Elbow Holdings Pte Ltd *v* Marina Bay Sands Pte Ltd
[2014] SGHC 26

Case Number : Suit No 954 of 2012 (Registrar's Appeal No 275 of 2013)

Decision Date : 14 February 2014

Tribunal/Court : High Court

Coram : George Wei JC

Counsel Name(s) : Gregory Vijayendran, Wendy Low Wei Ling and Dhiviya Mohan (Rajah & Tann LLP) for the plaintiff/respondent; Alma Yong and Sim Mei Ling (WongPartnership LLP) for the defendant/appellant.

Parties : Elbow Holdings Pte Ltd — Marina Bay Sands Pte Ltd

Civil Procedure – Discovery of Documents – Application

14 February 2014 Judgment reserved.

George Wei JC:

Introduction

1 This is an appeal against the decision of the learned Assistant Registrar Kan Shuk Weng ("the AR") in Summons No 2743 of 2013 ("SUM 2743/2013") given on 25 July 2013. SUM 2743/2013 concerned a discovery order for certain documents which were allegedly covered by the Official Secrets Act (Cap 213, 2012 Rev Ed) ("OSA"). After hearing the arguments of both parties, with consideration given especially to the fact that the OSA was involved, I am dismissing the appeal and I now give my reasons.

Background facts

2 The plaintiff, Elbow Holdings Pte Ltd ("the Plaintiff"), is a private limited liability company incorporated in Singapore. The Plaintiff owns and operates an "Australian themed" bar and bistro called "South Coast Bar & Bistro" at Units "#01-R7" and "#B1-R7" of the Marina Bay Sands Shoppes Singapore ("the Premises"). The Premises were subsequently renamed "The Shoppes at Marina Bay Sands". The unit numbers have also been renamed as "#01-85" and "#01-85 at B1 level" respectively. It appears that Unit "#01-85" is a kiosk located on the Promenade ("the Promenade Kiosk"), whereas Unit "#01-85 at B1 level" is a basement kitchen ("the Basement Kitchen") used to serve the Promenade Kiosk.

3 The defendant, Marina Bay Sands Pte Ltd ("the Defendant"), is a private limited liability company incorporated under the laws of Singapore. It manages The Shoppes at Marina Bay Sands.

4 The dispute between the parties in the main suit, Suit No 954 of 2012 ("S 954/2012"), arises in connection with a lease agreement for the Premises (as well as the actual lease itself) which was signed by the parties on or around 8 March 2010 ("the Lease Agreement"). The Writ of Summons and Statement of Claim were issued by the Plaintiff on 7 November 2012. The Defence and Counterclaim was filed on 3 December 2012 and subsequently amended on 3 January 2013. This was followed by the Plaintiff's Reply and Defence to Counterclaim filed on 20 December 2012 and further amended on 18 January 2013.

5 The Plaintiff's case is advanced on two fronts, briefly summarised as follows. First, the Plaintiff argues that it was induced into concluding the Lease Agreement as a result of certain representations alleged to have been made by or on behalf of the Defendant during the pre-signing negotiations. These representations essentially concerned the right of the Plaintiff to use certain outdoor areas, and for the ease of convenience, these representations will be referred to as "the Outdoor Space Representations". The Plaintiff's assertion is that the Outdoor Space Representations were false, and on this basis, it has brought a claim against the Defendant for relief under s 2 of the Misrepresentation Act (Cap 390, 1994 Rev Ed). In addition, the Plaintiff has also brought a claim for breach of a collateral contract (where the Defendant was said to have permitted the Plaintiff to use the outdoor spaces) as well as a claim based on proprietary estoppel. Without delving into the precise details and substantive merits of the main action, the Plaintiff is essentially alleging that the space it was entitled to use turned out to be much less than what they had been led to believe. This, of course, is denied by the Defendant.

6 The second front advanced by the Plaintiff is the assertion that the Defendant had committed a number of breaches in relation to the Lease Agreement: namely, breach of an express and/or implied covenant in the Lease Agreement that the Defendant possessed a leasehold interest in the Premises, breach of an express term or covenant of the Lease Agreement that the term of the Lease was to be for a period of six years, as well as a general assertion of repudiatory breach of the Lease Agreement.

7 On 29 May 2013 the Plaintiff, by way of SUM 2743/2013, took out an application for specific discovery of certain documents. Subject to some minor variations, the AR on 25 July 2013 allowed the Plaintiff's application. The Defendant is now appealing against the decision of the AR. Before I turn to the applicable legal principles, it will be helpful to first set out the background to the dispute (insofar as it is relevant to the claim for specific discovery) so as to provide the proper context in which the application for specific discovery was made.

The parties' pleaded case

8 In its Statement of Claim, the Plaintiff asserts that prior to the conclusion of the Lease Agreement, the Plaintiff and the Defendant were engaged in negotiations on the commercial and legal terms of the lease. [note: 1] These negotiations were said to have commenced in around March 2009 and were only concluded about a year later. The Plaintiff alleges that the Defendant made a number of representations during the course of negotiations concerning the Plaintiff's right, as tenant of the Premises, to use certain outdoor spaces without further payment. The essence of the representations was that the Plaintiff would have the use of the "biggest outdoor area along the Marina Bay Sands Promenade", which would "be able to accommodate hundreds of customers drinking all the way to the waterfront edge of the Promenade." [note: 2] The Outdoor Space Representations were allegedly made both orally and in writing by a number of alleged agents of the Defendant. The Plaintiff asserts that the Defendant induced the Plaintiff to believe throughout the course of negotiations that it had a right to use the outdoor space area around and at the front of the Kiosk. [note: 3] It was on the basis of these Outdoor Space Representations that the Plaintiff entered into the Agreement for Lease (and also the Lease itself) on 8 March 2010 and thereafter commenced design and fitting works for the establishment of the South Coast Bar & Bistro.

9 Subsequently (between April and June 2010), the Plaintiff was informed by the Defendant that the Urban Redevelopment Authority ("URA") had imposed restrictions over the use of the outdoor spaces described as Outdoor Areas A, B and C. [note: 4] In mid-June 2010, the Defendant was granted a Temporary Occupation Licence ("TOL") to occupy Outdoor Areas A and B on a monthly basis. The TOL did not allow the construction of any pergolas or other cover over the outdoor seating areas.

Later, in November 2011, the Defendant instructed the Plaintiff to stop using Outdoor Area B and to remove all outdoor furniture in that area. [note: 5] Finally, on or about 29 February 2012, the URA amended the TOL, limiting the area of use that is subject to the TOL to just Outdoor Area A. The Plaintiff's case is that the Defendant never informed the Plaintiff during the lease negotiations that URA approval was necessary for the Plaintiff's use and occupation of the outdoor areas.

10 The Defendant denies most of the alleged representations and specifically asserts in its Defence and Counterclaim dated 3 January 2013 that the Plaintiff had been informed that its use of the outdoor areas was subject to the approval of both the Defendant and the URA. [note: 6] Indeed, the Defendant asserts that: [note: 7]

> … the Plaintiff knew that The Shoppes at Marina Bay Sands was a new development under construction and accordingly, the lease of the Premises (including the conditions relating thereto) would be subject to the approval of the Government of the Republic of Singapore (the "State") and/or relevant authorities. ...

11 The Defendant is also relying on the Entire Agreement Clause in the Lease Agreement to exclude any representations that may have been made in the course of negotiations. This includes:

(a) Clause 6.18.1 which states, *inter alia*, that:

> The STB [Singapore Tourism Board] is seized of the Land to be comprised in a State Lease ("Head Lease") to be issued in favour of the STB by the President of the Republic of Singapore ... for a leasehold estate for an unexpired portion of a term of 60 years…

(b) Clause 6.18.2 which states that:

> The Landlord [Marina Bay Sands] has an interest in the Land on which the Development is situated comprised in a superior Lease granted or to be granted by the STB to the Landlord ...

(c) Clause 6.12.2 which states that:

> The Landlord is not bound by any representations or promises with respect to the Development or the Premises if they are not stated in the Entire Agreement whether written or oral, express or implied by common law, statute, or custom…

(d) Clause 6.12.3 which states that:

> The Tenant confirms that it has not agreed to, or executed this Lease relying on any representations made by the Landlord or on its behalf which is not stated in the Entire Agreement.

12 Leaving aside (for the moment) the claims brought in respect of the Outdoor Space Representations, a number of connected issues arise in this case concerning: (i) the right or title of the Defendant to enter into the Lease Agreement (and the Lease) ("the Title Term"); and (ii) the obligation to provide the Plaintiff with a lease of the Premises for a period of six years ("the Duration Term").

13 Put at its most basic, the Plaintiff claims that the Defendant did not in fact possess the leasehold interest in the Premises at the time when it signed the Lease Agreement with the Plaintiff

[note: 8] and that the Defendant had committed an anticipatory breach of the Duration Term on 11 June 2012 when the Plaintiff was informed by the Defendant that a *licence* for Unit "#01-R7" ["#01-85"] would be issued for the remainder of the term of the Lease.

14 With respect to the claim that the Defendant had breached the express/implied Title Term, the Plaintiff has made reference to the Development Agreement ("DA") between the Defendant and the Government of Singapore, as well as the Head Lease and the Superior Lease. [note: 9] At this juncture, it is noted that the DA was concluded between the Defendant and the Singapore Tourism Board ("STB"). Whether the STB is to be regarded as the Government or as having concluded the contract on behalf of the Government is a matter in dispute. The Defendant denies any breach of the express/implied Title Term and further asserts that the email communication with the Plaintiff on 11 June 2012 was made in the context of an agreement between both parties to restructure their relationship. [note: 10] In brief, the Defendant asserts that the Plaintiff was informed "in or around" 2010 that the Letter of Offer and Lease might have to be amended as a result of the discussions taking place between the Defendant and the URA. In February 2011, it is said that the Plaintiff was informed that the parties may have to execute new commercial documents. Subsequently, on around 23 May 2011, it is pleaded that the State and the Defendant had entered into a licence agreement which contained the terms and conditions governing the use of the waterfront promenade area (where the Promenade Kiosk was located). This agreement was effective from 15 October 2010. In view of the State licence, the Defendant asserts that it prepared documents to vary the terms of the Letter of Offer and Lease Agreement, such that the Basement Kitchen would remain the subject matter of a *lease*, whereas the Promenade Kiosk would be the subject matter of a *licence* with effect from 3 December 2010. These documents were said to have been delivered to the Plaintiff (via email) on 11 June 2012. It is also claimed that the Plaintiff had accepted and agreed to the variation.

The hearing below – documents requested by specific discovery and the decision of the AR

15 SUM 2743/2013 was an application by the Plaintiff for specific discovery pursuant to O 24 r 5 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("ROC"). The documents requested were set out in the Schedule to the Summons and organised under nine categories. For convenience, the nine categories and a few of the sub-paragraphsub-paragraphs (of especial importance) are set out below:

(1) Documents relating to the leasehold interest held by the Defendant over the Premises (as defined at paragraph 1 of the Statement of Claim filed on 7 November 2012 … including but not limited to:

(i) the Development Agreement between the Defendant and the Government of Singapore and the documents evidencing the Defendant's efforts in obtaining clearance from the Singapore Tourism Board to disclose the same; …

(2) Documents evidencing whether the Defendant had a sufficient leasehold interest in the Premises to make an offer to grant the Lease to the Plaintiff as at 17 February 2010 including but not limited to …

(3) Documents evidencing whether the Defendant had a sufficient leasehold interest in the Premises to grant the Lease to the Plaintiff on or after 8 March 2010 including but not limited to …

(4) Documents relating to the Defendant's failure to countersign or execute a counterpart of the

Lease, including but not limited to …

(5) Documents evidencing that the URA required the "surrender" of the Premises as stated in the email from the Defendant to the Plaintiff dated 23 July 2012 (6:12PM) including but not limited to:

(i) Correspondence (including but not limited to letters, faxes, emails and/or memoranda) between:

a. the Defendant's employees;

b. the Defendant and its agent(s);

c. the Defendant and the URA whether directly or through agent(s) of the Defendant; and

d. the Defendant and other parties whether directly or through agent(s) of the Defendant.

(ii) Minutes of meetings, telephone attendance notes and/or other records of communication between:

a. the Defendant's employees;

b. the Defendant and its agent(s); and

c. the Defendant and the URA whether directly or through agent(s) of the Defendant; and

d. the Defendant and other parties whether directly or through agent(s) of the Defendant.

(6) Documents relating to the use of the Outdoor Seating Areas … including but not limited to …

(7) Documents relating to the use of the Outdoor Standing Area … including but not limited to …

(8) Documents relating to the provision of shelter over the Outdoor Seating Areas … including but not limited to …

(9) Documents relating to the design of the Premises and the Outdoor Seating Areas including but not limited to …

16 The Summons for specific discovery was heard by the AR on 17 July 2013. The AR, at [4] of her oral judgment delivered on 25 July 2013, was of the view that the documents sought to be discovered were relevant to the proceedings between the parties. Indeed, the AR commented that the requested documents were similar in nature to those already disclosed by the Defendant in its List of Documents filed on 6 March 2013 and the Plaintiff's List of Documents filed on 13 March 2013. That being so, the AR rejected the Defendant's arguments that were largely based on irrelevance and failure by the Plaintiff to demonstrate that the documents were in the possession, custody or power of the Defendant. In this regard, the main issue before the AR concerned the possible application of s 5 of the OSA to the documents covered by categories 1(i) and 5 of the Schedule (as set out above in [15]). These concerned (in the main):

(a) the DA between the Defendant and the STB;

(b) documents relating to the Defendant's efforts to obtain clearance from STB to disclose the same; and

(c) documents evidencing that the URA had required the "surrender" of the Premises as stated in the email from the Defendant to the Plaintiff dated 23 July 2012.

17 After considering the submissions of both parties, the AR held (at [19]) that s 5 of the OSA did not apply and that in any case, there was no evidence before the court to show that the documents were obtained or given under official confidence. There was also no evidence from any Government official that public interests would suffer if the documents and correspondence were disclosed.

18 As a result, the AR allowed the Plaintiff's application (subject to some minor amendments). The minor amendments concerned limiting the meaning of the phrase "agent to the Defendant's agents referred to in the pleadings".

19 On 7 August 2013, the Defendant appealed against the whole of the AR's decision by way of Registrar's Appeal No 275 of 2013 ("RA 275/2013"). Shortly before the hearing of RA 275/2013, the Defendant informed the Plaintiff and this court that it would only be proceeding with the appeal in respect of categories 1(i) and 5 of the Schedule.

20 RA 275/2013 was first heard by me on 9 September 2013. After hearing the arguments and submissions of both parties, the matter was adjourned for parties to prepare further submissions on the applicability of the OSA and s 125 of the Evidence Act (Cap 97, 1997 Rev Ed) in relation to the definition of the phrase "affairs of State". The hearing resumed on 8 November 2013 and I reserved judgment upon the conclusion of the hearing.

Issues before this court

21 Order 24 rule 5(1) of the ROC permits a party to apply for an order for discovery of specific documents or a specific class of documents within the possession, custody or power of another party. Discovery will only be granted if the conditions set out in O 24 r 5(3) are satisfied. In brief, this requires the document over which discovery is sought to be one which could adversely affect his own case or the case of another party or which might support another party's case. This includes documents that may lead to a "train of inquiry" resulting in the obtaining of further information which may adversely affect his own case or another party's case or support another party's case.

22 It is noted that even if the requirements of O 24 r 5 are satisfied by the applicant, the court still retains a discretion under O 24 r 7 to reject the application for discovery on the basis that it is not necessary at that stage of the cause or matter, or at all. *Singapore Civil Procedure 2013* (G P Selvam gen ed) (Sweet & Maxwell Asia, 2013) explains at para 24/7/1 that O 24 r 7 sets out the overriding principle that discovery must be necessary for either the fair disposal of the matter or the saving of costs. That said, once the applicant has established relevancy, the burden lies on the respondent to demonstrate that discovery is not necessary for the fair disposal of the matter, or for the saving of costs.

23 The two issues before me are, therefore, as follows:

(a) First, are the documents requested for relevant for the fair disposal of the matter or the

saving of costs? ("Issue 1")

(b) Second, even if they are relevant, are the documents protected by the OSA such that they should not be disclosed? ("Issue 2")

Issue 1 – Relevance of the documents requested

24 Category 1(i) is essentially concerned with the DA signed by the Defendant and the STB. The Plaintiff's case is that the DA is relevant to the issues that have arisen — in particular, the question as to the nature of the interest which the Defendant possessed in respect of the Premises and the assertion that the URA had required the surrender of the Premises. In this respect, it will be recalled that the Plaintiff's claim against the Defendant includes the breach of an express and/or implied Title Term in that the Defendant did not in fact possess the requisite leasehold interest in the Premises to conclude the Agreement for Lease and the Lease itself. [note: 11] Furthermore, a claim is also made for the anticipatory breach of the Duration Term by reason of the issuance of a *licence* for the remainder of the term with respect to Unit "#01-R7". [note: 12]

25 Insofar as the DA between the Defendant and the STB is concerned, there appears to be little doubt as to its relevance to the pleaded issues. Indeed, it appears from the Defendant's written submissions (on appeal) that the crux of its argument in relation to the DA was not so much of its relevance, but as to whether the DA was protected from discovery by virtue of the OSA and other related arguments.

26 On the question of relevance, the position in respect of the documents evidencing the efforts made by the Defendant to obtain clearance from STB is far less clear. In this regard, the Defendant maintains the position that these documents are not relevant to the pleaded issues. Counsel for the Defendant submits that the arguments made by the Plaintiff before the AR only concerned relevance in relation to the DA and not relevance with regard to the Defendant's efforts to obtain clearance. Looking at the matter afresh, it is not immediately apparent to this court as to how the documents relating to the Defendant's efforts to obtain clearance are relevant or indeed, if relevant, why it is necessary for these documents to be disclosed at this stage of the proceedings for either the fair disposal of the matter or the saving of costs.

27 In any event, at the hearing before me on 9 September 2013, the Plaintiff stated that it was no longer pursuing the discovery of documents relating to the efforts made by the Defendant to obtain clearance from the STB, but that this was without prejudice to their right to file a fresh application for specific discovery of the same at a later stage in the proceedings.

28 I turn now to consider the issue of relevance in relation to the documents evidencing that the URA had required the "surrender" of the Premises as stated in the email dated 23 July 2012 ("URA Surrender Documents") from the Defendant to the Plaintiff.

29 Leaving aside possible objections on the grounds of the OSA and other related arguments, the relevance and necessity for disclosing the URA Surrender Documents is contested by the Defendant. In the first place, counsel for the Defendant submits that the Plaintiff merely made a bare assertion that the documents were in the Defendant's possession, custody or power. In any case, the Defendant points out that it had already informed the Plaintiff by way of a letter dated 9 May 2013 that save for the Request for Proposal and the DA, there are no further documents evidencing URA's request for the Premises to be surrendered. In this regard, the Defendant adds that the application for the discovery of the URA Surrender Documents was no more than a "fishing expedition", especially in light of the broad terms in which the order was sought: all communications between the

Defendant's employees, the Defendant and its agents(s), the Defendant and the URA whether directly or through agent(s) of the Defendant and the Defendant and *other parties* whether directly or through agent(s) of the Defendant. It was for this reason (as described in the Defendant's written submissions) that the AR limited the scope of discovery under this category to documents with the URA, the Defendant's employees, and their respective agents as specified in the pleadings. The AR declined to order discovery with respect to the documents with "other parties."

30 Given the clear statement by the Defendant that it does not have any other documents relating to the URA Surrender Documents and the absence of any evidence to the contrary, the documents under this category are (at least for the time being) confined to the DA and the Request for Proposal. The DA is also a document sought under Category 1(i) and the main objection that remains is the claim for protection under the OSA and other related arguments. The Request for Proposal (which appears to be a document that predates and relates to the DA) is similarly subject to a claim for privilege under the OSA.

Issue 2 – The Development Agreement and the OSA

31 Section 5(1) and (2) of the OSA provides as follows:

> **Wrongful communication, etc., of information**
>
> 5.—(1) If any person having in his possession or control any secret official code word, countersign or password, or any photograph, drawing, plan, model, article, note, document or information which —
>
> (a) relates to or is used in a prohibited place or anything in such a place;
>
> (b) relates to munitions of war;
>
> (c) has been made or obtained in contravention of this Act;
>
> (d) has been entrusted in confidence to him by any person holding office under the Government; or
>
> (e) he has obtained, or to which he has had access, owing to his position as a person who holds or has held office under the Government, or as a person who holds, or has held a contract made on behalf of the Government or any specified organisation, or as a person who is or has been employed under a person who holds or has held such an office or contract,
>
> does any of the following:
>
> (i) communicates directly or indirectly any such information or thing as aforesaid to any foreign Power other than a foreign Power to whom he is duly authorised to communicate it, or to any person other than a person to whom he is authorised to communicate it or to whom it is his duty to communicate it;
>
> (ii) uses any such information or thing as aforesaid for the benefit of any foreign Power other than a foreign Power for whose benefit he is authorised to use it, or in any manner prejudicial to the safety or interests of Singapore;
>
> (iii) retains in his possession or control any such thing as aforesaid when he has no right to

retain it, or when it is contrary to his duty to retain it, or fails to comply with all lawful directions issued by lawful authority with regard to the return or disposal thereof;

(iv) fails to take reasonable care of, or so conducts himself as to endanger the safety or secrecy of, any such information or thing as aforesaid,

that person shall be guilty of an offence

(2) If any person receives any secret official code word, countersign, password, or any photograph, drawing, plan, model, article note, document or information knowing, or having reasonable ground to believe, at the time when he receives it, that the code word, countersign, password, photograph, drawing, plan, model, article note, document or information is communicated to him in contravention of this Act, he shall be guilty of an offence unless he proves that the communication to him of the code word, countersign, password, photograph, drawing, plan, model, article note, document or information was contrary to his desire.

32 The case for the Defendant, put simply, is that the DA signed by the Defendant and the STB is a document that falls within s 5(1) of the OSA and that the Defendant obtained the document as a person who holds a contract made on behalf of the Government or any specified organisation. That being so, the Defendant asserts that disclosure of the DA by the Defendant to the Plaintiff will be an offence by virtue of s 5(1)(e) and (i) of the OSA.

33 It is clear that for s 5(1)(e) to apply, it is necessary to establish the following elements:

(a) Possession or control of (i) any secret official code word, countersign or password or (ii) any photograph, drawing, plan, model, article, note, document or information ("the Protected Material");, and

(b) That the person with possession or control, had obtained or has had access to the Protected Material owing to his position as a person who holds or has held office under the Government, or as a person who holds, or has held a contract made on behalf of the Government or any specified organisation, or as a person who is or has been employed under a person who holds or has held such an office or contract.

The relevant protected material

34 In *Public Prosecutor v Bridges Christopher* [1997] 3 SLR(R) 467 ("*Bridges*"), the respondent, a lawyer, was convicted by the District Court of six charges under the OSA.

35 The first group of three charges was for offences under s 5(2) of the OSA, while the second group of three charges was for offences under s 5(1)(c)(i) of the OSA. All six charges arose from the fact that the respondent had received, from a Police Staff Sergeant in the Criminal Investigation Department ("the PSS"), information as to the change of addresses of certain persons who were named in the charges. These persons were individuals with whom another lawyer (a friend and relative of the respondent) was having problems serving court documents on account that they had changed their addresses. On three different occasions, the other lawyer requested the respondent's assistance to determine the latest addresses of four individuals. The respondent was able to obtain and supply the information as requested to the lawyer/friend. At the trial, it was not disputed that the respondent had obtained the information from the PSS. What was unclear was how the PSS had obtained the updated addresses. There were a number of possibilities: (i) The information could have been obtained by the PSS from the National Registration Office's on-line system with the assistance

of an analyst team. This on-line system was secret and could not be accessed by members of the public. (ii) From the Registry of Vehicles, provided the car licence plate number was known. (iii) From the Registry of Land Titles and Deeds by way of a title search of the property with the mukim, lot number or address. (iv) By searching (which is said to be a laborious process) the 1992 electoral registers. (v) With the assistance of private search agencies.

36 The High Court quashed the convictions on the basis that the Prosecution had failed to prove that the information relating to the change of addresses was or had been "secret official" and because the Prosecution had not established even a *prima facie* case that the information was official information protected by the OSA. The High Court also found that the respondent lacked the necessary *mens rea* required to establish an offence under s 5(2) and s 5(1)(c)(i) of the OSA.

37 Following the High Court judgment, the Public Prosecutor applied under s 60 of the Supreme Court of Judicature Act (Cap 322, 1985 Rev Ed) to reserve eight questions of law of public interest for the Court of Appeal (subsequently recast into six questions by the High Court). One question raised was whether information that has been published, released or made available to the public by a person authorised to do so nevertheless remains information falling within s 5 of the OSA. On this, M Karthigesu JA (delivering the judgment for the Court of Appeal) held (at [35]) that:

> As a matter of construction the collocation of words in s 5(1) of the Act logically fall into two groups: "any secret official code word, countersign or password" is one group ("the first group") and the other group is, "any photograph, drawing, plan, model, article, note, document or information" ("the second group)". ...

38 The important point that follows is that items in the second group do not necessarily have to be "secret official" in order to fall within s 5(1) of the OSA. Whether items in the second group fall within s 5(1) depends on whether one or more of sub-paragraphs (a)–(e) are applicable. One example illustrating the operation of s 5(1) and the second group given by the Court of Appeal was a photograph. In order for a photograph to be covered under the OSA, it does not have to be a "secret official" photograph as such. Whether s 5(1) applies depends on whether one or more of the sub-paragraphs apply. For example, a photograph of a military camp would be covered not because it is "secret official" but because it "relates to … a prohibited place" (assuming that the military camp in question is a prohibited place). If so, the photograph will fall within s 5(1)(a). Where an item within the second group falls within one or more of the sub-paragraphs (a)–(e), an offence will have been committed if the item (*eg*, a photograph) was used in one of the ways specified in paragraphs (i)–(iv) of s 5(1) (with the requisite *mens rea*).

39 It follows that in the present case, in order for s 5(1) of the OSA to apply, it is necessary to show that the DA (which is essentially a document) is caught by one or more of sub-paragraphs (a)–(e) of s 5(1). In this case, the relevant sub-paragraph is (e).

40 Before I turn to consider the parties' submissions on sub-paragraph (e), it will be convenient to first deal with a point of law that has arisen in connection with s 5(1) as a whole. This concerns whether information that is already in the public domain can be the subject matter of a charge under s 5 of the OSA.

Information in the public domain

41 In the *Bridges* decision, M Karthigesu JA at [39] postulates that:

> ... Information may be in the public domain (a) because its knowledge is universal like "the sun

rises in the east"; or (b) information initially "protected" by s 5 being information which a public servant learns in the course of his public or official duty entering the public domain by the authority of the appropriate government authority. As the Public Prosecutor says the Act does not apply to this kind of information. Information which indisputedly [*sic*] is already in the public domain could never be *obtained in contravention of the Act*. An essential ingredient of the offence would always be lacking. The same applies to information initially "protected" by the Act entering the public domain. The former category of information because of its universality belies proof while information in the latter category raises a question of fact to be proved or disproved. Even the poster advertising beer with a photograph of a swimsuit clad model … would not be a photograph "protected" under s 5(1)(a) simply because it is used as decoration in the mess of an army camp. It must be shown to *relate to or that it was used in a prohibited place* or anything in such a place … which is a matter of proof, the onus of which is on the Prosecution.

[emphasis in original]

42 The respondent in *Bridges* was prosecuted for an offence under s 5(2) of the OSA for receiving information knowing or having reasonable ground to believe that, at the time when he received it, the information was communicated to him in contravention of the OSA. It followed that, to succeed, the Prosecution would have to first prove that the communication by the PSS to the respondent was "in contravention of the Act". This would require showing that the communication by the PSS was itself caught under s 5(1)(d) or (e) read together with s 5(1)(i) of the OSA. In short, as M Karthigesu JA held at [40], this would require proof that the PSS had (i) obtained the information from an official government source in his capacity as a field intelligence officer; and (ii) communicated the information to the respondent, a person to whom the PSS was not authorised to communicate it to (or to whom it was not his duty to communicate it). If so, the PSS would have committed an offence under s 5(1) of the OSA. The liability of the PSS in this way would be that of a "giver" of the information. The liability of the respondent, if any, was that of a "receiver" under s 5(2). This would require proof of not only receipt, but specifically receipt with the necessary *mens rea* (knowing or having reasonable grounds to believe that the communication was in contravention of the OSA). On the evidence, the Court of Appeal held (at [44]) that the Prosecution had failed to prove that the respondent had reasonable grounds to believe that the information given to him was "protected" information. Thus, it was said that "this vital element in the ingredient of the *mens rea* required to be proved by the Prosecution was not *prima facie* proved".

43 The respondent in *Bridges* was also prosecuted for an offence under s 5(1)(c)(i) for having himself communicated the information to the "other lawyer". This also required proof of the necessary *mens rea*: knowledge that the information had been obtained by the respondent in contravention of the OSA and knowledge that he had no authority or duty to communicate the information to the "other lawyer". By "protected information", the Court of Appeal meant that the information "was *obtained* by the communicator in contravention of the Act and that it was *communicated* to another in contravention of the Act". It was in this context that M Karthigesu JA at [45] commented that "mere possession of the 'protected' information … does not constitute an offence". It is very likely that this is also the context in which Question 1(b) of the criminal reference was answered. That question, it will be recalled, asks whether:

> … information that has been published, released or made available to the public by a person authorised to do so nevertheless remain information falling within s 5 of the OSA?

44 The "negative" answer given by the Court of Appeal at [60] must be understood in this context. The statement by the Court of Appeal at [39] was that information in the public domain (such as the fact that the sun always rises in the east) could never be obtained in contravention of

the OSA. Given that such information could be obtained from a myriad of public sources (or what is commonly referred to as "general knowledge"), how could the Prosecution ever prove that the information had been obtained in contravention of the OSA? In such cases, as M Karthigesu JA stated at [39], the universality of the information in such a case belies proof. The position in other cases where the information was initially protected but which had subsequently become public knowledge was different in that the Prosecution might still be able to establish the necessary elements laid out in s 5(1)(a)–(e) and s 5(2). The example given was the use of a photograph depicting a swimsuit model as a decoration in an army camp. The Prosecution would have to prove that the information (*ie*, the poster and depicted images) was covered by one of the limbs under s 5(1), such as information which "relates to or is used in a prohibited place". If so, the information could still be "protected" in the sense of falling within s 5(1)(a)–(e) and an offence could still be made out under s 5(1)(i) or s 5(2), subject to the requisite *mens rea* being established.

45 In the present case, the Plaintiff claimed that it was able to obtain (what *they* stated seemed to be) a copy of the DA (as well as a copy of the Supplemental Agreement to the DA dated 11 August 2009) by way of an online Internet search. As deposed at para 9 of Aaron Joseph Kearney's affidavit filed on behalf of the Plaintiff on 25 June 2013 ("AJK-1"), the contents of the agreements were also said to have been disclosed in Las Vegas Sands Corporation's Annual Report for 2011 ("2011 Annual Report"). In reply, the Defendant has explained (at para 8 of the affidavit filed by Fang Fu-Cun Kevin on behalf of the Defendant on 10 July 2013) that the "limited disclosure" was required by the United States Securities and Exchange Commission and any disclosure was for this purpose only. Whilst there may be some uncertainty as to whether the online copies that the Plaintiff has been able to locate are accurate copies of the DA, there is no doubt that the online searches were conducted using standard Internet search engines. For the avoidance of doubt, this court notes that there is no suggestion that the online searches were improper.

46 Where information has been made available on the Internet, a serious question arises as to whether the information remains "confidential" or whether it has entered the public domain so far as the law of confidence is concerned. In the context of the equitable action to protect confidential information, once information is readily accessible to members of the public, the information will lack the necessary quality of confidence that is required to support the claim. Even where the publication of information is in an overseas jurisdiction, it does not mean that the court is prevented from finding that the information has entered into the public domain within the jurisdiction. See *eg*, *Franchi v Franchi* [1967] RPC 149, and generally *Attorney-General v Guardian Newspapers Ltd and Others* [1987] 1 WLR 1248 and *Attorney-General v Observer Ltd and Others* [1990] 1 AC 109. See also the helpful commentary, Ng Siew Kuan, "The Spycatcher Saga: Its Implications and Effect on the Law of Confidence" (1990) 32 Mal LR 1. In the modern information age of the Internet and the World Wide Web, news originating locally may rapidly become international news in a short period of time. Where members of the public in Singapore are able to (lawfully) access a foreign hosted website and locate uploaded information, serious difficulties will arise in sustaining any claim to confidentiality, although this will still depend largely on the circumstances of each case, including how readily accessible the website is to the public. It does not, however, follow that such information loses any protection that it might have enjoyed under the OSA. Information to be protected under the OSA does not have to be confidential information as such. Indeed, leaving aside matters of universal general knowledge such as the sun rising in the east, it is clear from *Bridges* that information which has become publicly accessible may still be protected under s 5(1).

47 In this respect, much will depend on the basis on which s 5(1) is said to apply. Under s 5(1)(e), the OSA applies to any document or information which a person has obtained owing to his position as someone who holds or has held a contract made on behalf of the Government or any specified organisation. There is no requirement that the document or information has to be of a confidential (let

alone secret) nature. If the document or information can be proved to fall within s 5(1)(e), the person who has possession or control commits an offence under s 5(1)(i) if he communicates the document or information to a person to whom he is not authorised to communicate or to whom he has no duty to communicate. Assuming that s 5(1) does apply to the DA, the Defendant's position is that it cannot be compelled to grant discovery to the Plaintiff without the consent (*ie*, authorisation) of the Government or the specified organisation.

48 The question to be addressed is whether s 5(1) applies to the DA. This depends not so much on whether the DA is confidential, secret or publicly available by means of appropriate Internet searches, but whether the Defendant is a person who had obtained the DA owing to his position as someone who held a contract made on behalf of the Government or any specified organisation.

49 There is no dispute that the DA was entered into between the Defendant and the STB. It is also not disputed that the Defendant obtained possession of its copy of the DA as a result of the contract. The key issue is whether the contract was made by or on behalf of the Government or any specified organisation.

50 The term "Government" is not expressly defined in the OSA. Section 2 of the Interpretation Act (Cap 1, 2002 Rev Ed) simply defines it as meaning "the Government of Singapore". The Online Oxford Dictionary defines government as "the group of people with the authority to govern a country or state; a particular ministry in office". On the other hand, the Merriam-Webster Online Dictionary defines it as including:

> 5 a : the organization, machinery, or agency through which a political unit exercises authority and performs functions and which is usually classified according to the distribution of power within it
>
> b : the complex of political institutions, laws, and customs through which the function of governing is carried out.

51 The STB is a statutory board set up pursuant to the Singapore Tourism Board Act (Cap 305B, 1997 Rev Ed) ("STB Act"). The present STB Act dates back to the Tourist Board Ordinance 1963 (Ordinance 35 of 1963). The functions of the STB are broadly set out in s 7, of which the relevant portions provide that:

> **Functions of Board**
>
> **7.**—(1) The functions of the Board shall be —
>
> (a) to develop and promote Singapore as a travel and tourist destination;
>
> (b) to advise the Government on matters relating to travel and tourism;
>
> …
>
> (d) to exercise licensing and regulatory functions in respect of such tourism enterprises as the Board may determine.

52 The powers of the STB are set out in s 8, of which the relevant portions provide that:

> **Powers of Board**

8. Subject to this Act, the Board may carry on such activities as appear to the Board to be advantageous, necessary or convenient for it to carry on for or in connection with the discharge of its functions and duties under this Act and, in particular, the Board may exercise the following powers:

(a) to act as an agent for the Government or, with approval of the Minister, for any person, body or organisation for the transaction of any business connected with the tourism enterprise;

…

(g) to acquire, take on lease, hire, hold and enjoy movable and immovable property and to convey, assign, surrender, charge, mortgage, demise, transfer or otherwise dispose of, or deal with, any movable or immovable property belonging to the Board upon such terms as the Board considers fit;

…

(i) to enter into any contract or agreement for carrying out the purposes of this Act.

…

53 Tourism enterprise is defined in s 2 as including any other undertaking "including any convention, exhibition, show, fair, publicity campaign or theme park, intended wholly or in part for the benefit of, or for the purpose of attracting, visitors to Singapore".

54 The STB is run by a Board comprising the Chairman, the Chief Executive and 10 other members appointed by the Minister. Other examples of statutory boards in Singapore include the Civil Aviation Authority of Singapore, the Casino Regulatory Authority of Singapore, the Intellectual Property Office of Singapore, Ngee Ann Polytechnic, the TCM Practitioners Board and the URA. Former statutory boards which have since been corporatised include the National University of Singapore.

55 Prior to its amendment in 2001, s 5(1)(e) of the OSA did not include the reference to "specified organisation". Instead, the provision simply applied to cases where the person held a contract made on behalf of the Government. The problem with the pre-amendment provision was that with the ever increasing number of statutory bodies being set up in Singapore (covering numerous areas of activity ranging from education to transport and beyond), the question was bound to arise in respect of the extent to which the provisions of the OSA were applicable to these statutory boards, including cases where the statutory board had entered into contractual arrangements with other persons. This appears to have been the problem which prompted the Government to table the Official Secrets (Amendment) Bill in Parliament in 2001 so as to extend the OSA to expressly cover statutory boards as listed in the Schedule to the OSA. The background considerations which led to the 2001 amendments are important, and they were addressed by the then Minister of State for Home Affairs, Associate Professor Ho Peng Kee, as set out in *Singapore Parliamentary Debates, Official Report* (25 July 2001) vol 73 at cols 1934–1936 (Associate Professor Ho Peng Kee, Minister of State for Home Affairs):

Sir, the Official Secrets Act (OSA) guards against disclosure of official documents and information as this can be detrimental to national and public interest. It is with this objective that I am presenting this Bill today.

Sir, increasingly, many governmental functions have been devolved to statutory bodies. This ensures that the public sector continues to remain nimble and responsive to challenges of the future. This also allows statutory bodies to have greater flexibility to compete in the recruitment of professional talent by tapping external expertise from either local or overseas organisations. With the greater flexibility, statutory bodies will better harness their professional capabilities and concentrate on developing their core competencies, whilst the Ministries focus on the core functions of policy planning and resource allocation …

Sir, this devolution of functions results in officers in these statutory bodies having access to official information. This is inevitable as the officers require this information to discharge their functions properly and effectively. The OSA currently only covers Ministries. To ensure that the provisions of the OSA continue to cover these officers, it is necessary to extend the scope of the Act to include selective statutory bodies. Prior to conversion into a statutory body, such information would have been handled by the officers as Ministry officials and therefore covered under the OSA. Hence, what this Bill essentially does is to restore the position to what it was before the formation of the statutory bodies. It also extends coverage to new matters that the designated statutory bodies may cover. There is thus no change to the substantive scope of the OSA's provisions. Currently, some of these selected statutory bodies are covered by the statutory bodies and Government companies' Protection of Secrecy Act (PSA) but the scope of PSA is narrower than the OSA. This is not satisfactory in so far as official information vital to national security and national interest is concerned. Hence these selected statutory bodies are now placed under the OSA.

The Bill proposes to amend the OSA by introducing a Schedule of Organisations comprising selected statutory bodies and DSO National Laboratories to be protected under the OSA. In this way, the provisions relating to wrongful communication of information, falsification of reports, forgery, personation and possession of false documents will apply to these organisations. The President can amend this Schedule from time to time by notification in the Gazette.

Sir, MHA has consulted all the Ministries to identify the statutory bodies under their charge that handle official information vital to national security or national interest. …

Sir, with these amendments, we aim to ensure that official information continues to be properly protected and managed. This can only be for Singapore's good.

56 At the date of the proceedings, the Schedule sets out a list of 28 statutory boards. These are the Building and Construction Authority; Casino Regulatory Authority of Singapore; Central Provident Fund Board; Civil Aviation Authority of Singapore; Civil Service College; Competition Commission of Singapore; Council for Private Education; Defence Science and Technology Agency; DSO National Laboratories; Economic Development Board; Energy Market Authority of Singapore; Government of Singapore Investment Corporation Private Limited and its subsidiary corporations; Housing and Development Board; Info-communications Development Authority of Singapore; Inland Revenue Authority of Singapore; International Enterprise Singapore Board; Jurong Town Corporation; Land Transport Authority of Singapore; Maritime and Port Authority of Singapore; Media Development Authority of Singapore; Monetary Authority of Singapore; National Environment Agency; National Heritage Board; Public Utilities Board; Singapore Examinations and Assessment Board; Singapore Land Authority; Singapore Workforce Development Agency and the URA. It is to be noted that there are more than 40 statutory boards in Singapore and the STB is not one of those named in the Schedule. Given the remarks made by the Minister and the extensive list of statutory boards set out in the Schedule, the "omission" of the STB from the Schedule must have been a matter on which there had been deliberation.

57 Indeed, it is to be noted that the STB is listed in the Schedule to the Statutory Bodies and Government Companies (Protection of Secrecy) Act (Cap 319, 2004 Rev Ed) ("PSA"). The PSA is an Act enacted in 1983 to protect the "secrecy of information of statutory bodies and Government companies". The PSA protects any secret or confidential document or information obtained by virtue of a person's position as a member, officer, employee or agent of any organisation specified in the Schedule. The STB, together with the URA, is listed in the Schedule to the PSA (together with some 30 other statutory boards). Thus, I am unable to accept the Defendant's submission that even though the STB is not listed as a specified organisation in the Schedule to the OSA, it can nonetheless still be included simply on the basis that it is part of the Government. Such an interpretation is not consistent with the legislative history of the relevant provisions and would render the 2001 amendments otiose.

58 The Defendant's argument on the OSA in this appeal did not, however, rest solely on the submission that the reference to Government included the STB. In addition, another point was raised to the effect that s 5(1) is applicable if the contract in question (*ie*, the DA) was made by the STB *on behalf* of the Government. It is this argument that I now turn to.

Did the STB enter the contract on behalf of the Government?

59 Under the STB Act, s 3(2) provides that the STB is a "body corporate" possessing the power to sue and be sued in its corporate name, and to perform all the acts which bodies corporate may by law perform. In carrying out and discharging its functions and duties, s 8(a) provides that the Board "may", *inter alia*, "act as agent for the Government" in relation to the "transaction of any business connected with any tourism enterprise". Other powers conferred on the STB under s 8 include (under sub-paragraph (i)) the power "to enter into any contract or agreement for carrying out the purposes of [the] Act". The Plaintiff rightly submitted that whilst the STB *may* act as an agent for the Government, it does not necessarily follow that in *all cases*, the STB enters into commercial contracts/arrangements as an agent for or on behalf of the Government. Any assumption that the STB *always* acts on behalf of the Government does not sit easily with s 8 and the broader rationale of devolving power and responsibility to the statutory boards so as to allow them to be nimble and responsive in the face of new challenges.

60 In the present case, the STB is not a party to the proceedings. The Plaintiff rightly draws the court's attention to the fact that no affidavit has been filed by the STB confirming their position on the DA and in particular, whether the DA was entered into on behalf of the Government. That said, the Defendant did, during the appeal hearing, produce a letter to the court from the STB objecting to the disclosure of the DA. The Plaintiff was, however, not given sight of the letter and the position remains that there is no affidavit from the STB as to its position.

61 On this point, counsel for the Plaintiff referred the court to the Court of Appeal decision of *Zainal bin Kuning and others v Chan Sin Mian Michael and another* [1996] 2 SLR(R) 858 ("*Zainal*"). This was a case where the appellants had sued the respondents for wrongful arrest and malicious prosecution. An issue arose as to whether the trial judge had properly refused to grant their application for specific discovery of certain documents reflecting communications between the first respondent (a police inspector attached to the Criminal Investigation Department) and the Deputy Public Prosecutor. Section 126 of the Evidence Act (Cap 97, 1990 Rev Ed) provides that:

> 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.

62 On the facts, L P Thean JA, in delivering the judgment of the court, noted (at [33]) that

affidavits had been sworn or affirmed by the officer in charge of the case, the Deputy Public Prosecutor and the Attorney-General to the effect that the documents sought were given or received as part of the official duties of the officers concerned and that public interest would suffer by the disclosure of these communications made to them in official confidence. For this reason, Thean JA held that the trial judge was fully justified in refusing to grant discovery of the documents. It bears noting that *Zainal* did not concern s 5(1) of the OSA. Nevertheless, the Plaintiff raises the point that a similar approach might be taken in relation to s 5(1). If a claim for "privilege" is raised on the basis that the STB had entered into the DA *on behalf of the Government*, the burden falls on the Defendant to establish that this was in fact the position. No affidavit had been filed by any representative of the STB or the Government. Indeed, the Plaintiff has pointed out that no affidavit was filed to explain why the disclosure of the contents of the DA (and the Request for Proposal) would be injurious to the public interest.

63 As noted above, the Plaintiff, by way of AJK-1, asserts that in any event, they have been able to obtain a copy of the DA dated 11 December 2009 (and the Supplemental Agreement). The contents of the agreements were also disclosed in the 2011 Annual Report. Copies of both agreements were also attached as exhibits to AJK-1.

64 I make the following brief comments on these exhibits. First, the 2011 Annual Report sets out a summary of the DA with the STB, which runs into some eleven (main) paragraphs and a number of subsidiary paragraphs as well. The opening sentence states:

> On August 23, 2006, our wholly owned subsidiary, Marina Bay Sands Pte. Ltd. ("MBS"), entered into a development agreement, as amended by a supplementary agreement on December 11, 2009 (the "Development Agreement") with the STB to design, develop, construct and operate the Marina Bay Sands.

65 Further down the summary, it is also stated that:

> Under the terms of the Development Agreement, MBS agreed to design, develop and construct the integrated resort in accordance with the plans set forth in its response to the Request for Proposal, which was accepted by the STB.

66 The 2011 Annual Report does not set out the actual DA, the Supplemental Agreement or the Request for Proposal. That said, it is noted that Part IV of the 2011 Annual Report (*ie*, Exhibits and Financial Statement Schedules) refers to the DA and the Supplemental Agreement to the DA in the list of exhibits. Moreover, the copy of the DA (and the Supplemental Agreement) exhibited in AJK-1 appears to be extracted from an online website. Whether the copy extracted is a true and accurate copy of the actual DA and the Supplemental Agreement is not clear, given that neither the Defendant nor the STB has confirmed the authenticity of the documents in question. I, therefore, confine my further comments on the STB and the DA (as well as the Supplemental Agreement) to what is set out in the 2011 Annual Report. Bearing in mind that the 2011 Annual Report only provides a summary of the agreements (although it does appear that the actual agreements were referred to in the list of exhibits), there is no express indication that the STB was entering into the agreements on behalf of the Government. The 2011 Annual Report does, however, refer to the fact that under the DA, the Defendant was required to be licensed by the relevant gaming authorities before it could actually commence operating the casino under the casino concession. The 2011 Annual Report also sets out the term (duration) of the casino concession provided for under the DA and goes on to state that "the Singapore Government may terminate the casino concession prior to its expiration in order to serve the best interests of the public, in which event fair compensation will be paid to MBS."

67 It is the Defendant who advances the argument that the agreements between the Defendant and the STB were entered into by the STB on behalf of the Government and that accordingly, the Defendant is to be regarded as a person who has held a contract made on behalf of the Government so as to bring it within s 5(1)(e) of the OSA. The Defendant does not appear to deny the relevance of the DA (and the Supplemental Agreement). Instead, the Defendant's argument against discovery is predicated on the assertion that it is unable to disclose the documents as this would amount to an offence under s 5(1)(i) of the OSA. In these circumstances and based on the material before the court, I find that the Defendant has not established that the agreements were entered into by the STB on behalf of the Government. In saying this, the court does take note of the Defendant's written submissions that the "Defendant has confirmed on affidavit that the Development Agreement was issued to the Defendant by the STB on behalf of the Government". This may well be so. Nevertheless, the fact that the STB could have entered into the contract on behalf of the Government is not enough to establish that this was in fact the case. In coming to this view, I also note that the Defendant has stated in its written submissions that the STB had confirmed that it is not agreeable to the disclosure of the DA and the Supplemental Agreement for the purposes of the present proceedings. The point remains that there is no affidavit from the STB in these proceedings to set out its position. Neither has there been any attempt by the STB to intervene so as to formally record its objections. The fact that the court was shown a letter indicating the STB's objection has been referred to above. The letter has not been exhibited in any affidavit before the court and indeed, it appears that the Plaintiff has not even seen the letter and was thus unable to respond. On the other hand, it appears that the AR was given sight of the STB letter. This led the AR to state, at [6] of her decision, that "both the STB and the URA declined to give consent". In these circumstances, based on the material placed before me in the current proceedings, this court is not satisfied that the Defendant has established that the DA was entered into by the STB on behalf of the Singapore Government.

Evidence as to affairs of State

68 I turn now to consider the next ground upon which the Defendant has relied on to resist discovery of the DA, which is that the DA is evidence as to affairs of State.

69 Section 125 of the Evidence Act (Cap 97, 1997 Rev Ed) states that:

> No one shall be permitted to produce any unpublished official record relating to affairs of State, or to give any evidence derived therefrom, except with permission of the officer at the head of the Department concerned, who shall give or withhold such permission as he thinks fit, subject, however, to the control of the Minister.

70 In order to succeed, it is clear that the Defendant would have to show, *inter alia*, that the document in question was (i) unpublished, (ii) an official record, and (iii) that it related to affairs of State. Even if it is accepted that the DA has not yet been published (notwithstanding the permitted referral and exposure of the agreement in the 2011 Annual Report), it is still necessary to demonstrate that the DA is an "official record" which relates to "affairs of State". It is the latter term to which I now turn.

71 The Defendant submits that the concept embodied by the term clearly covers any document protected by the official secrets legislation, citing Jeffrey Pinsler, *Singapore Court Practice* (LexisNexis, 2009) at p 655, where it is stated:

> ... Clearly, it covers documents protected by 'official secrets' legislation (see s 5 of the Official Secrets Act), documents relating to public security such as national defence … and confidential

> government documents including cabinet minutes, policy documents and documents the disclosure of which would be detrimental to foreign relations …

72 The assertion that an "affair of State" covers any document that is protected under s 5 of the OSA, whilst understandable, calls for closer examination. Section 5 of the OSA is a complex provision which is capable of covering a very wide variety of material. As discussed above, care is needed before a conclusion can be drawn as to whether any document or information is protected material. In the present case, the Defendant argues that the DA signed by the Defendant and the STB is a document that falls within s 5(1) and that the Defendant obtained the document as a person who holds a contract made on behalf of the Government or any specified organisation. That being so, the Defendant asserts that its disclosure of the DA to the Plaintiff will amount to an offence under s 5(1)(e) and s 5(1)(i) of the OSA. It follows that since this court is not satisfied that the DA was indeed signed by the STB on behalf of the Government, the Defendant cannot gain any mileage on the basis of the submission that any document falling within s 5 of the OSA must be taken to relate to an "affair of State".

73 The Defendant has also relied on a number of case authorities in support of its argument on how "affairs of State" ought to be construed.

74 The first is *Chan Hiang Leng Colin and others v Public Prosecutor* [1994] 3 SLR(R) 209 ("*Colin Chan*"). In this case, Yong Pung How CJ refused to order the production of certain files and documents of various Ministries due to the importance of protecting the confidentiality of state papers. This case concerned convictions under the Undesirable Publications Act (Cap 338, 1985 Rev Ed) in respect of certain publications by the Watch Tower Bible and Tract Society. These publications were the subject of Gazette Notifications. One of the issues that arose in the appeal concerned the production of files and documents of the relevant Ministries relating to the Gazette Notifications. It was in this context that Yong CJ remarked (at [40]) that, quite apart from s 125, he "was not convinced ... that the public interest dictated that such documents be produced before this court" and that the "importance of preserving the confidentiality of state papers need not be stressed". The present case is clearly different from the facts in *Colin Chan* and thus provides little support for the Defendant's case.

75 The second case is *Re Siah Mooi Guat* [1988] 2 SLR(R) 165, which was cited for the proposition that in cases turning on s 125, it was for the Minister, and not the court, to decide whether it was in the public interest for certain information to be disclosed. That case concerned an application by a foreigner for an order of *certiorari* to quash the decision that revoked her re-entry permit and employment pass. T S Sinnathuray J (at [36]) states that:

> ... It is laid in the second affidavit for the Minister that he had considered information from a reliable source on the applicant's conduct and activities, and that he was of the view that the information, if disclosed, would endanger the confidentiality of the source and that would not be in the public interest. ...

76 It was in this context that the learned judge held (at [36]) that it was for the Minister, and not the court, to decide whether it was in the public interest that the information should be disclosed. Again, the facts and circumstances of *Siah Mooi Guat* are rather different from the case at hand. In the first place, the confidentiality of the information in the DA must be affected by the (consensual) exposure in the 2011 Annual Report. Second, it is by no means clear that the DA does relate to an "affair of State". Moreover, there is no affidavit by the STB or the Minister before the court on "affair of State" or the general public interest.

77 In addition to the above cases, the Defendant also referred this court to a number of foreign authorities: *B A Rao & Ors v Sapuran Kaur & Anor* [1978] 2 MLJ 146 ("*B A Rao*"); *Wix Corporation South East Asia Sdn Bhd v Minister for Labour and Manpower & Ors* [1980] 1 MLJ 224 ("*Wix Corporation*") and *The Life Insurance Corporation of India v B B Singla & Ors* Civil Revision No 2475 of 2008 ("*Life Insurance Corporation*"). The first two are decisions on s 123 of the Malaysian Evidence Act 1950. Both were cited for the general proposition that (i) the term, "affair of State", was not defined in the Evidence Act because its existence would depend on the facts and circumstances of each case; and (ii) that it was for the court to decide whether there was a basis for the claim to "affair of State". In *B A Rao*, the Federal Court of Malaysia held that a report of a Committee of Inquiry into a death at a hospital was not an affair of State. In *Wix Corporation*, the Malaysian court found that a report by the Director General of Industrial Relations (relating to an employment dispute) was not an affair of State. Finally, *Life Insurance Corporation* was an Indian case from the High Court of Punjab and Haryana on s 123 of the Indian Evidence Act 1872, where it was held that an annual confidential report of an employee did not attract the privilege.

78 The Plaintiff, on the other hand, argues that the DA and lease arrangements were strictly commercial transactions and that the disclosure of the same could not be said to be detrimental to national and public interests. The Plaintiff points out that this assertion is consistent with the Defendant's own disclosure of the DA and/or its contents in its annual reports – this is so even if that disclosure was for the purposes of complying with the requirements of the United States Securities and Exchange Commission. Cases cited by the Plaintiff in support of its argument that commercial transactions or dealings (even those entered into by the Government) were not necessarily privileged as being an "affair of State" (whose disclosure is injurious to the public interest) included *Burmah Oil Co Ltd v Governor and Company of the Bank of England and Another* [1980] AC 1090, *Robinson v State of South Australia (No 2)* [1931] AC 704 and *Wix Corporation*. That said, it is noted that there is no immutable rule that a document which records a commercial transaction can never be an "affair of State". Further, the degree of relevancy and its importance to a fair disposal of the dispute between the parties is also a factor to be taken into account.

79 In the present case, the Plaintiff submits that even though the AR was showed a letter stating that the STB had objected to the disclosure, the AR went on to hold (at [23]) that "there is no evidence before this court that the documents or correspondences were obtained or given in official confidence, nor is there any evidence from any government official that public interests would suffer by the disclosure of documents or correspondence". After reviewing the helpful submissions of both parties, I have come to the view that the Defendant has not established a basis for the claim to protection on the ground of "affairs of State". In any case, I would also add (in passing) that not only does the DA appear to be a document which records a commercial transaction between the STB and the Defendant, the general relevance of the document to the substantive issues at hand is, at the very least, reasonably clear. In saying this, the court is not in any way suggesting that the contents of the DA will necessarily be decisive for either the Plaintiff or the Defendant. Nevertheless, it does appear to be a document that will assist in the fair resolution of the dispute between the parties. For the sake of clarity, neither is this court making any holding in relation to the original request for discovery of the correspondence evidencing the attempts made by the Defendant to secure consent from the STB. Leaving aside the issues relating to s 5 of the OSA and "affairs of State", the relevance of these correspondences to the substantive issues in the main dispute appears rather doubtful at this stage.

80 I turn now to touch briefly on the position of the URA. In the original request for specific discovery, the Plaintiff (at para 5 of the Schedule) sought disclosure of the documents evidencing the URA's request for the premises to be surrendered. This category refers to correspondences, as well as minutes of meetings on the surrender request. The response of the Defendant was that save for the

DA and the Request for Proposal, there are no documents evidencing URA's request for the premises to be surrendered. [note: 13] That being so, the principal dispute in relation to this part of the specific discovery request was, for all practical purposes, confined to the DA signed by the Defendant with the STB as well as the Request for Proposal that pre-dated the DA and which provisions were incorporated by reference into the DA. The dispute here is largely the same as that discussed above in relation to the STB: s 5 of the OSA and s 125 of the Evidence Act. The main difference is that the Request for Proposal does not appear to have been made available online and publicly disclosed. That said, the Request for Proposal was itself referred to in the 2011 Annual Report. This court notes that, whilst the URA is listed as a specified organisation in the OSA, there is no suggestion that the DA including the Supplemental Agreement or the Request for Proposal was made with the URA. Given the decision made in respect of the claim by the Defendant to privilege in respect of the STB (whether under the OSA or the Evidence Act), it follows that the claim also fails here.

Conclusion

81 The Defendant's appeal against the decision of the AR in SUM 2743/2013 is dismissed.

82 For the sake of clarity and completeness, this court is reminded that on 9 September 2013, when the case was first argued on appeal, the matter was adjourned for further submissions on the OSA and the scope of "affairs of State". At that hearing, the court was informed that the appeal had been narrowed to Categories 1(i) and 5 of the Schedule. That being so, this court ordered discovery for the rest of the documents (in the other categories/paragraphs) in accordance with the AR's Order. The appeal, therefore, turned only on these two categories of the Schedule.

83 Costs are awarded to the Plaintiff and to be taxed.

[note: 1] Plaintiff's Writ of Summons and Statement of Claim dated 7 November 2012, p 3, para 6.

[note: 2] Plaintiff's Writ of Summons and Statement of Claim dated 7 November 2012, pp 3–4, para 7(b).

[note: 3] Plaintiff's Writ of Summons and Statement of Claim dated 7 November 2012, p 16, para 24.

[note: 4] Plaintiff's Writ of Summons and Statement of Claim dated 7 November 2012, pp 10–12, para 12.

[note: 5] Plaintiff's Writ of Summons and Statement of Claim dated 7 November 2012, pp 10–12, para 12(g).

[note: 6] Defendant's Defence and Counterclaim (Amendment No 1) dated 3 January 2013, pp 4–5, para 11.

[note: 7] Defendant's Defence and Counterclaim (Amendment No 1) dated 3 January 2013, p 13, para 27.

[note: 8] Plaintiff's Writ of Summons and Statement of Claim dated 7 November 2012, pp 18–19, para 29.

[note: 9] Plaintiff's Writ of Summons and Statement of Claim dated 7 November 2012, pp 18–19, para 29.

[note: 10] Defendant's Defence and Counterclaim (Amendment No 1) dated 3 January 2013, p 14–17, para 30.

[note: 11] Plaintiff's Writ of Summons and Statement of Claim dated 7 November 2012, pp 18–19, para 29.

[note: 12] Plaintiff's Writ of Summons and Statement of Claim dated 7 November 2012, pp 19–20, para 31.

[note: 13] See Kate Eva McGettigan's Affidavit dated 29 May 2013, p 115–117, Exhibit KEM–7 referred to at Defendant's Skeletal Submissions dated 6 September 2013, p 23–24, para 67.