IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2021] SGHC 202

Suit No 256 of 2020 (Registrar's Appeal No 34 of 2021)

Between

Mah Kiat Seng

… *Plaintiff*

And

(1) Attorney-General
(2) Mohamed Rosli bin Mohamed
(3) Tan Thiam Chin Lawrence

… *Defendants*

JUDGMENT

[Civil Procedure] — [Discovery of documents] – [Evidence Act s 126]
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v
Attorney-General and others

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Philip Jeyaretnam JC
1 March, 23, 25 August 2021

27 August 2021 Judgment reserved.

Philip Jeyaretnam JC:

Introduction

1 We live in a panoptic world where video recording has become ubiquitous. Ordinary people use the cameras built into their smartphones, recording and uploading to the internet incidents of interest or concern. Governments also make extensive use of video recordings. One example of governmental video recordings are the body-worn cameras of police officers and closed-circuit television cameras at police lock ups. These serve various purposes. Body-worn cameras provide video evidence in the investigation of suspected offences as well as an independent record of the police officer's own conduct during an arrest or search.

2 The ubiquity of video recording was unimaginable in 1872 when the Indian Evidence Act was enacted, and scarcely conceivable even in 1893, when the Straits Settlements, of which Singapore was then a part, introduced the Evidence Ordinance, modelled after the Indian Evidence Act, and which, with some amendments over the years, has become our current Evidence Act. In 1893, the Lumiere brothers had yet to stage the world's first commercial movie screening, which took place two years later in Paris.

3 Video recordings are often good, if not the best, evidence of interactions between people. For this reason, parties to litigation often seek to introduce them as evidence. Where video recordings are in another's possession, a discovery application may be required.

4 Where the video recordings are done by and belong to government, when may they be withheld from disclosure and production? The answer depends first on the scope and ambit of certain provisions in the Evidence Act, drafted, as I have said, with no expectation of there ever being video recordings of ordinary life, let alone ones made so routinely. If those do not apply, then one turns to whether the government may rely on the common law doctrine of public interest immunity.

5 Surprisingly, there is a paucity of authority on whether and to what extent that common law doctrine survived the enactment of the Evidence Ordinance, and it is this question that is the subject of much of this judgment.

Facts

The parties

6 The plaintiff, Mah Kiat Seng, ("Mr Mah") is unrepresented and a litigant in person. The first defendant is the Attorney-General ("AG") representing the Singapore Police Force ("SPF") sued pursuant to the Government Proceedings Act (Cap 121, 1985 Rev Ed) ("GPA") s 19(3). The second defendant is the police officer who took Mr Mah into custody on 7 July 2017 under s 7 of the Mental Health (Care and Treatment) Act (Cap 178A, 2012 Rev Ed) ("MHCTA"), while the third defendant is a police officer who was at the Central Police Division Regional Lock-Up ("RLU"), to which Mr Mah was taken. Following information received via the SPF emergency call line from the complainant, the second defendant was dispatched to the incident location (*ie*, Suntec City). He interviewed the complainant before speaking to Mr Mah. In the course of doing so, he formed the view that Mr Mah was mentally disordered and by reason of that disorder posed a danger. Consequently, he proceeded, with the assistance of two more police officers, to arrest him under s 7 of the MHCTA.

Background to the dispute

7 The claim arises from Mr Mah's allegation that he was wrongfully arrested and falsely imprisoned. He says he was subjected to assault and suffered physical and mental trauma. He also claims that his personal property, namely his bag and mobile phone, were negligently damaged.

Procedural history and decision below

8 This action was commenced by Mr Mah pursuant to leave granted by the Court of Appeal on 5 March 2020 under s 25 of the MHCTA.

9 Mr Mah sought discovery of various recordings made by closed-circuit television cameras ("CCTV") and body-worn cameras ("BWC"). Mr Mah took the position that, while the government was entitled to invoke the doctrine of public interest immunity, the public interest in the administration of justice in this case outweighed any public interest in non-disclosure.

10 The AG argued that both the CCTV and BWC recordings were absolutely protected from disclosure by virtue of s 126 of the Evidence Act (Cap 97, 1997 Rev Ed) ("EA"). Section 126 of the EA provides:

> (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.

11 The AG relied on the Court of Appeal decision in *Zainal bin Kuning and others v Chan Sin Mian Michael and another* [1996] 2 SLR(R) 858 ("*Zainal Kuning"*) at [32] to [33], to support its argument that while it is for the court to decide whether the communication in question was made to the public officer in official confidence, the determination by that public officer that the public interest would suffer by the disclosure is conclusive pursuant to s 126 of the EA.[1] In short, the AG contended that there is no room for the balancing by the court of the public interest in the administration of justice against the public interest in the efficient and confidential functioning of the public service. However, seeking a compromise that would in their view accommodate the

[1] First to Third Defendant's Written Submissions ("DWS") at [8].

interests of justice, the AG agreed to permit inspection by viewing of the footage at the Police Cantonment Complex, but not the taking of copies, and, in the case of the BWC recordings, that they be pixelated prior to inspection so as to protect the identity of the complainant.[2] The AG also confirmed that at any trial of this matter it would make the footage available for admission into evidence by viewing *in camera* pursuant to s 8 of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA").[3]

12 The assistant registrar agreed with the submissions of the AG and made an order that the defendants were to file and serve a supplemental list of documents on Mr Mah listing: (i) all CCTV footage of Mr Mah's entire imprisonment in the RLU; and, (ii) BWC recordings showing the second defendant interviewing the complainant. However, Mr Mah was limited to having inspection of these recordings rather than being permitted to have copies of them. Further, in relation to the BWC recordings, the defendants were permitted to "pixelate" the images in order to conceal the identity of the complainant.

13 Mr Mah, being dissatisfied, appealed, seeking to have copies of the CCTV and BWC, without any pixelation being permitted. Mr Mah considered that he was unable to prepare his case properly in the light of the limitations placed on him.

The parties' cases

14 When the matter first came before me, the AG maintained its position that there was no room for any balancing exercise under s 126 of the EA read

[2] DWS at [19] and [24].

[3] First affidavit of Seah Kah Weng Daniel filed on 8 January 2021, at paras 24 and 30.

with *Zainal Kuning* at [32] to [33], that it did not rely at all on public interest immunity, and that only the traditional grounds of judicial review (including *Wednesbury* unreasonableness) applied to the decision not to allow Mr Mah to have the recordings he sought.

15 In relation to the AG's reliance on s 126 of the EA, I was immediately troubled that "communications" hardly seemed apt to cover camera footage (except perhaps where what is being recorded is a specific communication to the public officer). I observed that there is a clear difference between "records" and "communications". I was not convinced by the argument that footage becomes a communication when it is watched by a public officer.

16 I therefore adjourned the matter for further submissions on the question of the scope of s 126 of the EA. When the AG filed its further submissions, its position had changed. The AG now accepted that the CCTV and BWC footage was not in and of itself "communications" within s 126 of the EA.[4] However, where such footage recorded a communication, as was the case with some of the BWC footage, then those parts would be covered by s 126 of the EA.[5] The AG now contended that where s 126 of the EA did not apply, the government was entitled to invoke public interest immunity which continued to exist to fill any gaps in the statutory framework.[6] AG also declined to adopt the High Court's position in *BSD v Attorney-General and other matters* [2019] SGHC 118 ("*BSD*"), where at [64] appears the tentatively expressed *obiter* remark that common law public interest immunity does not apply in Singapore.[7] In that case,

[4] First to Third Defendant's Further Written Submissions ("DFWS") at [8].

[5] First to Third Defendant's Further Written Submissions ("DFWS") at [9].

[6] DFWS at [42].

[7] DFWS at [33] to [37].

the appellants were account holders affected by a production order made under s 22 of the Mutual Assistance in Criminal Matters Act (Cap 190A, 2001 Rev Ed). They had argued that common law public interest immunity is not part of the law of Singapore in light of ss 2(2) and 125 of the EA.

17 Section 2(2) of the EA provides that:

> All rules of evidence not contained in any written law, so far as such rules are inconsistent with any of the provisions of this Act, are repealed.

18 Section 125 of the EA provides that:

> No one shall be permitted to produce any unpublished official records relating to affairs of State, or to give any evidence derived therefrom, except with the 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.

19 Given the change of position, and both because the question whether the common law doctrine of public interest is part of Singapore law is one of considerable public importance and because Mr Mah is a litigant in person without legal training, the assistance of a young *amicus curiae* was sought. Ms Zeslene Mao, the *amicus* appointed, provided me with helpful and comprehensive submissions. The questions posed of her were:

> (a) Is common law public interest immunity available to the government under Singapore law given that there already exists a statutory framework under ss 125 and 126 of the EA relating to the protection of government documents from disclosure on public interest grounds?

(b) If common law public interest immunity is available in Singapore, what test or standard should apply?

20 Following the further submissions of parties and of the *amicus*, I requested additional submissions concerning who is entitled to invoke public interest immunity on behalf of government. The AG sought leave to file a further affidavit[8]. Mr Mah did not object and I granted leave at the resumed hearing on 23 August 2021. Finally, as some additional authorities were raised by the AG at that resumed hearing, I gave Mr Mah the liberty to respond by 25 August 2021.

21 I should also add for completeness that in response to my question the AG clarified that he did not rely on EA s 127. That section protects the identity of informants.

Issues to be determined

22 The issues are as follows:

(a) Is common law public interest immunity part of Singapore law?

(i) What is common law public interest immunity?

(ii) Has common law public interest immunity been repealed by s 2(2) read with ss 125 and 126 of the EA?

(A) Is common law public interest immunity a "rule of evidence not contained in any written law"?

(B) Is common law public interest immunity "inconsistent with any of the provisions" of the EA?

[8] Second affidavit of Seah Kah Weng Daniel filed on 23 August 2021.

(b) If it is part of Singapore law, how is it to be invoked and what is the appropriate test?

(i) The position in England

(ii) The position in Australia

(iii) Conclusion under Singapore law

(c) Does s 126 of the EA apply to the BWC footage of the second defendant's interactions with the complainant?

(d) In relation to the remaining footage, and if public interest immunity is available to the government, does the probative value of the evidence outweigh the public interest in withholding it?

Issue 1: Is common law public interest immunity part of Singapore law?

23 In order to answer this question, it is necessary to consider first what common law public interest immunity is and then examine whether it might have been repealed by virtue of s 2(2) of the EA.

What is common law public interest immunity?

24 Common law public interest immunity began as "*Crown privilege*". In *Duncan and another v Cammell, Laird and Company Limited* [1942] 1 AC 624 ("*Duncan*"), the House of Lords traced the history of Crown privilege, summarising it as follows (at 636):

> … The principle to be applied in every case is that documents otherwise relevant and liable to production must not be produced if the public interest requires that they should be withheld. This test may be found to be satisfied either (*a*) by having regard to the contents of the particular document, or (*b*) by the fact that the document belongs to a class which, on

> grounds of public policy, must as a class be withheld from production.

25 The House of Lords considered that the objection should be taken in an affidavit or certificate from "the minister who is the political head of the department" who "should have seen and considered the contents of the documents and himself have formed the view that on grounds of public interest they ought not to be produced, either because of their actual contents or because of the class of documents, *eg*, departmental minutes, to which they belong" (at 638).

26 The House of Lords held that a claim to Crown privilege should be treated by the Court as conclusive, although the House of Lords emphasised that the minister should have good grounds to object to production. Viscount Simon LC explained (at 642–643):

> … It would not be a good ground that, if they were produced, the consequences might involve the department or the government in parliamentary discussion or in public criticism, or might necessitate the attendance as witnesses or otherwise of officials who have pressing duties elsewhere. Neither would it be a good ground that production might tend to expose a want of efficiency in the administration or tend to lay the department open to claims for compensation. In a word, it is not enough that the minister of the department does not want to have the documents produced. The minister, in deciding whether it is his duty to object, should bear these considerations in mind, for he ought not to take the responsibility of withholding production except in cases where the public interest would otherwise be damnified, for example, where disclosure would be injurious to national defence, or to good diplomatic relations, or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service. When these conditions are satisfied and the minister feels it is his duty to deny access to material which would otherwise be available, there is no question but that the public interest must be preferred to any private consideration. …

27 In 1947, Crown privilege was expressly recognised in the Crown

Proceedings Act 1947 (c 44) (UK) ("CPA 1947") s 28, which provides:

> Discovery.
>
> (1) Subject to and in accordance with rules of court:—
>
> > (a) in any civil proceedings in the High Court or the county court to which the Crown is a party, the Crown may be required by the court to make discovery of documents and produce documents for inspection; and
> >
> > (b) in any such proceedings as aforesaid, the Crown may be required by the court to answer interrogatories:
> >
> > Provided that this section shall be without prejudice to any rule of law which authorises or requires the withholding of any document or the refusal to answer any question on the ground that the disclosure of the document or the answering of the question would be injurious to the public interest.
>
> Any order of the court made under the powers conferred by paragraph (b) of this subsection shall direct by what officer of the Crown the interrogatories are to be answered.
>
> (2) Without prejudice to the proviso to the preceding subsection, any rules made for the purposes of this section shall be such as to secure that the existence of a document will not be disclosed if, in the opinion of a Minister of the Crown, it would be injurious to the public interest to disclose the existence thereof.

28 However, in *Conway v Rimmer and another* [1968] 1 AC 910 ("*Conway*"), the House of Lords departed from the holding in *Duncan* that the Minister's decision was conclusive of Crown privilege, and instead held that the court is to balance the public interests involved in deciding whether discovery will be ordered. As Lord Reid observed (at 940 and 951–952):

> It is universally recognised that here there are two kinds of public interest which may clash. There is the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents, and there is the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done. There are many cases where the nature of the injury which would or might be done to the nation or the

> public service is of so grave a character that no other interest, public or private, can be allowed to prevail over it. With regard to such cases it would be proper to say, as Lord Simon did, that to order production of the document in question would put the interest of the state in jeopardy. But there are many other cases where the possible injury to the public service is much less and there one would think that it would be proper to balance the public interests involved. …
>
> …
>
> …
>
> … in considering what it is "proper" for a court to do we must have regard to the need shown by 25 years' experience since *Duncan's* case, that the courts should balance the public interest in the proper administration of justice against the public interest in withholding any evidence which a minister considers ought to be withheld.
>
> I would therefore propose that the House ought now to decide that courts have and are entitled to exercise a power and duty to hold a balance between the public interest, as expressed by a minister, to withhold certain documents or other evidence, and the public interest in ensuring the proper administration of justice. …

29 The term "Crown privilege" was subsequently replaced by that of "public interest immunity". This change of label was prompted by the insight that the claim that documents ought not to be disclosed in the public interest was not a privilege as it did not operate to favour any party. Rather, it was a duty that was exercised in the public interest to refuse the disclosure of the information. This was explained by Lord Simon in the House of Lords decision of *Rogers v Home Secretary* [1973] 1 AC 388 ("Rogers") at 407.

30 The current state of the law in England on the doctrine of public interest immunity is as summarised by the UK Supreme Court in *Al Rawi and others v Security Service and others (JUSTICE and others intervening)* [2012] 1 AC 531 ("*Al Rawi*") at [145]:

(a) A claim for public interest immunity must be supported by a certificate signed by the appropriate minister relating to the individual documents in question;

(b) Disclosure of documents which ought otherwise to be disclosed under the rules of civil procedure may only be refused if the court concludes that the public interest which demands that evidence be withheld outweighs the public interest in the administration of justice;

(c) In making that decision, the court may inspect the documents. This would necessarily be an *ex parte* process;

(d) The court should also consider the appropriate safeguards that may be imposed to permit the disclosure of the material, for example, by holding all or part of the hearing *in camera*, requiring express undertakings of confidentiality, or restricting the number of copies of documents that could be taken or the circumstances in which the document could be inspected;

(e) Even where a complete document cannot be disclosed, it may be possible to produce extracts or to summarise the relevant effect of the material;

(f) If the public interest in withholding the evidence does not outweigh the public interest in the administration of justice, the document must not be disclosed unless the party who has possession of the document concedes the issue to which it relates.

Has common law public interest immunity been repealed by s 2(2) read with ss 125 and 126 of the EA?

31 Having described the doctrine of public interest immunity as it has developed in England, the next question is whether it is available to the government in Singapore, such that the government has the right to refuse disclosure of documents that would otherwise be relevant and necessary in court proceedings on the basis that disclosure would harm the public interest. This requires consideration of the EA, and in particular s 2(2), the text of which I have cited at [17]. The issue breaks down into two sub-issues:

(a) Is common law public interest immunity a "rule of evidence not contained in any written law"?

(b) Is common law public interest immunity "inconsistent with any of the provisions" of the EA?

Is common law public interest immunity a "rule of evidence not contained in any written law"?

32 This sub-issue breaks down into two questions. Is it a rule of evidence, and if so is it contained in any written law?

33 I accept that common law public interest immunity should be characterised as a "rule of evidence" for the purposes of s 2(2) of the EA. The EA does not explicitly define a "rule of evidence". However, it is straightforward that a rule that excludes evidence is a rule of evidence as much as an inclusionary one.

34 This is reflected in the EA, which contains both inclusionary rules concerning the admissibility of facts in issue and relevant facts, and

exclusionary rules relating to the types of evidence that a particular class of witnesses may not be compelled or permitted to give. These rules may be found under the heading titled "Witnesses" within Part III (Production and Effect of Evidence) of the EA. For instance, s 123 of the EA states that "[n]o Judge and … no Magistrate shall be compelled to answer any question as to his own conduct in court …", while s 128 of the EA states that "[n]o advocate or solicitor shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate or solicitor …". Other statutory rules on privileges and immunities such as marital communications privilege (s 124) and public interest immunity (ss 125 to 127) may also be found within this portion of the EA.

35 Common law public interest immunity has been described as a "rule that certain evidence is inadmissible on the ground that its adduction would be contrary to the public interest" (*Rogers* at 407). It is a rule, which in the appropriate circumstances, prohibits the giving, or permits the withholding, of evidence that would harm the public interest.

36 The next issue is whether as a rule of evidence, common law public interest immunity may be said to be "contained in any written law" within the meaning of s 2(2) of the EA. I accept that as the concept of common law public interest immunity has been statutorily recognised and referred to in s 34 of the GPA, it is a rule of evidence which is "contained in … written law".

37 Section 34(1) of the GPA states:

> Subject to and in accordance with Rules of Court —
>
> > (*a*) in any civil proceedings in the General Division of the High Court or a State Court to which the

> Government is a party, the Government may be required by the court to make discovery of documents and produce documents for inspection; and
>
> (*b*) in any such proceedings as aforesaid, the Government may be required by the court to answer interrogatories:
>
> Provided that this section shall be without prejudice to any other written law, or to any rule of law which authorises or requires the withholding of any document or the refusal to answer any question on the ground that the disclosure of the document or the answering of the question would be injurious to the public interest.

38 The legislative history of the GPA in Singapore has been traced in the Court of Appeal decision of *Deepak Sharma v Law Society of Singapore* [2017] 2 SLR 672 at [48]–[49]. The Court of Appeal noted that the GPA stems from the Malaysian Government Proceedings Ordinance 1956 (M Ordinance 58 of 1956). In turn, the Malaysian Government Proceedings Ordinance 1956 derived from the CPA 1947: see *Re Fong Thin Choo* [1991] 1 SLR(R) 774 at [16]. The Malaysian Ordinance was extended to Singapore on 25 February 1965 by virtue of the Malaysian Modification of Laws (Government Proceedings and Public Authorities Protection) (Extension and Modification) Order 1965 and retained the force of law in Singapore after Singapore's independence on 9 August 1965 through the Republic of Singapore Independence Act (Act 9 of 1965).

39 Section 34 of the GPA is *in pari materia* with and ultimately comes from s 28(1) of the CPA 1947 (cited at [27] above). Thus, English cases and Parliamentary debates may be referred to in order to help explain the scope of this section.

40 The English cases have held that s 28 of the CPA 1947 was not a codification or confirmation of the common law, but simply a recognition and preservation of it. The importance of this distinction is that on this view the

common law relating to public interest immunity could continue to evolve and develop. Thus, in *Conway*, the House of Lords rejected the submission that s 28 of the CPA 1947 was a "statutory confirmation" of the law set out in *Duncan*. Lord Pearce explained that the effect of s 28 of the CPA 1947 was to make the ordinary rules of evidence applicable to the Crown when it was a party to proceedings, and that the exception did not "create any particular rule of law", but "preserve[d] in the operation of the section whatever may from time to time be the courts' rule of law for the withholding of documents" (see *Conway* at 983–984). Subsequently, in *Al Rawi*, Lord Neuberger noted that s 28 of the CPA 1947 had expressly recognised public interest immunity (see *Al Rawi* at [23]).

41 The English Parliamentary debates leading up to the enactment of the CPA 1947 also embody this approach and understanding. During the debate on the Crown Proceedings Bill in the House of Commons (see United Kingdom, House of Lords, *Parliamentary Debates* (4 July 1947) vol 439 at col 1685-1686), the UK Attorney-General stated as follows:

> Part IV of the Bill deals with miscellaneous matters, and Clause 28, in particular, with the discovery or disclosure of documents. This is an important matter and one about which in the past there have been grave doubts as to how far the Crown ought to go. In general, the Crown will be obliged under this Clause to disclose all relevant documents, but I think that everyone in the House and everyone who has considered this matter outside agree that there will be and, indeed, there must be some documents for instance those dealing with matters of defence, which is an obvious case, which it would be contrary to the public interest for the Crown to disclose. That is a position which has been well established by many decisions in the courts both in this country and in Scotland.
>
> …
>
> … This Clause preserves the existing law, at all events so far as England is concerned in this respect, and we regard this Clause as fundamental to the Bill.

42 Thus, the purpose of the proviso to s 28 of the CPA 1947 was to recognise the doctrine of public interest immunity as it then was, while preserving the operation of public interest immunity as it might continue to develop in the common law.

43 Given that s 28 of the CPA 1947 was the model for s 34(1) of the GPA, the same statutory purpose animates it too. Thus, in my view, its proviso should similarly have the effect of recognising and preserving the operation of common law public interest immunity in Singapore.

44 The further question arises then as to whether at the time that the GPA was enacted there continued to be in existence in Singapore common law public interest immunity. The argument against the existence of common law public interest immunity as of 1956 or 1965, is that it had already been repealed by the enactment of the EA in 1893 when it already contained ss 125 and 126(1). Section 126(2) extending the operation of the section to members, officers and employees or secondees to organisations specified in the Schedule to the Official Secrets Act, was enacted in 2003 by the Evidence (Amendment) Act 2003 (Act 17 of 2003). If the doctrine of common law public interest immunity as it was in 1893 was inconsistent with s 125 and 126 of the EA as enacted at that time then to the extent of that inconsistency it would have been repealed by s 2(2) of the EA. In that case, the exceptions to s 34(1) as referred to in the proviso would have to be read as referring only to the provisions in the EA (and any other written law) which permit the exclusion of evidence on public interest grounds, and not to any (already repealed) *common law* public interest immunity.

45 An argument against this is that the proviso to s 34(1) of the GPA expressly recognised that there were two sources of law by which the

government might withhold documents on the basis that disclosure would be "injurious to the public interest", one being "any other written law" and the other being "any rule of law". References in a statute to "law" without the qualifier of "written", would generally include the common law. In this case the section also appears to use the phrase in contradistinction to "written law" and this fortifies the conclusion that the proviso was also intended to preserve the common law concerning discovery in civil proceedings in relation to government. It is a well-established principle of statutory interpretation that Parliament shuns tautology and does not legislate in vain: see *JD Ltd v Comptroller of Income Tax* [2006] 1 SLR 484 at [43], cited in *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [38].

46 The principle that Parliament is generally to be taken not to have legislated in vain further supports and reinforces the argument that when the proviso to s 34(1) of the GPA was enacted there was and was understood to be a common law doctrine of public interest immunity that was to be recognised and preserved by the proviso. In short, this court should lean toward interpreting the proviso in such a way as gives it meaningful and substantive content.

47 For the common law doctrine of public interest immunity to have survived the enactment of the EA in 1893 it must have not been inconsistent with the provisions contained in the EA, in particular ss 125 and 126.

48 I now turn to this question of possible inconsistency.

Is common law public interest immunity "inconsistent with any of the provisions" of the EA?

49 While the EA is a code of the evidence law that existed at the time of its enactment, it is not an exhaustive one. Consequently, common law rules of

evidence continue to apply so long as they are not inconsistent with the EA (see *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 ("*Phyllis Tan*") at [117]).

50 It is helpful to review the approaches taken by the court to the application of s 2(2) of the EA. In *Phyllis Tan*, the Court of Three Judges rejected the contention that the court had a general discretion to exclude illegally obtained evidence (including entrapment evidence). The Court held that the overarching principle of the EA was that "all evidence is admissible unless specifically expressed to be inadmissible", and hence it would not be consistent with the EA to sanction the exclusion of relevant evidence on the ground of unfairness to the accused (at [126]). In particular, the Court stated at [117] that "new rules of evidence can only be given effect to only *if they are not inconsistent with the provisions of the EA or their underlying rationale*" [emphasis in original].

51 At the same time, the court has on various occasions recognised other rules of evidence not found within the EA. In *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and other appeals* [2007] 2 SLR(R) 367 ("*Skandinaviska*"), the Court of Appeal held that the concept of litigation privilege, which existed by virtue of the common law, was not inconsistent with the provisions of the EA as litigation privilege was also envisaged by s 131 of the EA (at [67]). Similarly, in *Mariwu Industrial Co (S) Pte Ltd v Dextra Asia Co Ltd and another* [2006] 4 SLR(R) 807 at [28], the Court of Appeal held that as the rationale of the "without prejudice" privilege found in s 23 of the EA is to encourage settlements, it was not inconsistent to recognise the common law rule that prevented "without prejudice" communications being adduced in civil proceedings involving third parties.

52 More recently, the Court of Appeal in *ARX v Comptroller of Income Tax* [2016] 5 SLR 590 ("*ARX*") held that a common law rule relating to the privilege conferred upon advice proffered by in-house counsel is not inconsistent with any of the provisions of the EA. Instead, the Court of Appeal found (at [32]) that the common law rule was "*wholly consistent with* the rationale as well as spirit undergirding the existence of the doctrine of legal professional privilege" [emphasis in original], the latter of which has been "enshrined" in the EA by virtue of ss 128 and 131 (at [21]).

53 Professor Jeffery Pinsler, in *Evidence and the Litigation Process* (LexisNexis, 7th Ed, 2020) at para 1.062A, has offered the following helpful summation of the case law:

> … a common law principle or rule of evidence may be applicable in Singapore if it does not contradict any provision of the EA and its *raison d'etre* is consistent with the purposes of the area of law concerned …. The fact that the common law principle or rule is not addressed or referred to by the EA does not prevent its application if the conditions just mentioned are satisfied. Putting it in a nutshell, while supplementation is legitimate, contradiction is not. …

54 In my opinion, common law public interest immunity is not inconsistent with the EA. Where a particular doctrine (*eg*, legal professional privilege or "without prejudice" privilege) has been given effect to by provisions in the EA, common law rules that supplement or extend such doctrines (for example, to third parties or in-house counsel or to the context of litigation) have been regarded as consistent with the provisions of the EA.

55 Considered in this way, ss 125 and 126 of the EA may be viewed as instantiating the common law doctrine of public interest immunity and embedding it within the EA, without contradicting the continued existence and

development of public interest immunity as a broader doctrine. For completeness, the same point would apply to s 127 of the EA, which reads:

> **Information as to commission of offences**
>
> 127.—(1) No Magistrate or police officer shall be compelled to say whence he got any information as to the commission of any offence.
>
> (2) No revenue officer shall be compelled to say whence he got any information as to the commission of any offence against the public revenue or the excise laws.

56 Although the concept of "public interest" is only explicitly referred to in s 126 of the EA, ss 125 and 127 of the EA also fall under the broad umbrella of public interest immunity as they seek to protect a particular class of information (*viz*, unpublished official records relating to affairs of State and information as to the commission of an offence) from disclosure on the grounds of public policy (as opposed to any interest personal to the witness in question). Section 127 of the EA protects a particular class of information, namely the identity of informants.

57 That the common law doctrine of public interest immunity continues to exist is also supported by the Court of Appeal's decision in *ARW v Comptroller of Income Tax and another and another appeal* [2019] 1 SLR 499 ("*ARW*"). There, the appellant sought specific discovery of internal documents belonging to the Inland Revenue Authority of Singapore. The Comptroller of Income Tax resisted the application on the ground of public interest privilege under s 126(2) of the EA (amongst other grounds). Additionally, the AG sought to intervene in the application to state his position on public interest privilege. The appellant objected to the AG's intervention on the ground that s 126(2) of the EA did not give the AG a right to raise the issue of public interest privilege. The issue before the Court of Appeal concerned the AG's standing to intervene.

58 The Court of Appeal held that the AG's standing to intervene in the application arose by virtue of his position as the guardian of the public interest (at [18]). Although s 126(2) of the EA provided that public interest privilege may be invoked by a relevant officer in a specified organisation, the Court of Appeal held that this did not necessarily mean that the AG could not raise the public interest privilege in his own right under a different basis, namely, the common law (at [23]). In rejecting the appellant's argument that s 126 had "codified the common law position on public interest privilege to such an extent that it excludes any such privilege which the AG might have in his capacity as the guardian of the public interest" (at [24]), the Court of Appeal held that:

(a) Section 126 of the EA did not make reference to the AG's distinct right to object to disclosure by the relevant officer (at [24]);

(b) There was nothing in the Parliamentary debates at the time s 126(2) of the EA was introduced which could be construed to indicate that Parliament intended to restrict or curtail the function of the AG as the guardian of the public interest (at [25]); and

(c) There were sound policy reasons for allowing the AG to intervene, where necessary, to raise issues of public interest (at [26]).

59 The Court of Appeal in *ARW* also made an observation on the AG's common law right to raise public interest privilege (at [25]):

> … It is hardly imaginable that Parliament had intended s 126 EA to be a complete codification of this aspect of the common law at the expense of the [AG's] common law right to raise public interest privilege when nothing was said about and no reference whatsoever was made to the position of the [AG]. In our opinion, by s 126 EA, Parliament intended no more than to make clear that public officers, and members, officers or employees of, or secondees to, the specified organisations can plead public interest privilege in *their own right*. This does not in any way

> derogate from or undermine the *separate* and *distinct* function of the [AG] to object to disclosure sought from the relevant officer.
>
> [emphasis in original]

60 It may be seen from the above that the Court of Appeal in *ARW* accepted that the AG retained a common law right to object to disclosure of information by public officers on the ground of "public interest privilege", even though such a right was not found within the EA. I interpret the Court of Appeal as accepting that the rules of evidence concerning public interest immunity in ss 125 to 127 of the EA are not exhaustive, and are to be supplemented by common law rules and principles not inconsistent with those provisions.

61 Pulling the above strands together, the Court of Appeal has consistently viewed the rules on privileges and immunities as set out under the heading "*Witnesses*" in Part III (Production and Effect of Evidence) of the EA as neither exhaustive nor displacing the common law entirely. It has held on multiple occasions that the EA may be supplemented by common law rules, for example regarding:

(a) additional classes of persons who may claim the privilege or immunity;

(b) types of information that may be covered by the privilege or immunity; and

(c) contexts or situations in which the privilege or immunity may arise.

62 I now return to the views expressed *obiter* in *BSD*. I respectfully disagree with them for two principal reasons. First, the decision of the Court of Appeal in *ARW* does not appear to have been cited to the court.

63 Secondly, the approach advanced by the appellants in *BSD* as summarised in [62] (which the court tentatively agreed with at [64]) was overly narrow and focused only on the inconsistency between the operation of common law public interest immunity and s 125 of the EA in its technical aspects. The analysis whether provisions of the EA are consistent with the common law for the purpose of s 2(2) must be undertaken from a conceptual and purposive, as opposed to a technical, perspective. In other words, a common law rule of evidence is not inconsistent with the provisions of the EA if it is conceptually in keeping with the rationale and spirit of provisions within the EA. This was the approach taken by the Court of Appeal in *ARX* and *Skandinaviska*. In those cases, technical differences in the operation of the common law rules as compared with the EA provisions were not held to amount to inconsistency for the purposes of s 2(2) of the EA.

Issue 2: If it is part of Singapore law, how is it to be invoked and what is the appropriate test?

64 Before I return to the position under Singapore law it is helpful to review the position in other jurisdictions. For this purpose, I will review the law relating to public interest immunity in England and Australia.

The position in England

65 The general position in England concerning common law public interest immunity has been summarised at [24] to [30] above. The test of whether relevant documents otherwise subject to disclosure should be withheld on the

ground of common law public interest immunity is whether the public interest in the administration of justice is outweighed by the public interest sought to be protected by withholding disclosure. The Courts in the UK have drawn a broad distinction between civil and criminal proceedings, and generally recognised that where material is necessary to prove an accused's innocence or avoid a miscarriage of justice in a criminal case, the balance is in favour of disclosure, and if the Crown refuses to disclose the material, it should forgo further prosecution: see *Al Rawi* at [101].

66 A statutory regime exists both in the criminal and civil context setting out the appropriate procedure where claims for public interest immunity are made. These regimes apply generally to all claims of public interest immunity.

67 For criminal matters, the rules and procedure may be found in the Criminal Procedure and Investigations Act 1996 (c 25) (UK) and the Criminal Procedure Rules 2020 (SI 2020 No 759) (UK). Sections 3(6) and 7A(8) of the Criminal Procedure and Investigations Act 1996 (c 25) (UK) provide that "[m]aterial must not be disclosed … to the extent that the court, on an application by the prosecutor, concludes it is not in the public interest to disclose it and orders accordingly".

68 For civil matters, r 31.19 of the Civil Procedure Rules 1998 (SI 1998 No 3132) (UK) sets out a procedure by which parties may apply for an order permitting the withholding of disclosure of a document on the ground that the disclosure would harm the public interest.

69 In conducting the balancing exercise, the court asks whether the probative value of the evidence is so important to a fair resolution of the issues in the action that the public interest in the administration of justice outweighs

the risk of harm raised by the government. The factors which the court would take into account include the seriousness of the claim for which disclosure is sought, whether or not the government is itself a party to the proceedings, whether the government is alleged to have acted unconscionably and the relevance of the particular evidence to the dispute, taking into account other possible sources of evidence and the nature of the State's interest: *Al Rawi* at [102]. At the same time, the court would also seek to resolve the issue fairly in a practical sense. As the learned authors of *Phipson on Evidence* (Hodge M Malek gen ed) (Sweet & Maxwell, 19th Ed, 2020) note at para 25-12:

> … the court will wish to consider whether the position can be resolved by ordering disclosure on terms which protect the public interest. Disclosure may be limited to solicitors and counsel. Redactions may be permitted. Where a claim to [public interest immunity] is established, and a complete document cannot be disclosed, it is incumbent on the court to consider whether relevant extracts can be disclosed or a summary made of the relevant effect of the material. …

70 A particular class of documents recognised as generally being subject to public interest immunity is information relating to sources and informants and information leading to the detection of crime, including premises used for surveillance. The basis for this was explained by Lord Diplock in *D v National Society for the Prevention of Cruelty to Children* [1978] 1 AC 171 at 218:

> The rationale of the rule as it applies to police informers is plain. If their identity were liable to be disclosed in a court of law, these sources of information would dry up and the police would be hindered in their duty of preventing and detecting crime. So the public interest in preserving the anonymity of police informers had to be weighed against the public interest that information which might assist a judicial tribunal to ascertain facts relevant to an issue upon which it is required to adjudicate should be withheld from that tribunal. … the balance has fallen upon the side of non-disclosure except where upon the trial of a defendant for a criminal offence disclosure of the identity of the informer could help to show that the defendant was

> innocent of the offence. In that case, and in that case only, the balance falls upon the side of disclosure.

71 In *R v Rankine* [1986] 1 QB 861, the English Court of Appeal held that the rule protecting the identity of informers similarly supported a rule protecting the location of premises used for surveillance. This public interest in protecting informants and surveillance premises has also been recognised in other common law jurisdictions, see for example, the New Zealand decision of *R v John Allan Robertson* [2009] NZCA 154 and the Canadian decision of *Iser v Canada (Attorney-General)* [2017] BCJ No 2316.

The position in Australia

72 In Australia, the rule on public interest immunity may be found in the Evidence Act 1995 (Cth) (No 2) (Aust) (the "Australian EA"), which applies to proceedings in a Federal Court. Section 130 of the Australian EA provides:

> **130 Exclusion of evidence of matters of state**
>
> (1) If the public interest in admitting into evidence information or a document that relates to matters of state is *outweighed* by the public interest in preserving secrecy or confidentiality in relation to the information or document, the court may direct that the information or document not be adduced as evidence.
>
> (2) The court may give such a direction either on its own initiative or on the application of any person (whether or not the person is a party).
>
> (3) In deciding whether to give such a direction, the court may inform itself in any way it thinks fit.
>
> (4) Without limiting the circumstances in which information or a document may be taken for the purposes of subsection (1) to relate to matters of state, the information or document is taken for the purposes of that subsection to relate to matters of state if adducing it as evidence would:
>
> (a) prejudice the security, defence or international relations of Australia; or

(b) damage relations between the Commonwealth and a State or between 2 or more States; or

(c) prejudice the prevention, investigation or prosecution of an offence; or

(d) prejudice the prevention or investigation of, or the conduct of proceedings for recovery of civil penalties brought with respect to, other contraventions of the law; or

(e) disclose, or enable a person to ascertain, the existence or identity of a confidential source of information relating to the enforcement or administration of a law of the Commonwealth or a State; or

(f) prejudice the proper functioning of the government of the Commonwealth or a State.

(5) Without limiting the matters that the court may take into account for the purposes of subsection (1), it is to take into account the following matters:

(a) the importance of the information or the document in the proceeding;

(b) if the proceeding is a criminal proceeding—whether the party seeking to adduce evidence of the information or document is a defendant or the prosecutor;

(c) the nature of the offence, cause of action or defence to which the information or document relates, and the nature of the subject matter of the proceeding;

(d) the likely effect of adducing evidence of the information or document, and *the means available to limit its publication*;

(e) whether the substance of the information or document has already been published;

(f) if the proceeding is a criminal proceeding and the party seeking to adduce evidence of the information or document is a defendant—whether the direction is to be made subject to the condition that the prosecution be stayed.

> (6) A reference in this section to a State includes a reference to a Territory.
>
> [emphasis added]

73 Broadly, the test under s 130 of the Australian EA is one of balancing the public interest of admitting the evidence against the public interest in preserving the secrecy or confidentiality of the information.

74 In *Director of Public Prosecutions v Mustafa Zogheib (Ruling No 2)* [2014] VSC 550 ("*Mustafa (No 1)*") and *Director of Public Prosecutions v Mustafa Zogheib (Ruling No 3)* [2014] VSC 559 ("*Mustafa (No 2)*"), Beale J in the Supreme Court of Victoria considered whether to allow public interest immunity under s 130 of the Evidence Act 2008 (Vic) (which is *in pari materia* with s 130 of the Australian EA) in respect of CCTV footage from a property in the neighbourhood to where the offence in question had been committed. The central issue in the trial was whether the accused acted in reasonable self-defence (see *Mustafa (No 1)* at [6]). The prosecution claimed that the disclosure of the CCTV footage would disclose a "confidential source of information in relation to the enforcement of the administration of a law of the State" and argued that "the public interest in preserving confidentiality outweighed the public interest in disclosure" because the undisclosed footage added "nothing of significance" to the other available evidence (see *Mustafa (No 1)* at [11]). Beale J initially upheld the claim to public interest immunity, on the grounds that informant sources might "dry up", disclosure of the footage's source might expose the source to some danger, and the undisclosed footage did not add anything of significance to the already available evidence (see *Mustafa (No 1)* at [27] and [28]). In coming to this decision, Beale J had viewed the CCTV footage in question "many times".

75 Subsequently, new information came to light concerning the contents of the CCTV footage, namely information which could have shown that a gun had been fired in the accused's presence, to support the accused's claim that he had acted in self-defence (see *Mustafa (No 2)*). On the basis of the new information, Beale J reversed his earlier decision, holding that as the CCTV footage added something significant to the question of the accused's guilt, this tipped the balance in favour of disclosure (see *Mustafa (No 2)* at [25]).

76 In New South Wales ("NSW"), there is a specific legislative scheme governing the information captured by law enforcement body cameras. This is set out in the Surveillance Devices Act 2007 (No 64) (NSW) ("NSW SDA"). Section 39(d) of the NSW SDA provides that information obtained from the use of body-worn video by a police officer in accordance of s 50A of the NSW SDA amounts to "protected information" under Division 1 of the NSW SDA. Section 40 of the NSW SDA provides for rules on the use, communication and publication of such "protected information". In particular, ss 40(4) and 40(4A) of the NSW SDA provide that:

> (4) Protected information may be used, published or communicated if it is necessary to do so for any of the following purposes—
>
> > (a) the investigation of a relevant offence within the meaning of this Act or a relevant offence within the meaning of a corresponding law,
> >
> > (b) the making of a decision whether or not to bring a prosecution for a relevant offence within the meaning of this Act or a relevant offence within the meaning of a corresponding law,
> >
> > (c) a relevant proceeding within the meaning of this Act or a relevant proceeding within the meaning of a corresponding law,
> >
> > (d) an investigation of a complaint against, or the conduct of, a public officer within the meaning of this Act or a public officer within the meaning of a

> corresponding law and the oversight of such an investigation,
>
> (e) the making of a decision in relation to the appointment, re-appointment, term of appointment, promotion or retirement of a person referred to in paragraph (d) or the making of any managerial decision with respect to such a person,
>
> (f) the keeping of records and making of reports by—
>
> (i) a law enforcement agency in accordance with the obligations imposed by Division 2, or
>
> (ii) a law enforcement agency (within the meaning of a corresponding law) in accordance with the obligations imposed by provisions of the corresponding law that correspond to Division 2,
>
> (g) an inspection by the Inspector under section 48 or an inspection under a provision of a corresponding law that corresponds to section 48,
>
> (h) an inquiry or investigation under the Privacy and Personal Information Protection Act 1998 or of the law of a participating jurisdiction or of the Commonwealth concerning the privacy of personal information.
>
> (4A) Information obtained from the use, in accordance with section 50A, of body-worn video by a police officer may also be used, published or communicated—
>
> (a) in connection with the exercise of a law enforcement function by a member of the NSW Police Force, or
>
> (b) in connection with education and training of members of the NSW Police Force or students of policing within the meaning of the Police Act 1990, or
>
> (c) for any purpose prescribed by the regulations.

77 The NSW SDA exists together with another NSW statutory scheme, being the Government Information (Public Access) Act 2009 (No 52) (NSW) ("GIPA"), which allows persons to make access applications for government information. Section 5 of the GIPA sets out an express statutory presumption in favour of the disclosure of government information unless there is an overriding

public interest against disclosure.[9] Public interest considerations are detailed in Division 2 of Part 2 of the GIPA,[10] and s 13 of the GIPA states the test to be applied in the following terms: "There is an ***overriding public interest against disclosure*** of government information for the purposes of this Act if (and only if) there are public interest considerations against disclosure, and on balance, those considerations outweigh the public interest considerations in favour of disclosure" [emphasis in original]. Section 14 of the GIPA then sets out various considerations in deciding whether there is an overriding public interest against disclosure. Some examples of these include responsible and effective government, the efficacy of law enforcement and possible contravention of secrecy provisions in other Acts.

78 In *Cheung v Commissioner of Police* [2019] NSWCATAD 249[11] ("*Cheung*") the relationship between the NSW SDA and the GIPA was considered. In that case, the applicant was stopped for a random breath test when the police noticed that the applicant had been using her mobile phone. She was issued a penalty notice for using her mobile phone while driving. The applicant then made an application under the GIPA for access to the body-worn camera footage of the officer in question. The NSW police was prepared to let her view the footage, but refused to provide a copy of the footage. The applicant applied to review the decision of the NSW police.

79 The argument of the NSW police was that the information should not be disclosed under the GIPA due to the secrecy provisions of the NSW SDA. The applicant, on the other hand, argued that she was seeking her own personal

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9 Amicus Curiae's Bundle of Authorities ("ACBOA"), Tab 13.

10 ACBOA, Tab 13.

11 ACBOA, Tab 19.

information and that this would enhance government accountability and transparency. In weighing up where the balance lay, the NSW Civil and Administrative Tribunal ("the Tribunal") held that the public considerations in favour of disclosure were not particularly strong (at [56]). Among other things, the Tribunal was of the view that disclosure of a copy of the footage would provide little assistance in facilitating procedural fairness and the administration of justice. The Tribunal further held that the interest of allowing the applicant access to her personal information could be satisfied by granting her access to view the footage without providing her with a copy (at [58]). It is worth noting that the scheme under the GIPA differs from public interest immunity, as the GIPA gives the public in NSW an "enforceable right to access government information" (at [10]) and the information sought under the GIPA need not necessarily be relevant information disclosable in court proceedings.

Conclusion under Singapore law

80 The test that should be applied in Singapore in respect of common law public interest immunity need not differ in structure from the balancing test currently adopted in England. As it weighs one public interest against another, it is flexible enough to take account of changing political and social conditions that may, over time, alter the appropriate weight to be given to particular concerns expressed on either side of the balance. Documents which ought otherwise to be disclosed under the rules of civil or criminal procedure may only be withheld if the court concludes that the public interest against disclosure outweighs the public interest in the administration of justice. It is a principled approach which recognises that, as the immunity is founded on public policy, the public interest in the disclosure of a relevant document can only be overcome by a greater public interest that is sought to be protected by the withholding of the information.

81 In the context of law enforcement body camera and stationary law enforcement footage, there are no special policy reasons which should result in any general rule that such footage should, as a class, be withheld from disclosure. Classifying documents or records according to how they have been brought into existence is not logical. More fundamentally, there is no principled reason to treat law enforcement body-worn or stationary camera law enforcement footage as a special class of information.

82 Thus, whether particular law enforcement body-worn and stationary camera law enforcement footage should be disclosed in court proceedings is to be determined on a case-by-case basis, upon consideration of all relevant factors, including the degree of relevance of information contained in such footage, the specific risks arising from disclosure, and the harm to the public interest should such risks eventuate. Where the disclosure of the footage may disclose the identity of informants, s 127 of the EA may come into play, but if it does not and the question has to be decided in relation to the common law doctrine then the strong public interest in withholding the identity of informants must be balanced against any countervailing interests, including whether there is significant information in the footage that may bear on the innocence of the accused. How this issue was considered in the NSW case of *Mustafa (No 2)* is certainly a helpful reference.

83 It is also desirable that, in deciding whether the claim for common law public interest immunity should stand, the court have the power to view the document or information in question. This is in line with the position in England. In Australia, it is expressly recognised in s 130(3) of the Australian EA. This is regularly done in other contexts. For example, where legal professional privilege is claimed, it has been recognised that the inspection of documents "might be an effective and practical 'middle ground' which ensures

that the claim to legal professional privilege is not abused, hence ensuring that the competing public policy that all available evidence ought to be disclosed is fulfilled to the fullest extent possible": *Skandinaviska* at [102].

84 The power of the court to inspect documents is set out in s 164(3) of the EA, which provides as follows:

> **Production and translation of documents**
>
> 164.—(1) A witness summoned to produce a document shall, if it is in his possession or power, bring it to court notwithstanding any objection which there may be to its production or to its admissibility.
>
> (2) The validity of any such objection shall be decided on by the court.
>
> (3) The court, if it sees fit, may inspect the document *unless it refers to affairs of State*, or take other evidence to enable it to determine on its admissibility.
>
> [emphasis added]

85 The words that I have italicised in s 164 of the EA raise the question whether the practice of the court itself inspecting documents to review a claim of common law public interest immunity is inconsistent with the EA. The phrase "affairs of state" is used in s 125 of the EA, and not in s 126. I consider that it is not inconsistent. Common law public interest immunity may be claimed for a variety of reasons. That the document relates to "affairs of State" is only one possible reason. At least where no claim is made that the document is an unpublished official record relating to "affairs of State" under s 125 of the EA, the court may, in my view, inspect the document itself.

86 Further, the court is entitled to consider, in its balancing exercise, whether the risks to the public interest that disclosure may bring can be eliminated or mitigated by appropriate safeguards, such as redaction of material

or holding proceedings *in camera*. In this matter, it will be necessary to consider whether two suggested safeguards, namely limiting access to inspection without permission to take copies and obscuring the identity of the complainant, are appropriate. Safeguards may be suggested by either party, or raised by the court itself, as ways to shift the balance towards disclosure in the interests of justice, or so as to protect the public interest in secrecy or confidentiality. These are practical ways that promote a nuanced and multifaceted approach and avoid a binary, all-or-nothing outcome.

87 The next question concerns who the right office holder is for the purpose of claiming public interest immunity. In England, ordinarily there should be a certificate signed by the appropriate minister: see *Al Rawi* at [145]. Nonetheless, as Lord Reid observed in *Conway* at 950: "… it is the duty of the court to [prevent disclosure] without the intervention of any Minister if possible serious injury to the national interest is readily apparent." In Australia, under s 130(2) of the Australian EA, the court may enforce the immunity "either on its own initiative or on the application of any person (whether or not the person is a party)".

88 In Singapore, s 125 of the EA vests the officer at the head of the department concerned with the power to give or withhold permission for publication of unpublished official records relating to affairs of state. By contrast, s 126 of the EA places the determination of whether the public interest would suffer by the disclosure on the shoulders of the individual public officer (or member, officer, employee of, or secondee to, any specified organisation). At the time that s 126(2) was introduced, the then Senior Minister of State for Law, Associate Professor Ho Peng Kee, made clear on the second reading of the bill (*Singapore Parliamentary Debates, Official Report* (2 September 2003) vol 76 at cols 3068–3082), that it arose from the conversion of some government

departments into statutory boards. Some of those statutory boards would continue to handle information that they handled when they were government departments, the disclosure of which might harm the public interest. He also made clear that not all statutory boards were scheduled under the Official Secrets Act (Cap 213, 2012 Rev Ed). Thus, the introduction of the sub-section was intended to preserve the position as it was prior to conversion, but only for some statutory boards. As for the question of how the individual officer would make the decision, he stressed that such decisions would be taken with the benefit of the advice of the AG, which is the custodian of the public interest. He also said there would be consultation with superiors in the same organisation.

89 Focusing then on who may claim common law public interest immunity on behalf of the government, it is my view that the court ought to act to prevent disclosure of its own initiative if the court perceives possible serious injury to the national interest from disclosure. This accords with the view expressed by Lord Reid that I have cited at [87]. As the court is entitled to act on its own initiative, it may also do so on the request of any person. Nonetheless, some guidance is apposite. In my view, persons appropriate to invoke public interest immunity would include the relevant minister, head of department or chief executive of a statutory board, as well as the AG, as custodian of the public interest. That the AG may do so independently and of his own volition follows from the decision in *ARW*. While the categories are not closed, it is important that the person or office-holder invoking public interest immunity is sufficiently senior and adequately separated from and independent of any alleged misconduct, so that the court has assurance that the public interest in withholding disclosure has been properly assessed without personal considerations entering into the decision.

90 In this case, the SPF is represented by the AG. However, the AG clarified at the hearing on 23 August 2021 that he has not claimed public interest immunity in his own right. Rather, the claim is made on behalf of government by Superintendent Seah,[12] who holds the appointment of Assistant Director, Frontline Policing Division, in SPF's Operations Department.[13] Superintendent Seah also deposed to the concurrence of the permanent secretary in the Ministry of Home Affairs in this claim of public interest immunity.[14] I hold that the claim to public interest immunity has been raised on behalf of government by an appropriate person.

Issue 3: Does s 126 of the EA apply to the BWC footage of the second defendant's interactions with the complainant?

91 To recap, s 126 of the EA 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 disclosure.

92 Mr Mah accepts that the BWC footage of which he seeks disclosure records a communication to a public officer but contends that EA s 126 would not apply where the communication is made under process of law, relying on a dictum in an Indian case concerning the equivalent of this section in the Indian Evidence Act, *Kunjanam Antony C. Kalliath v State of Kerala* AIR 1964 Ker 274, at [7]. It is not clear how this suggested distinction between communications made under process of law and those not so made relates to whether a communication is made in official confidence. I do not accept the applicability of any such distinction to EA s 126.

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[12] Second affidavit of Seah Kah Weng Daniel filed on 23 August 2021, para 6.

[13] Second affidavit of Seah Kah Weng Daniel filed on 23 August 2021, para 1.

[14] Second affidavit of Seah Kah Weng Daniel, para 16.

93 The second defendant is a public officer within the meaning of this section. The section is not limited to communications between or among public officers. It can include a communication made to him by a member of the public so long as such communication is made to him in official confidence. I interpret this phrase to mean that the communication must be made to him in his capacity as a public officer and with the expectation that it will be kept confidential by him except to the extent required by the carrying out of his duties. My interpretation of the section is supported by reference to the Malaysian case of *Suruhanjaya Sekuriti v Datuk Ishak bin Ismail* [2016] 1 MLJ 733, where the Federal Court opined at [39] in relation to the Malaysian equivalent of EA s 126 that:

> …Any communication which is treated as confidential and made to a public officer under an honest and bona fide belief that he would keep the contents of or the information contained in such communication confidential without disclosing the same to others would come within the ambit of s 124. It is settled that s 124 of the Evidence Act 1950 includes not only communications made in official confidence by one public officer to another, but also communications made in official confidence by private person to a public officer…

94 It is readily inferred that, where a member of the public speaks to a police officer about the possible commission of a criminal offence, he expects it to be kept confidential subject to the procedural requirements of disclosure in the context of any criminal proceedings that may eventuate. I therefore accept that the communication in this case was made in official confidence. It occurred face-to-face in the vicinity of the alleged incident and followed soon after the complainant's report via the SPF's emergency call line. It was that earlier call which constituted the first information report under s 14 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed). For completeness, I note that the AG has disclosed the first information report, with the complainant's name and

NRIC number redacted.[15] The AG also confirmed that it is the practice in criminal proceedings to redact the complainant's or informant's NRIC number, unless there is a compelling reason not to do so[16].

95 However, the AG has unilaterally given a limited waiver of s 126 of the EA, as follows:

(a) The footage is pixelated so as to conceal the identity of the complainant (and her son, if visible);

(b) Mr Mah may inspect the pixelated footage at Cantonment Police Complex;

(c) The pixelated footage may be adduced into evidence at the trial of this matter, if viewed *in camera*;

(d) A transcript of the footage will be disclosed, and may be adduced into evidence at trial.

96 In view of the Court of Appeal's decision in *Zainal Kuning*, once I have decided the communication in question was made to the public officer in official confidence, the determination by that officer that the public interest would suffer by the disclosure is conclusive, so long as that determination is made in good faith for a proper purpose and is not *Wednesbury* unreasonable. There is no basis to challenge the Superintendent's determination, and I accept it. As I have held that s 126 of the EA applies, the court is not empowered to go beyond the terms of the AG's limited waiver. Accordingly, the order for inspection made below, which was strictly limited to the terms of the AG's waiver, stands.

[15] First affidavit of Seah Kah Weng Daniel filed on 8 January 2021, p 25.

[16] Letter dated 25 August 2021 from the AG to the court.

Issue 4: In relation to the remaining footage, and if public interest immunity is available to the government, does the probative value of the evidence outweigh the public interest in withholding it?

97 Turning to the CCTV footage, the fact that the AG had, when he considered that s 126 applied to it, nonetheless been prepared to waive s 126, to the limited extent of permitting Mr Mah to inspect it and its adduction into evidence at trial (if viewed *in camera*), shows that it is likely to have probative value in relation to Mr Mah's claims.

98 Against the public interest in the administration of justice I must weigh the public interest in withholding the footage as expressed by the AG. Superintendent Seah has deposed to the SPF's concern on affidavit:[17]

> … SPF considers that the public interest will suffer if these footages are disclosed, since the footages reveal information on restricted areas in the RLU, and may give rise to security risks if they are disclosed to persons outside SPF.

99 I accept that there are security risks if footage of restricted areas is publicly disclosed. However, such risks can be mitigated through the adoption of appropriate safeguards. The question is what safeguards should be adopted.

100 Mr Mah has argued that he should receive a copy of the footage.[18] He considers that he is only able to properly analyse it if he has a copy of it that he can watch and re-watch as needed[19]. He has expressed concern about whether he will have adequate time to view the footage if he is limited to inspection. He has suggested an alternative safeguard, namely the obscuring of the background

[17] First affidavit of Seah Kah Weng Daniel filed on 8 January 2021, para 23.

[18] Affidavit of Mah Kiat Seng filed on 18 December 2020, para 27.

[19] Plaintiff's further submissions dated 25 August 2021, para 5.

so that restricted areas are not revealed. The SPF considers that this alternative safeguard is impractical.[20]

101 I agree with the SPF that obscuring the background is impractical. In addition, I am concerned that obscuring the background will also diminish its probative value. In particular, interpreting gestures, reactions or other body language of Mr Mah and the third defendant or others, requires viewing them against the actual background. Context is important. By contrast, if it is viewed without any obscuring, and in due course admitted into evidence unobscured (albeit perhaps only by viewing *in camera*, a matter for the trial judge to decide), it will be easier to interpret and will retain its probative value in full.

102 As for Mr Mah's concern that having to inspect the footage rather than having a copy of it will not be adequate for him to prepare his case, I note that inspection was offered by the AG from November 2020 and that Mr Mah has thus far chosen not to inspect the footage. In these circumstances, his concern remains theoretical.

103 Mr Mah has also contended that it is a sufficient safeguard for him to undertake expressly that he will not transmit the footage to anyone else, as there will be penal consequences if he breaches that undertaking. The AG did express concerns about whether it will be possible to monitor compliance with such an undertaking, including for reasons specific to Mr Mah. I do not consider it necessary to determine this point because I am satisfied that at this stage of the matter the balance is properly struck by ordering inspection of the footage. I consider that Mr Mah should be able to prepare his case sufficiently by viewing

[20] First affidavit of Seah Kah Weng Daniel filed on 8 January 2021, para 25.

the footage and making a note, including of the runtime, relating to any incident to which he might subsequently wish to refer.

104 I therefore order that inspection be given to Mr Mah of the CCTV footage, by appointment at the Cantonment Police Complex. In providing inspection, the SPF should ensure that Mr Mah is given reasonable time to view the footage. He is not to be restricted to a single occasion for viewing of the footage. I also grant liberty to apply, as the court has control over the discovery process in relation to this footage. Thus, if Mr Mah faces any difficulties in relation to this footage that he is unable to resolve by discussion with the Attorney-General's Chambers, a further application may be made to court.

105 For completeness, I note that the SPF has already informed the court that one part of the CCTV footage had earlier been overwritten and cannot be made available.[21] This is the CCTV footage when Mr Mah was being moved between Cell 24P and Cell 30S. As it no longer exists, it obviously cannot be inspected.

Remaining discovery matters

106 There are three remaining matters of discovery to be resolved on this appeal. Mr Mah seeks discovery of the internal guidance or operating procedure for the identification of mentally disordered persons, as well as the names and NRIC numbers of the complainant, the victim and other police officers who were at the RLU. I consider these in turn.

107 In relation to the internal guidance or operating procedure, the government has invoked EA s 126. I accept that this guidance or operating procedure was communicated in official confidence and accept Superintendent

[21] DWS at [20].

Seah's determination that the public interest would suffer from its disclosure as it may reveal operational information as having been made in good faith. Accordingly, EA s 126 applies.

108 In relation to the names and NRIC numbers of the complainant and the victim, the government has invoked EA s 126, on the ground that this information was communicated to the police in official confidence. Again, Superintendent Seah has explained the need to protect complainants and victims and ensure the willingness of members of the public to report suspected offences. I accept that EA s 126 applies. I would also add that, in the absence of any allegation that the complainant or victim were known to the second or third defendant prior to the incident at Suntec City, their identity is not relevant to this action.

109 In relation to the names and NRIC numbers of other police officers at the RLU, such information is not relevant to this action, which concerns specific allegations made against the second and third defendants in respect of Mr Mah's arrest and detention at the RLU. Moreover, it is unclear that this is a request for discovery of any particular document.

Costs

110 I have varied the orders below, and put the inspection of the CCTV footage on a different legal basis, such that it will take place under the court's continuing control. The different legal basis thus has important practical implications. I have dismissed the rest of the appeal. I will hear parties on costs.

Conclusion

111 The common law doctrine of public interest immunity is available to the government. It requires a careful and nuanced balancing of competing public interests. With the active exploration of potential safeguards, such as redaction, it is likely that in most cases the public interest in the administration of justice can be upheld without risking that the public interest would otherwise be harmed.

112 I would also make three observations. The first is that the possibility of aligning s 126 of the EA with the common law doctrine of public interest immunity, as it has evolved since 1893, may be an appropriate topic for consideration in law reform. The balancing test offers better modulation compared to a judicial review challenge.

113 Another observation is that it would be helpful to set out in the rules of court a procedure for invoking and deciding on the applicability of public interest immunity, such as that in England described at [67] and [68] above.

114 My final and more general observation is that, in an age and world where video recording is omnipresent, it has become pressing to consider possible legislative and published policy frameworks for its making, retention, use and publication in different contexts.

Philip Jeyaretnam
Judicial Commissioner

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