiff did not take issue with the intervention.

The AG's arguments

8 The AG clarifies that it does not seek to intervene in the suit proper, but merely in the three discovery-related interlocutory applications filed in this suit and related applications or appeals. The AG's primary concern is to be heard on the issue of public interest privilege under s 126 of the EA. According to the AG, its role as the guardian of the public interest entitles and obliges it to intervene in private litigation where issues of public interest are at stake. In particular, as Parliament has expressly recognised, the AG has a unique

responsibility with respect to public interest privilege and the operation of s 126 of the EA.

9 In respect of the issue of standing to intervene in private litigation, the AG argues that it is entitled to do so if issues of public interest are at stake, citing a series of English cases: *Attorney-General v Blake* [1998] 2 WLR 805; *Gouriet v Union of Post Office Workers and Others* [1978] AC 435; *Adams v Adams* [1970] 3 WLR 934; *Rio Tinto Zinc Corporation and Others v Westinghouse Electric Corporation* [1978] AC 547.

10 In particular, the AG has a "unique responsibility" in respect of the law on public interest privilege: *R v Chief Constable of West Midlands Police, Ex parte Wiley* [1995] 1 AC 274 ("*ex p Wiley*") at 287H. This responsibility entailed a legal entitlement and duty on the part of the AG to intervene in proceedings where it is in the public interest for confidentiality of the relevant documents to be safeguarded. In England, a Minister of the Crown is recognised as being the most appropriate person to assert this public interest: *R v Lewes Justices, Ex parte Secretary of State for Home Department* [1973] AC 388 ("*R v Lewes Justices*"). Further, where injury to the public interest could arise from disclosure and the Crown is not a party, the court should give the Attorney-General an opportunity to intervene before disclosure is ordered: *Burmah Oil Co Ltd v Governor and Company of the Bank of England and Another* [1980] AC 1090 ("*Burmah Oil*"). In Singapore, speeches at the Second Reading of the Evidence (Amendment) Bill in 2003 which considered the enactment of the present s 126 showed that Parliament contemplated a central role for the AG, as the custodian of the public interest, in the assertion of public interest privilege.

11 On the facts, the AG's intervention is appropriate. The documents concerned are the internal tax assessment and investigatory audit documents created by the officials of the IRAS in the course of their official duties. There has not been any determinative ruling by local courts on the availability of public interest privilege in such a situation. The Court's interpretation of s 126 will affect not only IRAS but also the Government and other organisations operating under the Official Secrets Act (Cap 213, 2012 Rev Ed). Furthermore, the AG, who assessed the documents only after the release of the Judgment, has concluded that public interest would be injured by the disclosure of the documents concerned, and should thus be heard on the matter.

12 In respect of the Court's power to allow an intervention, the relevant provisions here are O 15 r 6(2)(*b*) and O 92 r 4 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC"). Under O 15 r 6(2)(*b*), the Court has a wide discretion, which should be exercised with the aim of allowing all those having a legitimate interest in the subject matter of the proceedings to have the opportunity to be heard: *Tan Yow Kon v Tan Swat Ping and others* [2006] 3 SLR(R) 881 at [40]. As the AG has the responsibility of safeguarding the public interest, the issue of whether public interest privilege applies must be determined not just between the Plaintiff and 1st Defendant, but also in respect of the AG. Therefore, allowing the intervention will ensure that all interested parties are heard at the same time on the same issue. This would allow for an effectual and complete determination and adjudication (O 15 r 6(2)(*b*)(i)), and would be just and convenient (O 15 r 6(2)(*b*)(ii)). Intervention can also be ordered by the Court through the exercise of its inherent powers under O 92 r 4.

13 In respect of the scope of the proposed intervention, the AG submits that it is appropriate to seek intervention in the Discovery Application, the Further

Arguments Application, and the Leave to Appeal Application, as they are all applications that may touch on the assertion of public interest privilege. An amendment was also sought to clarify that the AG may, if necessary, file any application or appeal with regard to these applications.

The 1st Defendant's arguments

14 The 1st Defendant's arguments focus primarily on the purported non-satisfaction of O 15 r 6(2)(b) and O 92 r 4 of the ROC, though it does question whether the proposed intervention fell within the AG's powers under Article 35 of the Constitution of the Republic of Singapore (1999 Rev Ed) ("the Constitution").

15 The Defendant argues that the grounds under O 15 r 6(2)(*b*) are not made out. Under O 15 r 6(2)(*b*)(i), intervention is allowed where the intervener ought to have been joined or his presence is necessary for the effectual and complete adjudication of the matter. This will be the case where the rights or liabilities of the intervener will be directly affected by any order which may be made: *Pegang Mining Co Ltd v Choong Sam & Ors* [1969] 2 MLJ 52 ("*Pegang*"). On the facts, significant obstacles arise with respect to the AG's application:

> (a) First, the AG has no role to play in the Further Arguments Application. Any explanation of the delay in raising the relevant arguments is for the Plaintiff to make. This is not a full determination of the merits and the AG's participation is not necessary. The AG also has little to comment on the prejudice caused to the 1st Defendant. The same concerns apply in relation to the question of whether further evidence should be permitted: it is for the Plaintiff to make out a persuasive case.

(b) Secondly, the necessity of an intervention will not be made out if a party to the proceedings has brought the claim at the direction of the intervener, or if the intervener has control over that party's prosecution of the litigation: *White v London Transport and Another* [1971] 2 QB 721 ("*White v London*"). Thus, the AG need not be joined since he has and will continue to have control over the arguments put forward by the Plaintiff, and he is not seeking to protect any interest which the Plaintiff is not already seeking to protect.

(c) Thirdly and relatedly, there is no necessity to allow the AG's intervention on the facts as there is no risk of a multiplicity of proceedings and no question of general principle that would apply across the board to all governmental organisations.

16 The alternative ground under O 15 r 6(2)(*b*)(ii) permits intervention where there is a question related to the relief or remedy claimed that involves the intervener, and the Court thinks it just and convenient to allow an intervention: *Attorney-General v Aljunied-Hougang-Punggol East Town Council* [2016] 1 SLR 915 ("*AHPETC*"). The 1st Defendant submits that this has not been satisfied for the following reasons:

(a) First, if an existing party sufficiently represents parties with the same interest, another such party with the same interest will not be allowed to be joined: *De Hart v Stevenson* (1876) 1 QB 313 ("*De Hart*"). Here, the Plaintiff sufficiently represents the AG's and the public's interests.

(b) Secondly, the question in which the intervener has an interest must have already arisen; a potential question or issue does not suffice:

Spelling Goldberg Productions Inc v BPC Publishing Ltd [1981] RPC 280 ("*Spelling Goldberg*"). Thus, until such time as the further arguments and further evidence are properly before the Court, the AG has no right, standing, or basis to be heard.

(c) Thirdly, it would not be just and equitable for intervention to be allowed given the lateness of the application, the absence of new facts that have emerged necessitating the application, and the inconvenience and prejudice that may be caused to the 1st Defendant: *Chan Kern Miang v Kea Resources Pte Ltd* [1998] 2 SLR(R) 85 ("*Chan Kern Miang*"); *Lim Seng Wah and another v Han Meng Siew and others* [2016] SGHC 177.

17 In respect of the Court's inherent powers under O 92 r 4, the 1st Defendant submitted that the Court should only exercise such powers to allow an intervention if serious hardship, difficulty or danger would follow if the intervention is not allowed; the touchstone is necessity and the mere absence of prejudice is not sufficient: *Wee Soon Kim Anthony v Law Society of Singapore* [2001] 2 SLR(R) 821 ("*Wee Soon Kim*"). On the facts, there is no basis to allow the intervention. The Plaintiff will fully protect the AG's interests as far as public interest privilege is concerned – they seek to raise largely the same arguments, and if the AG would like to make further points or emphasize particular issues, the AG may as the Plaintiff's legal adviser ensure that this is done. Cases such as *R v Lewes Justices* ([10] *supra*) by the House of Lords and *Sankey v Whitlam and others* (1978) 21 ALR 505 ("*Sankey*") by the High Court of Australia may also be distinguished.

18 Finally, the 1st Defendant submitted that the AG's arguments that he should be permitted to intervene as the guardian of the public interest cannot be accepted here as he is not seeking to act in his capacity as an independent, non-partisan guardian. Rather, the AG is the Plaintiff's legal adviser and is seeking to intervene to support the Plaintiff's case. There is, therefore, no need to allow the AG to rehash the same arguments and permit the Plaintiff to have two sets of lawyers argue the same application to its benefit.

The decision

Standing of the AG to intervene

19 An intervener must establish his standing to make a particular claim or assert a right that is the basis for intervention: see *Singapore Civil Procedure 2017* vol 1 (Foo Chee Hock gen ed) (Sweet & Maxwell, 2017) ("*Singapore Civil Procedure*") at para 15/6/9. In almost all cases, no difficulty arises where private persons or similar entities are concerned: their standing to assert rights or interests that sufficiently relate to the subject matter of the action in which intervention is sought would generally not be in doubt; issues that arise focus on the substantive question of whether intervention should be permitted. Similarly, in public law matters, the standing of the AG to intervene is not usually in question. But where, as in the present case, the AG seeks to intervene in a civil suit based on private law rights, his role and standing is not immediately apparent and must be properly established.

20 I find that the AG has established sufficient standing, though for different reasons from those relied upon by the AG in submissions.

21 The starting point of the analysis of the AG's standing and powers must be Article 35 of the Constitution, the salient parts of which read as follows:

> **Attorney-General**
>
> **35.**—(1) …
>
> …
>
> (7) It shall be the duty of the Attorney-General to advise the Government upon such legal matters and to perform such other duties of a legal character, as may from time to time be referred or assigned to him by the President or the Cabinet and to discharge the functions conferred on him by or under this Constitution or any other written law.
>
> (8) The Attorney-General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for any offence.
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> (9) In the performance of his duties, the Attorney-General shall have the right of audience in, and shall take precedence over any other person appearing before, any court or tribunal in Singapore.

22 Apart from the above, there are no other articles under the Constitution that expressly confer any other role or power upon the AG.

23 In terms of legislation, there are various provisions conferring express roles and powers on the AG, such as s 19 of the Government Proceedings Act (Cap 121, 1985 Rev Ed), the Attorney-General (Additional Functions) Act 2014 (No 25 of 2014), and ss 24 and 25 of the Charities Act (Cap 37, 2007 Rev Ed) ("Charities Act"). It is also of note that express rights of intervention by the AG are conferred under various provisions such as s 46 of the Charities Act, s 97 of the Women's Charter (Cap 353, 2009 Rev Ed), r 84 of the Family Justice Rules 2014 (No S 813 of 2014), and s 63 of the Industrial Relations Act (Cap 136, 2004 Rev Ed). Further, the AG performs a number of functions not expressly granted by statute, such as the protection of the administration of justice through actions for contempt: *Aurol Anthony Sabastian v Sembcorp Marine Ltd* [2013]

2 SLR 246. For the avoidance of doubt, the AG's powers and duties *qua* the Public Prosecutor are not relevant to the present case.

24 The AG relies on three English cases involving the exercise of Crown prerogatives in support of the proposition that the AG is entitled and indeed obliged, at common law, to intervene in discovery applications to assert public interest privilege.

25 The first case is *R v Lewes Justices* ([10] *supra*). Here, the applicant applied to the Gaming Board for gaming licenses but was refused. Believing that his application was thwarted by a letter written about him to the board by the assistant chief constable, the applicant sued the assistant chief constable in criminal libel. He obtained witness summonses against the chief constable and representatives of the board, requiring them to produce, *inter alia*, this said letter. The Attorney-General sought a quashing order to set aside the summonses on the ground of public interest privilege. The House of Lords held that public interest required that the letter should not be disclosed. Various statements were also made about the propriety of a Minister or the Attorney-General intervening to assert this privilege in the public interest. In this regard, Lord Reid stated (at 400E–F) that:

> A Minister of the Crown is always an appropriate and often the most appropriate person to assert this public interest, and the evidence or advice which he gives to the court is always valuable and may sometimes be indispensable. But, in my view, it must always be open to any person interested to raise the question and there may be cases where the trial judge should himself raise the question if no one else has done so. In the present case the question of public interest was raised by both the Attorney-General and the Gaming Board. In my judgment both were entitled to raise the matter.

Lord Morris of Borth-y-Gest also observed (at 405A–B) that:

> It has never been doubted that there are certain documents and certain classes of documents the production of which for reasons of the public interest should not be ordered by a court … The court will sometimes have to assess where the balance lies as between competing aspects of the public interest. There will often be cases where a Minister of the Crown has very special knowledge concerning the public interest and a court can as a result be greatly helped if it is informed of the views of the Minister. There will be many situations in which some aspect of the public interest can most helpfully be drawn to the attention of a court by a law officer.

Lord Pearson added (at 405H–406B) as follows:

> It seems to me that the proper procedure is that which has been followed, I think consistently, in recent times. The objection to disclosure of the document or information is taken by the Attorney-General or his representative on behalf of the appropriate Minister, that is to say, the political head of the government department within whose sphere of responsibility the matter arises, and the objection is expressed in or supported by a certificate from the appropriate Minister. This procedure has several advantages … (3) The Attorney-General is consulted and has opportunities of promoting uniformity both in the decision of such questions and in the formulation of the grounds on which the objections are taken.

Lord Simon of Glaisdale also stated (at 407E–G) the following:

> In all these cases a Minister of the Crown is likely to be in a peculiarly favourable position to form a judgment as to the public prejudice of forensic publication; and the communication of his view is likely to be of assistance to the court in performing its duty of ruling on the admissibility of evidence. Moreover, for reasons stated by my noble and learned friend, Lord Pearson, there are advantages in processing the matter through the Law Officers' Department; and the Attorney-General is traditionally the person entitled to intervene in a suit where the prerogatives of the Crown are affected … although there is no prerogative in itself to exclude evidence, certain evidence may affect the prerogative (e.g. of diplomatic relations or as the fount of honour).

Finally, Lord Salmon observed (at 412A–C) that:

> … when it is in the public interest that confidentiality shall be safeguarded, then the party from whom the confidential document or the confidential information is being sought may lawfully refuse it. In such a case the Crown may also intervene to prevent production or disclosure of that which in the public interest ought to be protected … When a document or information of the kind to which I have referred is in the possession of a government department it is the duty rather than the privilege of the Minister to refuse its disclosure. When such a document or information is in the possession of a third party, again it is the duty rather than the privilege of the executive through the Attorney-General to intervene in the public interest to prevent its disclosure.

26 The second case of *Burmah Oil* ([10] *supra*) concerned a sale of shares by an oil company to the Bank of England. Soon after the sale, the company sued the bank, seeking a declaration that the sale had been unconscionable and an order obligating the bank to transfer the shares concerned back to the company. When the company sought an order for discovery of all documents held by the bank relevant to the issues pleaded, the Attorney-General intervened and objected on grounds of public interest privilege: some of the documents related to the formulation of ministerial policies in reaction to an international oil crisis. The majority of the House of Lords found that public interest privilege applied. Lord Scarman opined that given the risk of serious injury from an erroneous trial judgment on the issue of public interest privilege, the Minister should be given a right to appeal, or the Attorney-General should be given an opportunity to intervene, prior to the production of the documents concerned (at 1146H–1147B):

> Something was made in argument about the risk to the nation or the public service of an error at first instance. Injury to the public interest – perhaps even very serious injury – could be done by production of documents which should be immune from disclosure before an appellate court could correct the error … I would respectfully agree with Lord Reid's observation on the point in *Conway v Rimmer* [1968] AC 910, 953D: "… it is

> important that the minister should have a right to appeal before the document is produced."
>
> In cases where the Crown is not a party – as in the present case – the court should ensure that the Attorney-General has an opportunity to intervene before disclosure is ordered.

27 The third authority relied on is *ex p Wiley* ([10] *supra*). In this case, two accused persons filed complaints against police officers under Part IX of the Police and Criminal Evidence Act 1984 (c 60) (UK) ("PCEA"), which contained a code for investigating complaints against the police. Concurrently, these accused persons brought civil actions against the police for malicious prosecution and false imprisonment. Considering it unfair that the police could use information obtained in the investigations of their complaints in the civil proceedings whereas they could not themselves do so, the accused persons declined to give any statements in support of their complaints unless the police undertook not to use the documents generated in the course of investigations in the civil proceedings. The police declined to provide the undertaking. The accused persons thus sought, *inter alia*, an injunction restraining the police from making use of those documents in the civil proceedings. The House of Lords unanimously held that there was no general class-based public interest immunity on all documents generated by an investigation into a complaint against the police under the PCEA. Of relevance is an observation in Lord Woolf's judgment, in which all the other Law Lords joined, which commented on the Attorney-General's refusal to intervene and state a position in that case (at 287):

> At the opening of the appeal, Mr Pannick informed their Lordships that the Attorney-General, although he was aware of the new position being adopted by the authority, did not wish

> to intervene to advance a different argument before their Lordships.
>
> …
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> There is force in Mr Pannick's argument that their Lordships should adopt a restrictive approach to the issues before them. Questions as to the scope and impact of public immunity are controversial at the present time. Any views expressed on these subjects by their Lordships' House are therefore likely to be regarded as being of considerable significance. As a result of the parties being agreed on the outcome of these appeals, their Lordships have been deprived of the advantage of hearing adversarial debate on the principal issue. There has also not been the advantage of hearing argument on behalf of the Attorney-General who, in his capacity as the guardian of the public interest, rather than in his role as the legal adviser to the government, has a unique responsibility in this area of the law.

28 In addition, the Court's attention was also drawn to the case of *Sankey* ([17] *supra*), where the High Court of Australia found that "crown privilege", or public interest privilege in the common term, did not apply and thus ordered the production of certain cabinet and governmental documents. Gibbs ACJ opined (at 529–530):

> In view of the danger to which the indiscriminate disclosure of documents of this class might give rise, it is desirable that the government concerned, Commonwealth or State, should have an opportunity to intervene and be heard before any order for disclosure is made. Moreover no such order should be enforced until the government concerned has had an opportunity to appeal against it, or test its correctness by some other process, if it wishes to do so …

29 While the AG's submission premised on the common law has its attractions, particularly the availability of a body of case law in England to which reference may be made, in my view, caution has to be exercised for two reasons.

30 First, the English cases appear to premise the Attorney-General's (or the relevant Crown Minister's) standing and power to intervene on the concept of Crown prerogatives. At its core, this concept refers to the powers of the reigning Monarch that may be exercised without the consent of the Parliament. In modern times, the law and practice in Britain has evolved such that Government Ministers exercise the bulk of the prerogative powers, either in their own right, or through the advice they provide to the Monarch (see United Kingdom, Ministry of Justice, *The Governance of Britain Review of the Executive Royal Prerogative Powers: Final Report* (2009) at para 25). The prerogative in question is, therefore, that of the Crown, and through the Crown, the Ministers. In the words of Blackstone, these prerogatives are powers of an exclusive nature which the Crown enjoys alone (William Blackstone, *Commentaries on the Laws of England* (Oxford Clarendon Press, 1765) at Book 1, Chapter 7, p 232):

> By the word 'prerogative' we usually understand that special pre-eminence which the King hath over and above all other persons, and out of the ordinary course of the common law, in right of his royal dignity. It signifies … something that is required or demanded before, or in preference to, all others. And hence it follows, that it must be in its nature singular and eccentrical; that it can only be applied to those rights and capacities which the King enjoys alone …

31 Blackstone's definition, while perhaps not without its detractors, was quoted in Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown; and the Relative Duties and Rights of the Subject* (Butterworth, 1820) (at p 4). Chitty further opined as follows (at pp 3–4):

> As supreme executive magistrate, the King possesses, subject to the law of the land, exclusive, deliberative, and more decided, more extensive, and more discretionary rights and powers. These are wisely placed in a single hand by the British constitution, for the sake of unanimity, strength, and dispatch … The King of England is therefore not only the chief, but

> properly the sole, magistrate of the nation; all others acting by commission from, and in due subordination to him.

32 Similar views were expressed by the House of Lords in *Attorney-General v De Keyser's Royal Hotel, Limited* [1920] AC 508, where it was said that the "Royal Prerogative implies a privilege of the Crown of a special and exclusive character" (at 571–572, *per* Lord Parmoor). There was consideration of the Crown's prerogative powers recently in *R (Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5, but that case does not touch the present concerns here.

33 In this regard, the English cases cited by the AG appear to suggest that the Attorney-General's (or the relevant Crown Minister's) standing to intervene to assert public interest privilege is premised on the concept of Crown prerogatives. Before the phrase "public interest privilege" came into prominence, the doctrine was termed "Crown privilege" and the entitlement or duty to intervene has often been said to be of the Crown or the Ministers of the Crown: see *eg*, Lord Reid, *R v Lewes Justices* ([10] *supra*) at 400D–F, quoted by Lord Woolf in *ex p Wiley* ([10] *supra*) at 290G–291C. Indeed, some of the *dicta* may be taken to suggest that the reason for the intervention should itself be the protection of the Crown prerogative. As Lord Simon of Glaisdale stated in *R v Lewes Justices* (at 407F–G), "the Attorney-General is traditionally the person entitled to intervene in a suit where the prerogatives of the Crown are affected … although there is no prerogative in itself to exclude evidence, certain evidence may affect the prerogative (e.g., of diplomatic relations or as the fount of honour)".

34 While relying on prerogative cases is attractive and understandable because of the ready availability of English case law and English legal learning,

the concept of the Crown prerogative is not easily transposed into a system with a written constitution. There are some prerogative powers that are imported into or referenced in Singapore's Constitution, including the prerogative of clemency (as provided for in Art 22P, considered in *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189). But other than such instances, it is questionable whether the concept of prerogatives should be resorted to except by analogy, and even then only in a carefully considered manner (see *eg*, *The Sahand and other applications* [2011] 2 SLR 1093 at [30]–[35]). Under our Constitution, power and responsibility are divided amongst the three branches of Government: the Executive, the Legislature and the Judiciary. There may be powers that are inherent or implicit in the exercise of powers or responsibilities by specific branches of government under the Constitution. The Executive, for instance, would be taken to have the ability to delegate the exercise of administrative powers and to exercise discretion; the Legislature will have the power to regulate the conduct of its business and members; and the Judiciary will need to have powers to manage cases and ensure that there is no abuse of the machinery of justice. Where there is possible overlap, the Constitution will need to be construed to determine the proper scope of these powers. The respective roles of the three branches will undoubtedly be of great import in this determination and it is probable that on many matters there will be deference to the discretion and efficiency required for the proper functioning of the Executive, or to recognise the popular mandate given to the Legislature. But it would to my mind be a mistake to regard this process as involving the determination of the nature, scope, or content of prerogative rights, which arose in a system of government different from our own.

35 I should emphasise that there may not be any significant difference in result between reasoning based on the prerogative powers and that based on the

Constitution; the outcome may largely be the same, whether in relation to the Executive or the Legislature, whatever the basis for the power may be found to be. This may thus appear to be a technical point, but it is conceptually odd to refer to prerogative powers within our constitutional context. Prerogative power cases may in some situations be invoked to provide an analogy, but paramount consideration should always be had to our constitutional language and framework. Fifty years after the founding of the Republic, it is essential that the doctrinal basis for the powers and responsibilities of the various branches of Government is established on autochthonous constitutional grounds, informed by our national circumstances.

36 The second reason for caution in the direct transposition of English cases is the different nature of the offices of the Attorneys-General in the two jurisdictions. While the Attorney-General in England & Wales is a Minister of the Crown, the AG in Singapore is not. The AG is a member of the executive branch of the Government; neither is his office a political office nor does he have to be a Member of Parliament: *Halsbury's Laws of Singapore* vol 1 (LexisNexis, 2017 Reissue) ("*Halsbury's Laws of Singapore*") at para 10.651. Indeed, the AG in Singapore is a holder of a constitutional office. In that office, the AG does not act as an agent or servant of any sovereign; he acts in the performance of his constitutional functions, including matters assigned to him or her by the President and cabinet. It has been observed in Parliament that "in Singapore, the Attorney-General is a professional, not a political office holder, like in some countries": *Singapore Parliamentary Debates, Official Report* (13 March 2003) vol 76 at col 665 (Assoc Prof Ho Peng Kee, Senior Minister of State for Law); see also Tan Boon Teik, "The Attorney-General" [1988] 2 MLJ lviii; Her Majesty's Stationery Office, *Report of the Federation of Malaya*

Constitutional Commission (11 February 1957) at para 127 (Chairman: Lord William Reid).

37 Returning to an analysis of the Constitution, while the office of the AG may not have started off in this way, its present nature and incidents of its power are controlled and circumscribed by the language and framework of the Constitution. In that regard, the constitutional role of the AG envisaged by Art 35(7) is very broad. Leaving aside those of an advisory nature or which are conferred by written law, the AG is charged with performing "such other duties of a legal character, as may from time to time be referred or assigned to him by the President or the Cabinet". As it is not expressed that such referral or assignment be performed or signified in any particular way, the duties – and the necessary powers to give effect to such duties – can be inferred in the absence of any contrary intention either in statute or other Presidential or Governmental action.

38 The present application relates to an intervention in a private litigation to assert public interest privilege contained in s 126(2) of the EA. For context, s 126 of the EA is reproduced as follows:

> **Official communications**
>
> **126.**—(1) No public officer shall be compelled to disclose communications made to him in official confidence when he considers that the public interest would suffer by the disclosure.
>
> (2) No person who is a member, an officer or an employee of, or who is seconded to, any organisation specified in the Schedule to the Official Secrets Act (Cap. 213) shall be compelled to disclose communications made to him in official confidence when he considers that the public interest would suffer by the disclosure.

39 I accept that, as part of the AG's responsibilities contemplated in Art 35(7) of the Constitution, the AG has a duty to intervene, even in private litigation, to assert and state its position as to the issue of public interest privilege under s 126 of the EA. In order to give effect to this duty, the AG must be conferred the requisite standing to intervene where it considers appropriate.

40 This position is consistent with the role of the AG as the guardian of the public interest. This role is reflected in the numerous statutory provisions providing for the AG's responsibilities and powers in relation, *inter alia*, to crime, charities, families and public nuisance (see above at [23]). It is also the basis of the procedure of relator actions, where in recognition of the AG as "the protector and defender of the public interest", a member of the public may sue in the name of the AG for violation of public rights or interests (*Halsbury's Laws of Singapore* at para 10.653.2). While that is a case concerning standing in public law cases, some support may also be drawn from the Court of Appeal's *dictum* in *Jeyaretnam Kenneth Andrew v Attorney-General* [2014] 1 SLR 345 at [35] that, in modern times, "the Attorney-General's role [has] expanded beyond the context of charitable trusts to protecting the *public* interest generally whenever a public authority exceeded its statutory powers by some act that tended to interfere with public rights and so injure the public" [emphasis in original] (see also *Deepak Sharma v Law Society of Singapore* [2017] SGCA 43 ("*Deepak Sharma*") at [34]–[37]). Indeed, there has recently been express recognition in Parliament of the AG's role as the guardian of the public interest (see *Singapore Parliamentary Debates, Official Report* (3 March 2017) vol 94 at Committee of Supply – Head B (Attorney-General's Chambers) (Ms Indranee Rajah, Senior Minister of State for Law).

41 Further, I accept that, by analogy, the authorities cited such as *ex p Wiley* ([10] *supra*) and *Sankey* ([17] *supra*) point to the AG in Singapore having the requisite standing to intervene in matters involving public interest privilege under s 126 of the EA. There is no other person who or institution which is in the position to perform this role.

42 I also accept, as Lord Pearson opined in *R v Lewes Justices* ([10] *supra*) at 406B–C, that such interventions, if permitted, have the benefit "of promoting uniformity both in the decision of such questions and in the formulation of the grounds on which the objections are taken".

43 Finally, the extension of public interest privilege in s 126(2) of the EA to statutory bodies does not rob the AG of that role. While statutory bodies may have their own rights and interests, the AG would have the responsibility of protecting the overall interest, and any separate interest, of the Government. Even where there is an assertion of such an interest by the statutory body, the Government would have, at the very least, a broader interest than that of the statutory body in question. This stems from the fact that the Government is responsible for the position of all the government departments, as well as all statutory bodies ultimately answerable to it.

44 Turning now to the 1st Defendant's arguments, an attempt was made to distinguish the cases cited by the AG on the ground that the issue of public interest privilege was "front and centre" before the courts there, whereas the Further Arguments Application not having been granted here, there is no certainty that this issue would become a live one. This distinction cannot be sustained. If disclosure of the documents concerned would be injurious to the public interest, it would be so whether or not the issue of public interest privilege

had already been brought to the attention of the Court. Indeed, given the potentially serious and irreparable harm to the public interest that may be caused by an imprudent disclosure (see *Burmah Oil* ([10] *supra*) at 1146H), it would be all the more important that the AG be conferred standing and power to intervene and raise the issue for consideration if the parties had not themselves done so. The 1st Defendant's position would lead to a peculiar situation where the AG must hold his hand until one of the parties raises the issue of public interest privilege, or be precluded from intervening at all if no party takes the point. That cannot be. *Sankey* ([17] *supra*), which was an authority cited by the 1st Defendant, also appears to be a case in which the issue of public interest privilege was only brought to the attention of the Court by the counsel for the Commonwealth, who was then permitted to intervene (at 510).

45 In fairness, the 1st Defendant appears to concede a theoretical possibility that the AG may intervene if he is satisfied that it is in the public interest to do so, whether or not parties had raised the point. However, the 1st Defendant argues that the AG should not be permitted to intervene in this case since the Plaintiff had himself not taken the point at the first instance; to permit the AG's intervention would thus be to allow the Plaintiff a backdoor to make further arguments. I do not agree. In principle, the AG's standing and power to intervene should not be contingent on the conduct of the parties in the litigation. Whether the issue of public interest privilege is raised, not raised, belatedly raised, or inappropriately raised by the parties, the AG remains entitled to intervene to make its position clear.

46 The 1st Defendant further argues that there being no objection contained in an affidavit by a Minister, there would be no assistance provided by the AG's intervention. In my view, while the absence of such an affidavit may or may not

be relevant to the substantive issue of satisfaction of s 126(2) of the EA, it does not have a bearing on the threshold issues of the AG's standing to intervene and whether intervention should be granted.

47 Accordingly, Art 35(7) of the Constitution, taken together with the AG's recognised role as the guardian of the public interest, provides the basis for the AG's standing and power to intervene in the present matter in respect of the arguments on public interest privilege under s 126(2) of the EA.

48 I would note that the AG referred to several passages in the Parliamentary debates surrounding the enactment of s 126(2) to show that the AG's role in asserting public interest privilege is essential and contemplated. However, these passages show at best that the AG has a role in advising the Government and its officers on the issue of public interest privilege; that is not the same question as whether the AG has the standing or power to intervene in private litigation to assert such privilege. In any event, the speeches could not assist as the question of construction or interpretation of s 126(2) is not in play.

Mechanism of intervention

(1) Joinder under O 15 r 6(2)

49 The AG argues that it should be allowed to intervene in the Discovery Application, the Leave to Appeal Application, the Further Arguments Application and all related applications and appeals under O 15 r 6(2)(*b*) of the ROC as this would be necessary for the complete determination of the Discovery Application, and is just and convenient. The material portions of O 15 r 6(2) provide as follows:

Misjoinder and nonjoinder of parties (O. 15, r. 6)

> **6.**—(1) …
>
> (2) Subject to the provisions of this Rule, at any stage of the proceedings in any cause or matter, the Court may, on such terms as it thinks just and either of its own motion or on application —
>
> (*a*) …
>
> (*b*) order any of the following persons to be added as a party, namely:
>
> (i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in the cause or matter may be effectually and completely determined and adjudicated upon;
>
> (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.
>
> (3) An application by any person for an order under paragraph (2) adding him as a party must, except with the leave of the Court, be supported by an affidavit showing his interest in the matters in dispute in the cause or matter or, as the case may be, the question or issue to be determined as between him and any party to the cause or matter.
>
> (4) …

50 In ordinary cases involving private parties, the recognised objects of the joinder provisions under O 15 r 6(2)(*b*) are: (a) to prevent multiplicity of actions and to enable the court to determine disputes between all parties to them in one action; and (b) to prevent the same or substantially the same questions or issues being tried twice with possibly different results: *Wee Soon Kim* ([17] *supra*) at [19]; *Singapore Civil Procedure* at para 15/6/8.

51 The AG's present application to intervene in relation to the issue of public interest privilege may not commend itself to these objects narrowly construed: there is unlikely to be a multiplicity of action even if the AG's application was rejected. However, at least in relation to the particular issue of public interest privilege, there are broader purposes to permitting the joinder under O 15 r 6(2)(*b*), which are to allow important issues pertaining to the public interest to be raised, ventilated, and fully considered, as well as to "promot[e] uniformity both in the decision of such questions and in the formulation of the grounds on which the objections are taken": *R v Lewes Justices* ([10] *supra*) at 406B–C. These are not necessarily different objectives as those traditionally cited by the courts; they just have to be approached from a different perspective.

52 In the present case, I find that joinder of the AG may be effected under either O 15 r 6(2)(*b*)(i) or (ii) of the ROC.

53 Taking O 15 r 6(2)(*b*)(i) first, joinder is generally permitted where the non-party would be directly affected, either legally or financially, by any order which may be made in the action: *Singapore Civil Procedure* at para 15/6/8. In *Pegang* ([15] *supra*), the Privy Council formulated the question as "will his rights against or liabilities to any party to the action in respect of the subject matter of the action be directly affected by an order which may be made in the action?" (at 56).

54 In the unique context of the AG's intervention to assert or resist a claim of public interest privilege in his role as the guardian of the public interest, it is perhaps artificial to search for a private legal or financial interest of the AG's that would be directly affected by the outcome of the Court's determination. After all, it is the public interest in which name he seeks the intervention. In my

view, once it has been found that the AG has the standing to put forward its position in respect of s 126 of the EA, it should generally follow that the AG would be allowed to be joined at least in relation to arguments on public interest privilege under either limb of s 126. The AG's function as the guardian of the public interest would allow him to present a perspective that is distinct from that of either party and which, in the language of the ROC, is necessary to ensure that all matters in relation to the disclosure application may be effectually and completely determined and adjudicated upon. In any event, the general approach to O 15 r 6(2)(*b*)(i) taken in *Pegang* ([15] *supra*) would also be satisfied: while the AG may not have rights as such in the disclosure application, the AG's performance of his duties and obligations would be affected by the outcome of that application.

55 The 1st Defendant argues, citing *White v London* ([15(b)] *supra*), that intervention should not be allowed since the Plaintiff represents the same interests as the AG, and/or that the AG controls or directs the litigation conducted by the Plaintiff. That case does not apply to our facts. In that case, a plaintiff who was injured during an accident on a London Transport bus was directed by the Motor Insurers' Bureau to claim against London Transport under an agreement between the bureau and the Minister of Transport to compensate injured victims where the driver responsible for the accident could not be traced. After the plaintiff commenced suit against London Transport pursuant to the compensation agreement and the directions of the bureau, the bureau sought to join the action as a party, claiming an interest as the compensation agreement provided that the plaintiff could claim against the bureau itself if she failed against London Transport. The English Court of Appeal unanimously rejected the joinder application on the ground that it was not necessary given the considerable control over the plaintiff's conduct of the claim conferred on the

bureau by the compensation agreement. In this regard, Lord Denning MR opined that (at 726G-727C):

> Those provisions [in the compensation agreement] show quite clearly that the bureau are standing behind the plaintiff in this action. They require it to be brought; they indemnify the plaintiff; they put her forward on their behalf in an endeavour to make London Transport wholly or in part to blame. Nevertheless in this application they wish to come in and stand behind the defendant. …
>
> … In my judgment, seeing that the plaintiff is bringing the action on the direction of the bureau, she will be bound to pursue the action with vigilance and skill against London Transport, doing all she can to make them liable in part or whole. So far as London Transport is concerned, they will do their best to defend the action by disputing negligence … So all the matters will be properly and fully investigated without the necessity of joining the bureau. Accordingly, I doubt whether this joinder is "necessary" within the opening words of R.S.C., Ord. 15, r. 6.

56 The facts in *White v London* were materially different from the present application: the plaintiff's suit was initiated at the direction of the bureau, there was a legal agreement aligning the interests of the plaintiff and the bureau, and both the plaintiff's and the bureau's interests in the suit were monetary and private in the sense that their concerns related only to the outcome of that suit. In the circumstances, the interests of the intervener and existing party were in fact substantially co-incident. In contrast, while the positions of the AG and the Plaintiff on s 126 may overlap in the present case, their interests and reasons are not the same (see above at [43]). The Plaintiff's position reflects the interests and concerns of the tax authority, whereas the submissions of the AG would reflect that of the Government as a whole, and of the public more generally. Their bottom-line may be the aligned, and the same affidavits may form the evidential basis of their arguments, but that does not mean that there is a necessary coincidence as to the precise parameters and nuances of the

submissions that may be made on the operation of s 126. Further, the AG's participation as the guardian of the public interest is on a non-partisan basis; his alignment of position with one side or the other is "*purely incidental* and forms no part of the AG's intention" [emphasis in original]: *Deepak Sharma* ([40] *supra*) at [37]. Accordingly, I do not find anything in *White v London* that would exclude separate representation in this situation. The case of *De Hart* ([16(a)] *supra*) may be distinguished on similar grounds.

57 The 1st Defendant also argues that the AG has no role to play in the Further Arguments Application. I do not agree. It may be that the AG's primary role and concern here relate to the substantive position in relation to s 126 of the EA, but that cannot be detached from the threshold question in the Further Arguments Application of whether an extension of time should be granted to request for those arguments. Insofar as the question of merits of the further arguments is not irrelevant and there is an element of discretion with the Court, the AG may legitimately and helpfully draw the Court's attention to the issues and consequences at stake even *vis-à-vis* this threshold question. It would, of course, be a separate matter whether the Court is persuaded.

58 The 1st Defendant's third argument is that there is no necessity for the intervention since there is no risk of a multiplicity of proceedings. This is, to my mind, a red herring. By the Intervention Application, the AG seeks to intervene only in an interlocutory matter and not the substantive claim between the Plaintiff and the Defendants. Naturally, no separate suit will be filed by the AG against the Defendants even if he is not joined at present. However, that does not take the case out of the rationale of the joinder procedure under O 15 r 6(2)(*b*) (see above at [50]).

59 In addition, O 15 r 6(2)(*b*)(ii) gives an additional basis for the joinder of the AG. Generally, this limb permits a non-party to be added to "any cause or matter" if (*AHPETC* ([16] *supra*) at [39]):

> (a) the question or issue between that non-party and one of the parties is linked, factually or otherwise, to the relief or remedy claimed in the cause or matter; and
>
> (b) the court is of the view that it would be "just and convenient" to order a joinder or allow an intervention.

60 As mentioned (at [54] above), once the AG is found to have sufficient standing to intervene in private litigation to make submissions on s 126 of the EA as the guardian of the public interest, he should generally be joined at least insofar as the arguments on public interest privilege is concerned. In any case, I find that the issue sought to be raised by the AG (*ie*, public interest privilege under s 126(2) of the EA) is sufficiently linked to the discovery orders sought by the Defendants, and further that it is just and convenient for intervention to be allowed.

61 The 1st Defendant, relying on *Spelling Goldberg* ([16(b)] *supra*), argues that there must be a live issue between the intervener and a party at the time the joinder order is made, and that is not satisfied because the Further Arguments Application has not yet been granted and the issue of public interest has not thus arisen before the Court. That case concerned an application by certain film companies to intervene in a concluded and failed copyright claim by other film companies against users of certain frames in their produced films. The English Court of Appeal unanimously disallowed the intervention application. Bridge LJ opined that "the interest of the interveners is solely an interest in the outcome

of the appeal in so far as it determines a question of law which may affect the interveners' business in future" (at 281). Cumming-Bruce LJ said that it does not suffice to justify intervention if "at some future time … certain contingencies not presently in existence [would] come into existence" (at 282). The reticence in *Spelling Goldberg* to allow intervention is understandable, but that is a wholly different case from the present, where the AG seeks to intervene to resist an ongoing application for discovery in his recognised role as the guardian of the public interest. In any event, at least in the present context, a principled distinction between cases where the parties invoke s 126 on their own initiative and cases where s 126 is not raised by either party cannot be seriously sustained: that would leave the public interest concerns underlying s 126 vulnerable to the vagaries of litigation and contingent on the conduct of the parties (see above at [44]–[45]).

62 The 1st Defendant further submits that the Court should consider the lateness of the application, the absence of new facts that have arisen, and the prejudice or inconvenience that would be caused to the 1st Defendant by allowing the Plaintiff a second bite at the cherry, this time aided by the AG. These factors are said to negate the requirement that the joinder be "just and convenient". In the circumstances of the present case, given that the AG was consulted only after the Judgment was handed down, and that any delay was not of such a long period, I do not find that the AG should be denied the opportunity to intervene. Neither do I find that any material prejudice is made out. As the Plaintiff pointed out, there is nothing that cannot be compensated for by costs. Weighing that against the potentially serious and irreparable harm that could result to the public interest from an imprudently ordered disclosure, it cannot be seriously argued that the AG's application for intervention should be denied.

63 For the foregoing reasons, I find that either limb of O 15 r 6(2) would suffice to allow the Intervention Application.

(2) Inherent jurisdiction under O 92 r 4

64 The AG also invoked the inherent jurisdiction of the Court under O 92 r 4 of the ROC. Generally, the Court has an inherent jurisdiction to allow an intervention or joinder if such an order would be in the interests of justice, even if O 15 r 6(2) did not apply: *Wee Soon Kim* ([17] *supra*) at [20]–[22]; see also *Singapore Civil Procedure* at para 15/6/10.

65 In *Wee Soon Kim*, the Court of Appeal provided the following guidance on how the court's inherent jurisdiction to allow intervention should be exercised:

> 27 It seems to us clear that by its very nature, how an inherent jurisdiction, whether as set out in O 92 r 4 or under common law, should be exercised should not be circumscribed by rigid criteria or tests. In each instance the court must exercise it judiciously. In his lecture on "The Inherent Jurisdiction of the Court" published in *Current Legal Problems 1970*, Sir Jack Jacob (until lately the general editor of the *Supreme Court Practice*) opined that this jurisdiction may be invoked when it is just and equitable to do so and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression and to do justice between the parties. Without intending to be exhaustive, we think an essential touchstone is really that of "need"…
>
> …
>
> 30 The question might well be asked, what prejudice would the intervention cause to the complainant/applicant. But we do not think that that is the correct approach upon which to invoke the court's inherent jurisdiction. It may well be that the question of prejudice is relevant to determine whether intervention should be allowed in the circumstances of a case. But that is not to say that once no prejudice is shown, the court should invoke that jurisdiction. There must nevertheless be

> reasonably strong or compelling reasons showing why that jurisdiction should be invoked.

66 It is thus clear that the touchstone of the court's inherent jurisdiction to permit intervention or joinder is the "strict criterion" of necessity: *Family Food Court (a firm) v Seah Boon Lock and another (trading as Boon Lock Duck and Noodle House)* [2008] 4 SLR(R) 272 at [63]. The absence of prejudice, while relevant, does not itself suffice. Due consideration will be given to the concerns of due process and fairness as between the parties. Ultimately, the court's inherent jurisdiction "should only be invoked in exceptional circumstances where there is a clear need for it and the justice of the case so demands" (*Roberto Building Material Pte Ltd and others v Oversea-Chinese Banking Corp Ltd and another* [2003] 2 SLR(R) 353 at [17]).

67 In the present case, as I have found that O 15 is available, it is not necessary to consider this in much depth. The AG argues that strong and compelling reasons exist for intervention given the AG's responsibility in relation to the issue of public interest privilege. The 1st Defendant counters, however, that no hardship, difficulty or danger to the public interest will arise by a rejection of the intervention since the Plaintiff would be able to make the same arguments as the AG.

68 In my judgment, the standing of the AG in respect of matters concerning s 126 of the EA invests the AG with sufficient interest to justify the Court's allowing an intervention or joinder under O 92 r 4. Indeed, disallowing the intervention may result in a divergence of position in respect of s 126 between that of the Plaintiff and the wider government; it may also result in imprudent disclosure of documents that could cause serious and irreparable injury to the

public interest. Accordingly, for similar reasons as to joinder under O 15 r 6, intervention should be permitted under the inherent jurisdiction of the Court.

Issue 2: The Further Arguments Application

The Plaintiff's arguments

69 The Further Arguments Application concerns the Plaintiff's application for (a) an extension of time to file the request to make further arguments in respect of the Discovery Application and (b) leave to file and serve two affidavits as evidence in support of the further arguments to be made in the Discovery Application and the Leave to Appeal Application (see above at [4]).

70 In respect of the issue of extension of time to make further arguments, the Plaintiff starts from the premise that the purpose of allowing further arguments is for the parties to advance all arguments that may be material, and to allow the Court to review a decision before an appeal is brought: *Singapore Press Holdings Ltd v Brown Noel Trading Pte Ltd and others* [1994] 3 SLR(R) 114 ("*Singapore Press Holdings*"). In this regard, the party making further arguments is not confined to points that have already been raised, but may also rely on additional grounds not previously invoked: *J H Rayner (Mincing Lane) Ltd v Teck Hock & Co (Pte) Ltd and others* [1988] SGHC 103 ("*J H Rayner*"). Accordingly, the issue in the present application is not whether the failure to raise these arguments during the initial hearing for the Discovery Application should be excused, but a narrower one of whether the 11 working days' delay in making the request for further arguments should bar the request.

71 To this end, the Plaintiff urges the Court to invoke its powers under para 7 of the First Schedule to the Supreme Court of Judicature Act (Cap 322, 2007

Rev Ed) ("SCJA") to grant an extension of time for the Plaintiff to request for further arguments: *Denko-HLB Sdn Bhd v Fagerdala Singapore Pte Ltd* [2002] 2 SLR(R) 336 ("*Denko*"). In considering whether to exercise its discretion, the less stringent approach in *The Tokai Maru* [1998] 2 SLR (R) 646 ("*The Tokai Maru*") should be adopted, rather than the stricter approach in relation to an extension of time to file a notice of appeal. The ultimate concern of the Court should be the justice of the case: *Sun Jin Engineering Pte Ltd v Hwang Jae Woo* [2011] 2 SLR 196 ("*Sun Jin*").

72 On the facts, an extension of time is justified because: (a) there is a reasonable and genuine justification for the delay, (b) there is no irremediable prejudice that would be occasioned to the Defendants, and (c) the further arguments sought to be made are highly pertinent and meritorious.

73 In relation to the issue of further evidence, the Plaintiff submits that their admission would ensure that the Court is properly positioned to consider all relevant material evidence when hearing the further arguments and, if necessary, the Leave to Appeal Application. Since the Discovery Application is subject to further arguments, the decision is "tentative" until such arguments are heard: *J H Rayner* ([70] *supra*). Accordingly, analogous to a Judge in chambers hearing a Registrar's Appeal, the Court has a broad discretion to allow the admission of fresh evidence in the absence of contrary reasons: *Lian Soon Construction Pte Ltd v Guan Qian Realty Pte Ltd* [1999] 1 SLR(R) 1053 ("*Lian Soon*"). Further, the Court's discretion to admit further evidence may be exercised more liberally in interlocutory matters such as discovery applications: *Park Regis Hospitality Management Sdn Bhd v British Malayan Trustees Ltd and others* [2014] 1 SLR 1175 ("*Park Regis*").

74 On the facts, the Court should permit the further evidence, *ie*, the two affidavits, to be admitted. These affidavits are necessary and relevant to the further arguments sought to be raised by the Plaintiff. They were delayed only because the advice to the Plaintiff to include these factual matters was given after the Judgment was delivered. No challenge has been made by the 1st Defendant as to their credibility, and no prejudice has been suggested that cannot be compensated by costs.

75 In particular, in relation to the affidavit of Ms Ng, the Plaintiff argues that this should now be admitted because this Court should have, during the earlier hearing of the Discovery Application, ordered further evidence to be produced on oath if it considered the evidential basis before it insufficient to justify the Plaintiff's claim as to legal professional privilege: Colin Passmore, *Privilege* (Sweet & Maxwell, 3rd Ed, 2013) at para 9.032; *Atos Consulting Ltd v Avis plc* [2007] EWHC 323 ("*Atos*") at [37(4)].

76 Finally, the Plaintiff submits that even if the Court were to decline to grant the extension of time to request for further arguments, these affidavits should still be admitted as they provide context for the Leave to Appeal Application. No prejudice would be caused to the 1st Defendant since the Leave to Appeal Application will only be heard at a later stage and, if necessary, leave may be sought by the Defendants for time to respond.

The 1st Defendant's arguments

77 The 1st Defendant first submits that, of the three further arguments sought to be made by the Plaintiff, two of those relating to s 126 of the EA and s 6(3) of the ITA are new, whereas the third argument is that the Court had improperly rejected the claim for legal professional privilege. In this context,

allowing the application would set a dangerous precedent as it would embolden litigants to try to repair and reopen their cases after judgments have been issued; the principle of finality and the respect for the procedures prescribed in the ROC would inevitably be undermined.

78 Substantively, the 1st Defendant attacks first the issue of further evidence. Counsel submits that new evidence cannot be admitted for the purpose of further arguments because further arguments must be based on existing evidence: *Travista Development Pte Ltd v Tan Kim Swee Augustine and others* [2007] 3 SLR (R) 628 ("*Travista*"). If the Plaintiff wishes to admit new evidence, the proper procedure is for it to do so on appeal and not before the Court of first instance. This approach accords with the rationale for permitting further arguments, which the 1st Defendant characterised as allowing a Judge in chambers to review an order made if the applicant was unable to present full arguments due to the time limit for the hearing: *Singapore Press Holdings* ([70] *supra*). On this basis, the two affidavits should not be admitted as further evidence, and the issue of further arguments – at least in relation to public interest privilege and legal advice privilege, both of which necessarily require the support of the further evidence – would not even arise.

79 Leave to adduce further evidence in the Leave to Appeal Application should fail because an application to adduce new evidence for the purpose of a leave to appeal application in relation to an interlocutory order will be granted only if the applicant is able to show strong reasons why the new evidence was not previously admitted: *Jurong Town Corp v Wishing Star Ltd* [2004] 2 SLR(R) 427. On the facts, the Plaintiff cannot satisfy this test for reasons by bare assertion that his former lawyers had not properly advised him.

80 As for the issue of whether an extension of time to request for further arguments should be granted, the 1st Defendant cites *Denko* ([71] *supra*) and submits that the Court should not permit the extension primarily because no credible explanation has been given by the Plaintiff for the delay. The excuse that the Plaintiff's former solicitors – which included a Senior Counsel – had not properly advised the Plaintiff was a bare and implausible assertion that should not be accepted in the absence of extenuating circumstances: *Nomura Regionalisation Venture Fund Ltd v Ethical Investments Ltd* [2000] 2 SLR (R) 926; *Tan Sia Boo v Ong Chiang Kwong* [2007] 4 SLR(R) 298. Further, the delay is not short, and grave prejudice would be caused to the 1st Defendant if all the effort expended in obtaining the initial judgment came to nothing, with further delays caused to the already protracted matter. In this regard, even an offer of payment of costs is not a cure for all defaults: *Chan Kern Miang* ([16(c)] *supra*).

The AG's arguments

81 As noted above at [6], in the interests of efficiency, I allowed the AG to make submissions in respect of the Further Arguments Application, on the basis that a consideration of their written and oral submissions would be premised on their being granted leave to intervene in the Intervention Application.

82 The AG does not submit on the question of extension of time. However, the AG takes an interest in the issue of whether further evidence may be admitted in support of the further arguments as the two affidavits sought to be adduced are relevant to the issue of public interest privilege under s 126(2) of the EA, with which the AG is concerned.

83 In relation to the admission of further evidence in support of the further arguments to be requested in the Discovery Application, the AG submits that

the Court has a discretion to admit new evidence even at the stage of further arguments: *Lian Soon* ([73] *supra*). This is because the Court, when it hears the further arguments, continues to exercise jurisdiction as a first instance court: *Thomson Plaza (Pte) Ltd v Liquidators of Yaohan Department Store Singapore Pte Ltd (in liquidation)* [2001] 2 SLR(R) 246. Further, *Travista* ([78] *supra*), invoked by the 1st Defendant, does not in fact bar the admission of new evidence for the purpose of further arguments, insofar as those arguments pertain to an interlocutory decision. The principle of finality is not significantly infringed upon at present given that directions in this case are still pending and no order has been extracted.

84 On the facts, good reasons exist for admitting the further evidence. First, the AG is entitled to state his position in respect of the issue of public interest privilege regardless of whether the Plaintiff is allowed an extension to make further arguments on the same. Secondly, courts have viewed public interest privilege as a matter that they can and should take cognisance of even if neither party nor the AG has asserted it: *Burmah Oil* ([10] *supra*). Thirdly, the relevant factors would point towards the admission of the further evidence: (a) the affidavits are relevant and credible, (b) the delay does not in itself warrant exclusion, and (c) there is no irremediable prejudice caused.

85 As for the admission of further evidence in support of the Leave to Appeal Application, the High Court is similarly not precluded from admitting further affidavits. Otherwise, a putative appellant may be precluded from taking the new points to the Court of Appeal. In this context, even if this Court admitted the further evidence, that would only be for the purpose of determining whether the leave to appeal threshold is met and does not bind the Court of Appeal.

The decision

86 The statutory basis for the requesting and making of further arguments is s 28B of the SCJA, which reads as follows:

> **Further arguments before Judge exercising civil jurisdiction of High Court**
>
> **28B.**—(1) Before any notice of appeal is filed in respect of any judgment or order made by a Judge, in the exercise of the civil jurisdiction of the High Court, after any hearing other than a trial of an action, the Judge may hear further arguments in respect of the judgment or order, if any party to the hearing, or the Judge, requests for further arguments before the earlier of —
>
> (*a*) the time the judgment or order is extracted; or
>
> (*b*) the expiration of 14 days after the date the judgment or order is made.
>
> (2) After hearing further arguments, the Judge may affirm, vary or set aside the judgment or order.
>
> (3) If any request for further arguments has been made under subsection (1) —
>
> (*a*) no notice of appeal shall be filed in respect of the judgment or order until the Judge —
>
> (i) affirms, varies or sets aside the judgment or order after hearing further arguments; or
>
> (ii) certifies, or is deemed to have certified, that he requires no further arguments; and

> (*b*) the time for filing a notice of appeal in respect of the judgment or order shall begin on the date the Judge —
>
> (i) affirms, varies or sets aside the judgment or order after hearing further arguments; or
>
> (ii) certifies, or is deemed to have certified, that he requires no further arguments.
>
> (4) For the avoidance of doubt, a party to the hearing may, but is not required to, request for further arguments before he files a notice of appeal in respect of the judgment or order.

87 Sub-section (4) explains that a request for further arguments is not mandatory, but rather voluntary, before a notice of appeal is filed. As noted by the parties, this reflects a change from the pre-2010 position under s 34(1)(*c*) of the Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed) ("the 1999 SCJA"), which required a party who wished to appeal to the Court of Appeal against an interlocutory order to write in for further arguments to the Judge who heard the application within seven days of the date of the order. After the SCJA was amended in 2010 to delete the then s 34(1)(*c*), s 28B was inserted in its place so that the making of further argument is now voluntary: the parties may write in for such arguments if they wished or the Judge may request for the same (see *Singapore Parliamentary Debates, Official Report* (18 October 2010) vol 87 at cols 1372–1373 (Assoc Prof Ho Peng Kee, Senior Minister of State for Law)).

88 I should note that while some of the parties' written submissions addressed the Leave to Appeal Application, that is not the subject of my present determination. The issues relating to the extension of time and the adducing of further evidence are to my mind the questions of immediate concern. If need be, the issue of what ought to be considered in any application for leave to appeal can be dealt with later, at the appropriate juncture.

Extension of time to request for further arguments

89 It is common ground between the parties that the Court has the power to grant an extension of time for the Plaintiff to request further arguments under s 28B of the SCJA. That power to abridge the time prescribed can be found in para 7 of the First Schedule to the SCJA, which reads as follows:

> **Time**
>
> 7. Power to enlarge or abridge the time prescribed by any written law for doing any act or taking any proceeding, whether the application therefor is made before or after the expiration of the time prescribed, but this provision shall be without prejudice to any written law relating to limitation.

90 Section 18(2) of the SCJA provides that the High Court shall have the powers set out in the First Schedule. In the present case, the Judgment was issued on 31 January 2017. As no notice of appeal has been filed against, and no order of court has been extracted in respect of that decision, under s 28B(1)(*b*) of the SCJA, further arguments (if any) should have been requested by 14 February 2017. Instead, the summons for the Further Arguments Application was filed on 1 March 2017: this was some 15 days after the time prescribed in s 28B(1)(*b*).

91 No authority has been cited to me which pronounced on the principles governing the exercise of the Court's power to extend time in the context of further arguments under the present s 28B of the SCJA. However, certain principles may be extrapolated from two decisions of the Court of Appeal involving extensions of time in other contexts.

92 The first decision is that of *The Tokai Maru* ([71] *supra*). In this case, the applicant sought to file an affidavit of evidence-in-chief nine months out of time. The Court of Appeal granted the extension even though the delay was

found to be unjustified (at [29]), recognizing the principle that "a litigant should not be deprived of his opportunity to dispute the plaintiff's claims and have a determination of the issues on the merits as a punishment for a breach of [the rules of civil procedure] unless the other party has been made to suffer prejudice which cannot be compensated for by an appropriate order as to costs" (at [23(b)]). Accordingly, that case concerning an application for an extension of time to file an affidavit was said to qualify for a less stringent approach than the test with respect to extensions of time to file a notice of appeal (at [20]). Under this less stringent approach, three issues are relevant: (a) whether any justification exists for the delay; (b) whether prejudice was caused to the other party; and (c) whether special circumstances warranted a dismissal of the application for extension of time (at [24]).

93 The next decision is that of *Denko* ([71] *supra*). In this case, the appellant sought to apply for the respondent's action to be stayed on the ground of *forum non conveniens*. The appellant succeeded before the assistant registrar but the stay was overturned on appeal before the High Court. Given the then-operative s 34(1)(*c*) of the 1999 SCJA, the appellant had to file a request to the High Court Judge for further arguments within seven days of the date of the order if it wished to appeal against it, but in fact made that request some 14 days after the expiry of the prescribed timeline. The appellant later filed a notice of appeal but that was rejected on the basis that its request for further arguments was out of time and thus its notice was invalid. To correct the error, the appellant filed a motion before the Court of Appeal seeking an extension of time for a request to be made for further arguments.

94 The Court of Appeal observed (at [9]) that the law drew a distinction between an application for extension of time to file a notice of appeal and an

application to extend time in relation to other matters: the less stringent approach as set out in *The Tokai Maru* ([71] *supra*) governs the latter. In that context, the appellant's application for extension of time to make a request for further arguments under the then s 34(1)(c) was more analogous to an application for extension of time to file a notice of appeal and thus warranted a stricter approach (at [10]):

> While [the appellant's] application was not an application for an extension of time to file a notice of appeal, neither was it an application to extend time in relation to a matter of the nature in *The Tokai Maru*. But the objective of [the appellant's application was to enable [the appellant] to appeal against the order made [by the High Court] … As we see it, [the appellant's] application was more akin to an application for an extension of time to file [an] appeal rather than to file affidavits of evidence-in-chief out of time as in *The Tokai Maru*. It was a necessary step to filing an appeal. Therefore, a stricter approach should be followed in determining whether an extension of time should be granted … It must be borne in mind that the very limited time frame prescribed in s 34(1)(*c*) is to ensure that an interlocutory order made by a judge in chambers will obtain finality quickly so that the trial of the action will take place soonest practicable and not be bogged down by interlocutory squabbles. The trial of the action should not be delayed.

95 The Plaintiff submits that, given the amendment to the then s 34(1)(c), which now takes the form of s 28B of the SCJA, the requirement to request for further arguments is no longer a mandatory condition for the filing of an appeal against an interlocutory order. The link, so to speak, between the regimes of further arguments and appeals have thus been broken. Therefore, *Denko* no longer governs and the less stringent approach in *The Tokai Maru* should be preferred.

96 I am of the view that the more stringent approach in *Denko* should govern the Court's approach to deciding whether to grant extensions of time to request for further arguments under s 28B of the SCJA. The less stringent

alternative in *The Tokai Maru*, while entirely appropriate for interlocutory matters generally, is less so in respect of cases where the principle of finality may be disturbed. This would be the case if the time prescribed for the request of further arguments is that which is sought to be abridged. While there have been legislative amendments to the further arguments regime under the SCJA (see above at [87]), the crux of the matter is not whether such further arguments are mandatory or voluntary, but the fact that when the requests for further arguments are made, the time for filing a notice of appeal is suspended and there is significantly less clarity as to when and whether the initial judgment would continue to stand (see s 28B(3) of the SCJA). In other words, the legislative amendments relied upon by the Plaintiff to distinguish *Denko* do not in substance negate the disturbance to finality that requests for further arguments out of time would create. To my mind, the Court of Appeal's concern in *Denko* (at [10]) continues to apply in relation to the present s 28B: "an interlocutory order made by a judge in chambers [should] obtain finality quickly so that the trial of the action will take place soonest practicable and not be bogged down by interlocutory squabbles".

97 The Plaintiff highlights that the present matter is merely interlocutory and there has not yet been a trial. However, the principle of finality applies also to interlocutory orders, even if to different extents. Interlocutory squabbles would otherwise bog down the progress of cases and there would be no end to the matter. In this regard, finality is not just a principle to which we pay lip service. It underlies several other concerns, including that there should be efficacious utilisation of the litigants' and the Court's resources, that the parties should be forthcoming with their arguments in the first instance, and that justice demands that an authoritative decision be made as regards any final or interlocutory matter so that the parties may move on with their lives.

98 The Plaintiff also submits that a more lenient approach would not set a bad precedent because the facts here are unusual and unlikely to be replicated. However, save for the fact that the AG is seeking an intervention in the present matter, it is not so clear that a request for further arguments out of time in relation to an interlocutory decision is such an uncommon occurrence.

99 Therefore, where an extension of time is sought for a party to request for further arguments, the more stringent approach in *Denko* (compared to that in *The Tokai Maru*), which applies to the issue of whether an extension of time should be granted to file or serve a notice of appeal, should govern save for one adaptation. *Denko* refers to the "merits of the appeal" as one of four relevant factors (at [11]). Given that further arguments are no longer necessarily tied to an appeal, this question of the merits of the appeal should not arise. However, the question of the merit of the further arguments is a relevant consideration: if it is clear that the further arguments are hopelessly unsound, the Court should not exercise its discretion to extend time even if the delay is short and the applicant without any fault.

100 Accordingly, in determining whether an extension of time should be granted for a party to request for further arguments under s 28B of the SCJA, the relevant factors are: (a) the length of the delay, (b) the reasons for the delay, (c) the merits of the further arguments, and (d) the degree of prejudice to the other party (see *Denko* at [11]).

101 Applying this approach to the facts, I am satisfied that the application for extension of time should be granted in the present case. In this regard, I am also guided by the Court of Appeal's *dictum* in *Sun Jin* ([71] *supra*) at [30]:

> … [T]he court, in deciding whether to extend the prescribed timeline for an act to be done, has to balance the competing interests of the parties concerned … Copious citation of case law will not be necessary (and also will not be helpful) as previous decisions will be no more than guides. In determining how the balance of interests should be struck and in applying the … factors [for when an extension of time will be granted], it is the overall picture that emerges to the court as to where the justice of the case lies which will ultimately be decisive.

102 Here, the delay was some 15 days, or as the Plaintiff put it, 11 working days. It is true that in *Denko*, the Court of Appeal opined that "[c]onsidering that the period allowed by s 34(1)(*c*) to apply for further arguments is only seven days, a delay of 14 days cannot be said to be relatively short" (at [12]). However, since the present s 28B permits a longer period to apply for further arguments (*ie*, 14 days), in that context the 15 days' delay does not show such dilatoriness that the extension should not be given because of the length of the delay alone.

103 The reasons for the delay relied upon by the Plaintiff are that (a) time was taken in considering the Judgment, (b) advice was required from the AG, (c) new counsel had to be instructed, and (d) voluminous documents sought in the discovery had to be reviewed by the relevant parties in order for a position to be taken and the necessary affidavits to be drafted. In the circumstances, while there was probably some room for expedition, I do not find that the delay was inordinate or inexplicable. Some time would reasonably have to be consumed for the preparatory stages prior to making a request for further arguments, particularly given the involvement of external parties and the relative novelty of the issue of public interest privilege raised in the Judgment.

104 As to the merits of the further arguments, I could not say that the arguments on s 126 of the EA are so unlikely to succeed that no opportunity should be given for these to be raised. There may be some greater concern for

the ambit of s 6(3) of the ITA, but it does not rise to the level that it could be described as hopelessly unsound. The 1st Defendant agreed that the applicant need only show that the merits of the further arguments are not hopeless, and need not rise to the threshold of likelihood to succeed. To that end, the merits of both these arguments on s 126 of the EA and s 6(3) of the ITA were not challenged. As for the further arguments on legal professional privilege, the real question which will be dealt with below is whether further evidence should be admitted at this stage.

105 Finally, I could not see that any material prejudice is shown from such delay. The matter is already some three years old and is still at the interlocutory stage. While the 1st Defendant should not be left with the threat of litigation hanging over its head, the suit is not yet so far advanced that further arguments would prolong matters disproportionately. In any case, as the Plaintiff acknowledges, any prejudice caused by the delay can be compensated by costs.

106 In the circumstances, therefore, I allow an extension of time for a request for further arguments under s 28B of the SCJA to be made by the Plaintiff.

New arguments as further arguments

107 It should be clarified that it is permissible to raise new legal arguments or issues in further arguments which had not earlier been raised. In the present case, that would relate to the Plaintiff's desire to submit on public interest privilege under s 126(2) of the EA and official secrecy under s 6(3) of the ITA. The Court of Appeal has expressly recognised that the main rationale behind the further arguments regime is to prescribe a procedure for the Judge to have an opportunity reconsider his decision in light of the further arguments as may be put forward (*Singapore Press Holdings* ([70] *supra*) at [40], quoting *J H*

Rayner ([70] *supra*)). The scope of the relevant provision may have since changed, but this core rationale did not. In a similar vein, it was stated under the recommendations section of a law reform report that "the making of further arguments was intended to address the possible injustice arising from full arguments not being made before the judge": Law Reform Committee, Singapore Academy of Law, *Report of the Sub-Committee on the Rationalisation of Legislation Relating to Leave to Appeal* (October 2008) at para 105 (Chairman: Cavinder Bull). That being the case, there is nothing in the rationale, the case law, or the legislative framework or language to suggest that further arguments are to be restricted to arguments that had earlier been raised and that new arguments are to be precluded. Indeed, a contrary position would be odd when viewed against the purpose of the further arguments regime since it is often the bringing to the Court's attention a heretofore unconsidered point that would be most helpful.

Further evidence in support of further arguments

108 The second part of the Further Arguments Application relates to the Plaintiff's request for leave to file and serve two affidavits in support of its further arguments in the Discovery Application and the Leave to Appeal Application (see above at [4]).

109 The Plaintiff argues that the Court has full discretion to allow the further evidence to be admitted. An analogy was drawn with new affidavit evidence coming in during a Registrar's Appeal in the High Court: in that situation, "[t]he judge's discretion is in no way fettered by the decision below, and he is free to allow the admission of fresh evidence in the absence of contrary reasons": *Lian Soon* ([73] *supra*) at [38]. Further, the Plaintiff cites *Park Regis* ([73] *supra*) at [28] for the proposition that further evidence may be more liberally permitted

in interlocutory matters, such as discovery, on the basis of "a distinction to be drawn between matters which had characteristics of a full trial or where oral evidence had to be recorded, and matters which were generally 'interlocutory' in nature".

110 However, these cases do not go as far as the Plaintiff would like. Both *Lian Soon* and *Park Regis* were concerned with allowing evidence in a Registrar's Appeal, which is a hearing *de novo*. The Judge in chambers may thus allow the admission of fresh evidence in the absence of contrary reasons because he is "entitled to treat the matter as though it came before him for the first time… [and] is in no way fettered by the decision below": *Lian Soon* at [38]. This practice appears to be adapted from that in England and Wales: see *Lian Soon* at [35]. That is, however, not the case when further arguments are allowed. While the Judge's agreement to hear further arguments may in some sense mean that the original decision is "tentative" (see *J H Rayner* ([70] *supra*)), that tentativeness does not by itself mean that the doors are opened to all matters: the original decision is not readily departed from, and the findings are not revisited *de novo*. As opposed to a further arguments hearing, a *de novo* Registrar's Appeal also does not involve the policy considerations of finality and abuse of process to the same extent. Therefore, I cannot accept the Plaintiff's proposed position that further evidence should generally or readily be permitted to be adduced in support of any further argument that may be raised.

111 In my view, the more principled position is to allow further evidence in support of new arguments if sufficient reason exists, but to disallow the admission of further evidence to support or strengthen previously raised arguments. As discussed above, the finality of a decision, even if only

interlocutory, must be respected (see above at [97]). Liberally allowing new evidence to support a previously raised argument would only encourage re-litigation and re-canvassing. The trickling in of evidence in support of an argument already made cannot, as the Plaintiff argues, be controlled solely by the Court's discretion: much judicial time and cost would be incurred unless a bright line rule was applied to winnow possible applications.

112 I appreciate that this position would cause a line to be drawn between the position as to further arguments (which permits old and new arguments alike to be raised) and that in relation to further evidence (which distinguishes between further evidence in support of new arguments and that in support of old arguments). However, this is not unjustified. As a matter of principle, this reflects a distinction that may be made between finality in evidence and finality in law. As I understand it, the concept of tentativeness used by Chan Sek Keong J in *J H Rayner* ([70] *supra*) to describe an order that is subject to further arguments relate to findings in law or how the evidence already presented is to be construed. Finality in evidence involves separate concerns – and that is why s 28B of the SCJA addresses further arguments rather than further evidence. It is this that underlines the approach in *Travista* ([78] *supra*), in which Judith Prakash J noted – expressly in the context of a final and not interlocutory decision – as follows (at [38]):

> … the purpose of further arguments is to highlight to the court an argument which was not made, or not made properly previously, but the new argument must be based on existing evidence. Otherwise, a party after having had the benefit of hearing the grounds of the court's decision will simply adduce evidence to address flaws or gaps in its evidence and ask for the matter to be reheard. This will affect the finality of the court's decision.

113 Practically, the admission of further evidence would also often be more disruptive to the conduct of the proceedings, distorting timelines to a greater extent than if further arguments were simply made without such evidence being adduced. This is because it may not stop with a simple affidavit introduced by one party; the other party may, as the Plaintiff acknowledged that the 1st Defendant could do in the present case, seek leave to file a reply or response. If not curtailed, the potential for further evidence to delay and disrupt matters is disconcerting.

114 In determining whether sufficient reasons have been shown to justify the admission of further evidence in support of new arguments, there can be no prescriptive list of factors for consideration given the myriad of factual circumstances that may arise. That said, the time-tested factors set out in *Ladd v Marshall* [1954] 1 WLR 1489 would likely be a useful starting point:

(a) whether the new evidence could have been obtained at the time of the original hearing, with reasonable diligence, by the party seeking to introduce it;

(b) whether the new evidence is such that it would probably have an important influence on the result of the case, even though it need not be decisive; and

(c) whether the evidence is such as is presumably to be believed.

115 In addition, the likelihood of further delay to the proceedings that would be caused as a result of such admission, and the degree of prejudice that may be caused to the other party, will likely be relevant. Where, as is the case here, an

extension of time is also sought to request for further arguments, some of the considerations may overlap.

116 On the facts, leave to admit further evidence in relation to s 126(2) of the EA and s 6(3) of the ITA is granted. While the new evidence could have been obtained earlier, I appreciate that the issue of public interest privilege is relatively novel and untested in Singapore. Further, the importance of the further evidence to the further arguments that may be made in the Discovery Application is immediately apparent: without these new affidavits, public interest privilege under s 126(2) would be a non-starter. The credibility of the affidavits is also not in question. The nature of the evidence is such that they relate to largely undisputed facts; rather, it is the legal characterisation and meaning of these facts that are likely to be in dispute. Inordinate delay to the proceedings is therefore unlikely. In this regard, I am unaware of any prejudice caused that cannot be compensated by costs. For these reasons, I find that sufficient reasons exist for the admission of the further evidence as sought by the Plaintiffs in the Further Arguments Application insofar as they relate to the further arguments on public interest privilege under s 126(2) of the EA and official secrecy under s 6(3) of the ITA.

117 However, that part of the further evidence that is to support the previously canvassed point in relation to legal professional privilege – including both litigation privilege and legal advice privilege – cannot be admitted. That being so, it would be for the parties to consider whether to continue their pursuit of the further arguments in relation to those points.

Issue 3: Inspecting documents and calling for further evidence in assessment of privilege

118 Properly speaking, the issue of whether the Court should, in determining the applicability of a head of privilege, inspect the documents concerned or call for further supporting evidence should only be considered at the stage where the further arguments are substantively heard. But that would difficult, as the Plaintiff in part invoked the Court's ability to inspect evidence as a supporting reason showing the strength of their case in favour of time being extended and further evidence being admitted. In view of that, I will address the issue here.

119 The Plaintiff submits that this Court should, at the original hearing of the Discovery Application and prior to the release of the Judgment, have given the Plaintiff an opportunity to file another affidavit to shore up his claim as to legal professional privilege if the Court considered the evidence before it insufficient to find in favour of the Plaintiff. Alternatively, the Court should have inspected the documents concerned. In this regard, the Plaintiff relied on the English High Court decision of *Atos* ([75] *supra*), where it was held (at [37(4)]) that where an objection is taken to discovery on the ground of privilege:

> If sufficient grounds are shown for challenging the correctness of the asserted right then the court may order further evidence to be produced on oath or, if there is no other appropriate method of properly deciding whether the right to withhold inspection should be upheld, it may decide to inspect the documents.

120 I do not read *Atos* as supporting the Plaintiff's submission so definitively. As argued by the 1st Defendant, the proposition in *Atos* is not either novel or unknown in Singapore. In *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and other appeals* [2007] 2 SLR(R) 367, the Court of Appeal considered that there may

be grounds for the Court to inspect the documents concerned, and stated (at [104]) as follows:

> However, there is also a case for using this approach only in cases where the judge has a real doubt about the claim of the party seeking to resist discovery on the ground of legal professional privilege …
>
> …
>
> This approach was accepted by the New Zealand Court of Appeal in *Taranaki Co-operative Dairy Company Limited v Rowe* [1970] NZLR 895, where Turner J, delivering the judgment of court said (at 904), "[t]he jurisdiction to inspect the documents of one party without disclosing what is in them to the other is perhaps one to be *conservatively exercised*" [emphasis added]. Subsequently, Cooke J (as he then was), in the New Zealand Court of Appeal decision of *Guardian Royal Assurance v Stuart* … observed thus (at 599):
>
> > As in previous cases in this Court (see *Konia v Morley*, *Environmental Defence Society Inc v South Pacific Aluminium Ltd (No 2)* [1981] 1 NZLR 153 and *Fletcher Timber Ltd v Attorney-General* [1984] 1 NZLR 290) *inspection of the documents by the Judges has proved illuminating. High Court Judges now appear to be adopting this practice quite commonly in disputed privilege claims. Experience suggests that its advantage in being likely to lead to a more just decision outweighs the disadvantage that only the Judge and not* the other side sees the documents if the claim to privilege is upheld. Accordingly, in the field of legal professional privilege at least, I think that *in general a Judge who is in any real doubt and is asked by one of the parties to inspect should not hesitate to do so.* [emphasis added]
>
> [emphasis in original]

121 I understand the guidance to be that if the Court is in real doubt from the affidavit evidence as to whether the claim of privilege is properly made out, the Court may inspect the documents concerned on the request of either or both parties. Indeed, to go beyond this would give too much leeway to the party claiming privilege and allow him a second attempt at the same argument. Further, inspection should be done with caution, as a decision on the basis of

such an inspection results in a determination without giving the opposing party an opportunity to argue the matter fully.

122 In the present case, I was not in doubt in the original application. Rather, my conclusion, though not stated as strongly as Plaintiff's current counsel may consider appropriate, was that the affidavit evidence was deficient and did not support what was claimed. For the avoidance of doubt, contrary to the Plaintiff's submission, I made a positive finding that legal advice privilege was not applicable. In the face of the evidence presented by the Plaintiff at that time, there was to my mind no necessity for inspection or further evidence. The statements in the supporting affidavits were not doubtful or ambiguous in their claim or meaning; it was just that the privilege was not supported by what had been asserted. Indeed, given the unambiguity of the assertions, and the lack of doubt in my mind as to what was asserted and its basis, calling for further evidence would not only be indulgent but may also appear partisan.

Conclusion

123 For the foregoing reasons, I allow the Intervention Application, which accordingly permitted the AG's submissions in relation to the Further Arguments Application to be considered. I also allow the Further Arguments Application in part: I grant the Plaintiff an extension of time to request for further arguments, but grant the Plaintiff leave to adduce further evidence only insofar as they relate to the further arguments on public interest privilege under s 126(2) of the EA and official secrecy under s 6(3) of the ITA.

124 Directions for arguments on costs as well as other matters relating to the conduct of this matter will be separately given.

Aedit Abdullah
Judicial Commissioner

Ang Cheng Hock SC, Tan Ruyan Kristy, Lim Jun Rui, Ivan and Mak Sushan, Melissa (Allen & Gledhill LLP) for the plaintiff;
Davinder Singh SC, Jaikanth Shankar, Fong Cheng Yee, David and Shirleen Low (Drew & Napier LLC) for the first and second defendants;
Aurill Kam and Jamie Pang (Attorney-General's Chambers) for the intervener.