IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 221

Originating Summons No 378 of 2020

Between

Ravi s/o Madasamy

… Plaintiff

And

Attorney-General

… Defendant

JUDGMENT

[Civil Procedure] — [Judicial review] — [Leave]
[Administrative Law] — [Judicial review] — [Locus standi]
[Administrative Law] — [Judicial review] — [Prima facie case of reasonable suspicion]
[Administrative Law] — [Remedies] — [Prohibiting order]
[Criminal Procedure and Sentencing] — [Search and seizure]
[Evidence] — [Witnesses] — [Privilege] — [Legal professional privilege]

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Ravi s/o Madasamy
v
Attorney-General

[2020] SGHC 221

High Court — Originating Summons No 378 of 2020
Ang Cheng Hock J
3 August 2020

13 October 2020 Judgment reserved.

Ang Cheng Hock J:

1 This case involves a situation where an advocate and solicitor's electronic devices have been seized by the Singapore Police Force (the "Police") for investigations into offences allegedly committed by *the advocate and solicitor*, but he claims that the items cannot be reviewed by the Police or the Attorney-General's Chambers ("AGC") as they contain communications between him and *his clients* that are protected by legal professional privilege. The plaintiff, who is the advocate and solicitor in question, applies for leave under O 53 r 1(*b*) of the Rules of Court (Cap 322, R5, 2014 Rev Ed) ("ROC") to commence judicial review so that he may be granted a prohibiting order to prohibit the Attorney-General ("AG") and the Police from reviewing the contents of the electronic devices, until the Court determines the lawfulness, nature and extent of the alleged legal professional privilege (the "prohibiting order"). The defendant, who is the AG, objects to this application.

Background facts

2 The plaintiff, Mr Ravi S/O Madasamy, is an advocate and solicitor who practises in the firm of Carson Law Chambers ("CLC"). On 10 January 2020, an online post was posted on the Facebook page of "The Online Citizen" ("the TOC Facebook post"). This post contained information about a Criminal Revision filed in the High Court by the plaintiff on behalf of Mohan S/O Rajangam ("Mohan") pertaining to a Magistrate's endorsement of a warrant of arrest issued by a Malaysian court against Mohan ("CR 2/2020"). The TOC Facebook post stated that The Online Citizen had seen "a petition filed by M Ravi" – the plaintiff – on the same day the petition was filed. The Police thus suspected that the plaintiff was involved in the publication of the TOC Facebook post (and other online posts also related to CR 2/2020), and that the plaintiff had thereby committed contempt of court under s 3(1)(*b*) of the Administration of Justice (Protection) Act 2016 (No. 19 of 2016) ("AJPA").[1]

3 In the course of its investigation of the plaintiff for the alleged commission of the AJPA offences, three Police officers entered CLC's office on 13 March 2020 and seized, *inter alia*, the plaintiff's mobile phone and firm issued laptop (the "seized items"). The plaintiff alleges that he informed the Police officers then that the contents of the seized items were confidential and protected by legal professional privilege, and that it would be a breach of s 128 of the Evidence Act (Cap 97, 1997 Rev Ed) ("EA") if the Police officers were to intrude into this information.[2] This is denied by the AG (see [4(d)] below).

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1 Leong Weng Tat's affidavit dated 17 June 2020 ("Leong's Affidavit") at [3]–[5].

2 Plaintiff's affidavit dated 2 April 2020 ("P's Affidavit") at [4]–[11].

4 Subsequently, from 15 to 26 March 2020, the plaintiff exchanged several letters with the Police and the AGC regarding the seized items.[3]

(a) On 15 March 2020, the plaintiff emailed Assistant Superintendent Ng Jun Wen ("ASP Ng"), the investigation officer for the case, to state that he "would like to reserve all [his] clients' rights in connection with the seizing of the phone and laptop including that of Mr. Mohan (under investigation) who is considering other legal options in relation to the miscarriage of justice he has suffered on those matters he had raised in his Criminal [*sic*] which is being currently withdrawn".

(b) On 19 March 2020, the plaintiff wrote to the Police, addressing ASP Ng, to state that the Police was not to open the contents of the seized items until a ruling is made by the court, as the said contents are protected by legal professional privilege. The plaintiff also stated that he had "already placed [ASP Ng] on notice on [*sic*] this matter on 15 March 2020."

(c) On 20 March 2020, the AGC replied to the plaintiff stating that they "do not agree that on 15 March 2020, [the plaintiff] gave the [Police] notice" that the seized items contained privileged information, but "the [Police] has, with immediate effect, paused investigative work into the contents of the [seized items]". The AGC also stated that the contents of the mobile phone will be reviewed by a team of officers from the AGC "who are not, and will not be, involved in the ongoing investigations" of the plaintiff for offences under the AJPA. The AGC also wanted the plaintiff to inform them in writing of the issues or

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[3] P's Affidavit at [12]–[17] and Exhibits MR-2 to MR-6.

grounds of objections the plaintiff wished to raise and the file name(s) or folder(s) within the seized items that are allegedly privileged (the "Requested Information"). The plaintiff replied to the AGC on the same day to assert that he had informed the Police on 13 March 2020 that the seizure of his phone and the laptop was an "interference" into his client's legal professional privilege. He did not identify the file name(s) or folder(s) in the seized items which contained the allegedly privileged material as requested by the AGC.[4]

(d) On 23 March 2020, the AGC replied to the plaintiff to state that it is "inaccurate" for the plaintiff to state that he had informed the Police officers on 13 March 2020 that the contents of the seized items were confidential and privileged. The AGC also noted the plaintiff's "refusal to particularise" the material that he claimed is privileged. The plaintiff replied on the same day by stating that he is "under no obligation to make the disclosure" which the AGC was "demanding [him] to make".

(e) On 26 March 2020, the AGC stated that they noted the plaintiff's continued refusal to particularise the material that he claims is privileged, and that the team of aforementioned AGC officers will commence work on the review of the contents of the seized items on 3 April 2020.

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[4] See letter of 18 Sep 2020 from the AGC, enclosing the letter from plaintiff to the AGC dated 20 Mar 2020.

5 On 2 April 2020, the plaintiff filed the present originating summons ("OS 378/2020") to seek leave to commence judicial review, as stated at [1] above. The plaintiff and the AGC then exchanged further letters.[5]

(a) On 3 April 2020, the AGC wrote to the plaintiff to inform him that its officers would not be commencing review of the seized items, if he provides the Requested Information and if he agrees to an early hearing date of OS 378/2020. The AGC also asked the plaintiff to let them know immediately should he wish to access the seized items.

(b) On 9 April 2020, the plaintiff wrote to the AGC reiterating that the AGC's request for the Requested Information "is in breach" of s 128 of the EA.

The parties' submissions

6 The plaintiff submits that the contents of the seized items are protected by legal professional privilege under s 128 of the EA. While s 128(2)(*a*) of the EA provides that "communication made in furtherance of any illegal purpose" is not protected under s 128, the plaintiff submits that the s 128(2)(*a*) exception does not apply to his case because the present offence that he is being investigated by the Police for – s 3(1)(*b*) of the AJPA – is only "quasi-criminal", rather than criminal, in nature.

7 The AG submits that s 128 of the EA does not apply because s 128 does not affect the Police's powers under s 35 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC") to seize an item. Instead, the common law applies.

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5 Leong's Affidavit at [6]–[8] and pp 5 to 8.

Under the common law, the Police is *not* bound to accept an assertion of privilege at face value, and the Police may examine the seized items to some extent to test the assertion of privilege. The AG also proposes a framework by which the contents of the seized items would be reviewed by a team of officers from the AGC who are not involved in the ongoing investigations. In his oral submissions, state counsel who appeared for the AG further submitted that the plaintiff is not the right party to bring this present OS, as the privilege in relation to the contents of the seized items belongs to the plaintiff's clients. Thus, it is for the plaintiff's clients to file this OS to seek to protect their privileged communications and other materials, if they wished to assert their privilege.

Legal requirements of O 53 r 1(b)

8 It is well-established law that three requirements must be satisfied before leave can be granted to commence judicial review under O 53 r 1(*b*) of the ROC. First, the applicant must have standing. Second, the decision that the applicant is challenging must be susceptible to judicial review. Third, there must be a *prima facie* case of reasonable suspicion that the applicant will succeed on the main application. As the application for leave is meant to be a means of filtering out groundless or hopeless cases at an early stage, the court only needs to read the material quickly and appraise whether it discloses an arguable and *prima facie* case of reasonable suspicion. The court does not need to, and should not, embark on a detailed analysis of the materials put forward by the applicant: *Re Nalpon, Zero Geraldo Mario* [2018] 2 SLR 1378 at [19]–[20]. It is apparent from the case law that these three requirements need not be considered in any particular order: see, *eg*, *Jeyaretnam Kenneth Andrew v Attorney-General* [2014] 1 SLR 345 ("*Jeyaretnam*"), where the Court of Appeal first analysed if there was a *prima facie* case of reasonable suspicion in favour of granting the prerogative orders sought by the appellant before analysing if the appellant had

standing. This may be necessary as issues of standing and the merits of the application are often intertwined.

Issues to be determined

9 The seized items are now in the custody of the AGC. The plaintiff is asking the court to prohibit the AGC (and the Police) from reviewing the seized items before the Court determines if they are privileged. To my mind, it is clear that the actions of the Police and the AGC are susceptible to judicial review. This is because the source of the AG's and the Police's powers to review the seized items is public law, as these powers are based on statute: *Manjit Singh s/o Kirpal Singh and another v Attorney-General* [2013] 2 SLR 1108 at [84]. The power to seize and review the seized items is derived from s 35 of the CPC, while the AG's power to review the seized items to control and direct the criminal prosecution is derived from s 11(1) of the CPC. Indeed, the AG did not dispute in his written submissions that the present matter is susceptible to judicial review.[6]

10 The main issues raised in this application pertain to the two remaining requirements of O 53 r 1(*b*), that is, whether the plaintiff has the requisite standing and whether there is any *prima facie* case of reasonable suspicion that the plaintiff might succeed in obtaining the prohibiting order. In this regard, the following specific questions are relevant.

(a) Does s 128 of the EA apply in this case?

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6 Defendant's written submissions dated 27 July 2020 ("DWS") at [8].

(b) Is there a *prima facie* case of reasonable suspicion that the seized items contain identified material that is protected by legal professional privilege belonging to the plaintiff's clients?

(c) If the answer to question (b) is yes, is there a *prima facie* case of reasonable suspicion that the plaintiff would succeed in obtaining a prohibiting order that the Police and the AG be prevented from reviewing the contents of the seized items, pending the ruling by a Court on the "lawfulness, nature and extent" of the alleged legal professional privilege?

(d) Does the plaintiff have standing to bring this OS?

Does section 128 of the Evidence Act apply?

11 The first question that arises from the parties' submissions is whether s 128 of the EA or the common law applies to the plaintiff's application. As highlighted at [6] to [7] above, the plaintiff submits that the Police and the AG have breached s 128 of the EA. On the other hand, the AG submits that s 128 of the EA does not even apply in the first place.

12 Legal professional privilege is found in two principal forms: legal advice privilege and litigation privilege. Legal advice privilege seeks to prevent the unauthorised disclosure of confidential communications between a legal professional and his client made for the purpose of seeking legal advice. On the other hand, litigation privilege is concerned with protecting information and materials, confidential or otherwise, created and collected for the dominant purpose of litigation and at a time when there was a reasonable prospect of litigation, including communications between third parties and the legal professional and/or his client. Legal advice privilege and litigation privilege are

"conceptually distinct", "although they overlap": *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and other appeals* [2007] 2 SLR(R) 367 ("*Skandinaviska*") at [23], [32]–[35], [43]–[46], and [69]–[74]. Legal advice privilege in Singapore is a statutory right found in ss 128 and 131 of the EA, but the common law remains relevant to determine the scope of ss 128 and 131: *Skandinaviska* at [27]–[31]; *Comptroller of Income Tax v ARW and another* [2017] SGHC 16 at [29]. Litigation privilege exists in Singapore by virtue of the common law, since there is no inconsistency between litigation privilege at common law and ss 128 and 131 of the EA: *Skandinaviska* at [67].

13 Unhelpfully, the plaintiff has not clearly identified the *form* of legal professional privilege – legal advice privilege or litigation privilege – that the contents of the seized items are allegedly subject to. It is unclear if the plaintiff's reliance on s 128 of the EA is meant to indicate that the contents of the seized items are *only* protected by legal advice privilege, because the plaintiff's written submissions sweepingly state that s 128 guarantees "legal professional privilege".

14 Sections 128(1) and 131(1) of the EA provide that:

> Professional communications
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> 128.—(1) *No 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 by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment.
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> …
>
> Confidential communications with legal advisers

> 131.—(1) No one shall be compelled to disclose to the court any confidential communication which has taken place between him and his legal professional adviser unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the court necessary to be known in order to explain any evidence which he has given, but no others.
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> [emphasis added]

15 I see the force of the AG's submission that the text of s 128 of the EA shows that it does not apply to the present case.[7] This is because s 128 of the EA prohibits the unauthorised *disclosure*, by *the lawyer*, of confidential communications between the lawyer and his client made for the purpose of seeking or giving legal advice. Disclosure and seizure are distinct concepts. The Police, in exercising its powers under s 35 of the CPC to *seize* the seized items, is not requiring any "disclosure" on the part of the plaintiff (or his clients).

16 Having said that, it is not strictly accurate to conclude that s 128 of the EA "does not apply" to the present case and that the common law "applies" instead. This is because, as the Court of Appeal had explained in *Skandinaviska* ([12] *supra*) at [27], s 128, along with s 131, of the EA statutorily *enact* legal advice privilege in Singapore. When legal advice privilege is at issue in Singapore, the common law is only relevant to the extent that it aids in the interpretation of legal advice privilege, *as enshrined* in ss 128 and 131 of the EA. In fact, the Court of Appeal in *Skandinaviska* also made it clear at [31] that it follows from s 2(2) of the EA that any common law rules inconsistent with ss 128 and 131 of the EA *do not apply* in Singapore. Similarly, litigation privilege, which is based on the common law, does not exist "independently" of the EA. Rather, litigation privilege can exist in Singapore *because* it is "envisaged" by

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7 DWS at [11]–[13].

s 131 of the EA and thus *not inconsistent* with the provisions of the EA: *Skandinaviska* at [67].

17 The AG's submission – that s 128 of the EA does not apply and that *therefore* the common law applies – is thus potentially confusing, to the extent that it suggests that legal advice privilege *as it is formulated under the common law* can apply to the present situation, *even if* it were inconsistent with the text of s 128 of the EA. That cannot be the case. In my view, the real issue is whether there are any common law principles of legal professional privilege that are not inconsistent with the EA that show that the Police and the AGC should be prohibited from reviewing the contents of the seized items in this case. I shall address this subsequently at [28] to [33] below.

Is there a *prima facie* case of reasonable suspicion that the plaintiff will succeed in the main application?

18 The next question is whether there is a *prima facie* case of reasonable suspicion that the plaintiff will succeed in the main application, that is, whether he should be granted a prohibiting order that the Police and the AG be prevented from reviewing the contents of the seized items, pending the ruling by a Court on the "lawfulness, nature and extent" of the alleged legal professional privilege? As aforementioned, the text of ss 128 and 131 of the EA do not state that legally privileged material cannot be seized and reviewed by the Police under s 35 of the CPC. The CPC also does not contain any provision which prohibits such seizure and review of legally privileged material. In this regard, the position in the United Kingdom ("UK") is different. English cases have held that the police in the UK cannot seize material which they reasonably suspect to be legally privileged. This restriction arises under statute. In particular, s 8(2) of the Police and Criminal Evidence Act 1984 (c 60) (UK)

("Police and Criminal Evidence Act") "entitles a constable to seize material which is within the scope of a properly drawn warrant which has been properly obtained *unless he has reasonable grounds for believing the item in question to be subject to legal professional privilege*" [emphasis added]: *R v Chesterfield Justices, Ex p Bramley* [2000] 2 WLR 409 ("*Bramley*") at 419.

19 I note that the prohibiting order sought by the plaintiff only seeks to prohibit the AG and the Police from reviewing the contents of the seized items *until* the Court rules on the "lawfulness, nature and extent" of the alleged legal professional privilege. Thus, the plaintiff's case is not that seizure of the items is not permissible at law, but that he wants the Court to undertake a review of the material for privilege, before the AGC and the Police can examine the material for the purposes of their investigation. It is clear to me then that the entire premise of this application therefore is that the seized items do contain material which is allegedly privileged. That being so, it is incumbent on the plaintiff to establish a *prima facie* case of reasonable suspicion (i) that there is material in the seized items that is legally privileged, and (ii) that, therefore, the AG and the Police should be prohibited from reviewing the seized items, *even* if the review is done just to determine if the AG agrees or disagrees with the plaintiff's claims of privilege.

Is there a prima facie case of reasonable suspicion that the contents of the seized items are privileged?

20 In my judgment, I am not satisfied that the plaintiff has adduced sufficient evidence to establish a *prima facie* case of reasonable suspicion that the content of the seized items is legally privileged.

21 It first bears highlighting that, in this case, the AGC contacted the plaintiff to ask him to identify what in the seized items is asserted to be legally

privileged, bearing in mind that the Police seized the items to investigate *the plaintiff* and not the plaintiff's clients. However, there was no useful response or cooperation from the plaintiff. This is particularly perplexing because the plaintiff, as an advocate and solicitor, owed his clients a duty to help protect their privileged communications and information. He would thus be discharging this duty to his clients by identifying to the AGC what items in the phone and laptop are privileged. That would obviate any risk of the AGC and the Police examining material which they are not interested in for their investigations and which are legally privileged. To be clear, if the plaintiff had rendered his assistance, that would have allowed the AGC to quickly sift out the legally privileged material that are irrelevant to the AJPA investigations. In this regard, my review of the practice in established common law jurisdictions reveals that lawyers, from which documents have been seized, will almost always provide such assistance to the authorities to identify the material that is alleged to be legally privileged (see [39] to [71] below).

22 At this juncture, it is necessary to briefly explain the stages which should generally take place when documents are seized by the investigating authorities from an advocate and solicitor. The immediate question that will usually arise is whether there is any claim that the seized material contains allegedly legally privileged material of the lawyer's clients. If the answer is in the affirmative, the investigating or prosecutorial authorities will have to then determine whether they accept or dispute the claim of legal professional privilege. If the authorities dispute the claim of legal privilege, they should inform the lawyer and/or his client as soon as possible. If the affected client is nonetheless prepared to allow the authorities to use the material in their investigations or prosecution, then no issue arises. However, if the affected client insists that the material in question is legally privileged, and he does not waive such privilege,

the client will have to decide whether he wishes to commence legal proceedings to prohibit the investigating or prosecutorial authorities from using the allegedly privileged material that has been *identified* and *is the subject of dispute over the question of legal privilege*. This is consistent with the English Court of Appeal's decision in *Abbey National plc v Clive Travers & Co (a firm)* [1999] PNLR 819 at 822, which held that solicitors should ordinarily first consult their clients for instructions with regard to applications for disclosure of privileged documents, as legal professional privilege belongs to the client: see Colin Liew, *Legal Professional Privilege* (Academy Publishing, 2020) at [3.133].

23 On the facts of this case, I accept that, in the process of going through the plaintiff's phone and laptop to identify the files or documents that are relevant to the AJPA investigation, the AGC and the Police might come across material which is subject to the legal professional privilege of the plaintiff's clients. This is precisely why the duty of the plaintiff at the very first stage of the process *after* seizure has happened is to cooperate with the AGC by identifying to the AGC the *specific* material within the seized items that he claims is protected by legal professional privilege belonging to his clients. Since the seized items contain softcopy documents, the plaintiff should have assisted the AGC by providing search terms or filters, if need be, to allow the AGC to quickly identify all such privileged material (see [83] below). The reason for this assistance, as I have mentioned, is to allow the AGC to quickly sift out the allegedly privileged material. Once done, the AGC might accept at face value the claim of privilege over this sifted out material. Or, it might be that, if the material is potentially relevant to the investigation and the AGC does not accept that the material is properly claimed to be privileged, the AGC might wish to turn over the materials to the Police for their investigation or to the prosecutorial team. Once informed of this, it is for *the plaintiff's client* to decide

whether to insist on their claim to legal privilege and/or take out legal proceedings to prohibit the AGC from turning over the allegedly privileged material to the Police for their further investigations, or to the prosecutorial team.

24 When viewed in this context, it is evident that it is only *after* the specific privileged material has been identified by the plaintiff, and the claim to privilege is disputed by the AGC, and the affected client starts legal proceedings in relation to that dispute, does the question of privilege arise for the Court to determine. This is obvious because the AGC *may not even intend* to turn over the allegedly privileged material to the Police or to the prosecutorial team if, for example, the claim to legal privilege is entirely proper or if the material in question is irrelevant to the underlying investigation *against the plaintiff*.

25 In this case, the plaintiff chose to ignore the AGC when he was asked to identify the legally privileged material in the seized items. This means that, evidentially, the plaintiff's application fails at the very first stage of the process because the privileged material has not even been identified. Even in *these proceedings*, the plaintiff has not assisted the Court by identifying in his affidavit who the clients in question are who are asserting privilege and the specific information/files over which privilege is asserted. No affidavit was filed by any of the plaintiff's clients to make a claim for privilege too. While the plaintiff then stated in his oral submissions that "Mohan" is one of his clients whose privilege he is asserting on behalf of, this bald assertion does not assist me because there are no particulars of what *specific* documents are allegedly privileged – are they emails, attendance notes, research notes or other correspondence? There is also no specification of *why* these specific documents are privileged – what is it about these specific documents that make them satisfy the requirements of legal professional privilege (outlined at [12] above)? It is

trite that not *all* communications between a lawyer and his client are *ipso facto* subject to legal professional privilege. Do the seized items contain, for instance, email correspondence involving the plaintiff giving legal advice to the client? This relates back to my first point that the plaintiff has not even identified the specific form of legal professional privilege which is apparently at issue here. The plaintiff does no service to the credibility of his claim that the seized items contain privileged material when he provides *no details* of such privilege. By failing to identify the specific clients' documents and information in the seized items that are privileged, I find that there is no basis for the plaintiff to start these proceedings.

26 Further, if the plaintiff was experiencing difficulty identifying which of his clients' privileged material is in the seized items or what materials are even stored there, he should have taken up the AGC's invitation for him to access the seized items so as to identify the privileged material. For reasons best known to him, the plaintiff did not take up this offer. Instead, he chose to charge ahead with this application and adopt a blunderbuss approach.

27 Given the lack of any evidence as to the identity or nature of the allegedly privileged material, it is quite impossible for the Court to decide if privileged material exists in the seized items. I cannot assume that privileged material exists in the devices just because they were seized from the plaintiff who is a lawyer. In these circumstances, I am wholly unable to reach a conclusion that the contents of the seized items are privileged. As such, I am constrained to find that the evidence before the court does not disclose a *prima facie* case of reasonable suspicion in favour of granting the prohibiting order sought by the plaintiff, which is entirely premised on the fact that the seized items contain legally privileged material of the plaintiff's clients.

28 I now turn to the common law cases on this issue which the plaintiff highlighted to me. I was not referred to any decision about legal professional privilege under the common law and which is not inconsistent with the provisions of the EA that supports the plaintiff's submission that the Police and the AG should be prohibited from reviewing the contents of the seized items, even where he has not identified what these privileged items are. In this respect, the plaintiff cited *R v Central Criminal Court, ex p Francis and Francis (a firm)* [1988] 3 WLR 989 (*"Francis and Francis*") for the proposition that "[t]here is no requirement here for legal advice privilege to be positively asserted". The plaintiff attributes this proposition to Lewison LJ and relies on it to argue that it was incumbent on the Police to note that the contents of the seized items are protected under legal professional privilege "because they have seized the said items from the [p]laintiff's office in [CLC]."[8] The suggestion here appears to be that the AGC and the Police would know that the seized items would obviously contain legally privileged material because the plaintiff is a lawyer, without the plaintiff needing to identify what particular items are the subject of legal professional privilege.

29 However, that proposition attributed to Lewison LJ is not found in the entirety of the judgment in *Francis and Francis*. That was a case that primarily dealt with s 10(2) of the Police and Criminal Evidence Act, which provides an exception to items subject to legal privilege if the items were held with the intention of furthering a criminal purpose. This is not at issue here, for the reasons explained at [33] below. Furthermore, *Francis and Francis* is a decision by the *House of Lords*, and Lewison LJ was quite obviously not part

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[8] Plaintiff's written submissions dated 27 July 2020 ("PWS") at [21].

of the *coram* that heard that appeal. It appears to me that the plaintiff has misrepresented the position stated in *Francis and Francis*.

30 If the plaintiff was intending to point me to the case that contained a statement of Lewison LJ of like effect, that case is likely to be *Addlesee and others v Dentons Europe LLP* [2019] 3 WLR 1255 ("*Addlesee*") at [31]. The question facing the English Court of Appeal in *Addlesee* was whether legal advice privilege subsisted notwithstanding the dissolution of the company (which held the privilege). In that case, the appellant investors invested in a scheme which the appellants claimed was fraudulent, and so the appellants sued the respondent law firm which represented the company – Anabus Holdings Ltd ("Anabus") – that marketed the scheme. The appellants wanted to see documents sent between Anabus and the respondent. Lewison LJ, in giving the leading judgment of the Court of Appeal, held that the legal advice privilege attaching to these documents subsisted even after Anabus dissolved. In arriving at his conclusion, Lewison LJ considered numerous case authorities on legal advice privilege. As part of this analysis, Lewison LJ then went on to cite (at [29]–[31]) the relevant provisions of the Police and Criminal Evidence Act and made the following observations:

> All the statements I have quoted suggest that ***privilege attaches to communications at the time when they were made; and that the privilege remains unless and until the client consents to its waiver***. The rationale for the privilege means that privilege comes into existence ***at the time when the person in question consults his lawyer.*** The client must be sure *at the time when he consults his lawyer*, that, without his consent, there are *no circumstances* under which the privileged communications will be disclosed without his consent. As Lord Taylor CJ explained, the lawyer's mouth "is shut forever." ***It is not the immunity which must be asserted. On the contrary, it is the consent to disclosure which must be established.***
>
> This position is reflected in, for example, section 8 of the Police and Criminal Evidence Act 1984. That section empowers a

> magistrate to issue a search warrant where a number of conditions are fulfilled. One of those conditions is that the material "does not consist of or include items subject to legal privilege". Where a constable is searching premises, he has no power to seize anything which he reasonably believes is an item subject to legal privilege: section 19. Items subject to legal privilege are defined in section 10 …
>
> This provision was said in *R v Central Criminal Court, ex p Francis & Francis* [1989] AC 346 to encapsulate the common law. Professor Zuckerman also considers that section 10 is "a useful definition of the common law privilege": Civil Procedure (3rd ed) (2013) para 16.4. ***There is no requirement here for legal advice privilege to be positively asserted.***
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> [emphasis in italics in original; emphasis added in bold italics]

31 The emphasised portions of the foregoing extract show that Lewison LJ was making the point that legal advice privilege need not be "positively asserted" in order for such privilege to be established as a matter of law. Rather, legal advice privilege is established automatically "at the time when the person in question consults his lawyer", and only ceases to exist when the client "consent[s] to disclosure". This explains Lewison LJ's final holding in the judgment (at [90]) that "legal advice privilege, once established, remains in existence unless and until it is waived" and that, thus, the privilege belonging to Anabus continued to subsist even after its dissolution. Lewison LJ was *not* addressing the question of whether a lawyer needs to "positively assert" his client's legal professional privilege when *his* items are being lawfully seized for investigations, much less that the prosecuting or investigating authority cannot, thus, investigate these items for offences allegedly committed by *him*. Thus, I do not find that either *Francis and Francis* or *Addlesee* assists the plaintiff's application to prohibit the AG and the Police from reviewing the seized items for privilege.

32 Finally, I shall deal with one other point raised in the plaintiff's written submissions. The focus of the plaintiff's written submissions was that the

exception to legal professional privilege under s 128(2)(*a*) of the EA applied in this case. Section 128(2)(*a*) of the EA provides that the protection accorded to legal advice privilege under s 128(1) of the EA does not apply if the communication at issue was "made in furtherance of any illegal purpose". At common law, this exception is commonly referred to as the "iniquity exception" or the "crime-fraud exception" to legal professional privilege: see, *eg*, *Addlesee* at [27]; *Curless v Shel International Ltd* [2019] EWCA Civ 1710 at [54]–[55]. The plaintiff relies on s 128(2)(*a*) of the EA, and the common law cases related to it, to submit that the present case does not fall within the s 128(2)(*a*) exception because s 3(1)(*b*) of the AJPA is a "quasi-criminal" offence.[9]

33 This argument is wholly misconceived. The plaintiff has not even shown me, for the reasons I have already explained, that the seized items contained legally privileged material of his clients. Thus, the question of whether there is an applicable exception to legal professional privilege does not even arise.

Is there a prima facie case of reasonable suspicion that the Police and the AG should be prohibited from reviewing the contents of the seized items?

34 What I have set out above is sufficient to dispose of the plaintiff's application on the basis that he has not shown what is allegedly legally privileged in the seized items. However, assuming *arguendo* that the seized items contain privileged material of the plaintiff's clients, the next question is whether the next steps proposed by the AGC for it to review the material to determine whether they are indeed privileged should be allowed to proceed. In

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9 PWS at [30]–[61].

other words, is there a *prima facie* case of reasonable suspicion that the Court will grant a prohibiting order to prevent the AGC from proceeding to review the material, pending the Court hearing the plaintiff and the AGC on the "lawfulness, nature and extent" of the plaintiff's clients' legal professional privilege?

35 There are presently no statutory provisions or legal precedents in the local context which provides any guidance on how a claim of legal privilege over documents lawfully seized by the Police should be handled. As would be clear, this issue may arise if the Police seizes documents of an advocate and solicitor or a law firm, and there is a claim by the lawyer, the law firm or their clients that the seized documents include material over which they enjoy legal professional privilege. As the parties have provided extensive submissions on this, I will provide my views, for completeness, on whether the procedure proposed by the AG is appropriate.

36 The main dispute between the parties is whether it is for the court or an AGC "privilege team" to conduct the review of seized materials for privilege. The plaintiff's position is essentially that an independent lawyer should have been present at the search and seizure of the plaintiff's items and that *the court*, rather than the AGC, should conduct such privilege reviews because AGC officers would not be sufficiently independent.[10]

37 In response, the AG argues that the plaintiff's application is "effectively for a *mandamus* directed at this Honourable Court, requiring it to sift through the entire contents of the seized items to determine the "lawfulness, nature and

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10 PWS at [27].

extent" of any potential claim of privilege."[11] The AG submits that a team of AGC officers who are not, and will not, be involved in the underlying AJPA investigation can be the ones to conduct the review of the seized items for privilege. In particular, the AG, citing *Bramley* ([18] *supra*), submits that, under the common law, the Police is not bound to accept an assertion of privilege at face value. Instead, the Police may examine the seized material to test the claim of privilege. It is only if the Police obtain reasonable grounds for believing the seized materials to be subject to legal professional privilege that the Police must return the items without further examination.[12]

38 The AG also submits that his proposal is in line with the practices of other jurisdictions.[13] The AG highlighted four jurisdictions – the United States ("US"), England and Wales, Australia, and New Zealand – and it is to the practices in these jurisdictions which I shall now turn.

The practice in other jurisdictions

(1) United States

39 The AG highlighted that the US Department of Justice ("DOJ") similarly utilises a "privilege team" to conduct the privilege review. Indeed, the United States Justice Manual ("USJM"), which provides non-binding guidance by the DOJ for searches of offices of attorneys who are subjects of criminal

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11 DWS at [2].

12 DWS at [16]

13 DWS at [14]–[33].

investigations, advises that a "privilege team" consisting of "agents and lawyers not involved in the underlying investigation" should be designated. Further:[14]

> Instructions should be given and thoroughly discussed with the privilege team prior to the search. The instructions should set forth procedures designed to minimize the intrusion into privileged material, and *should ensure that the privilege team does not disclose any information to the investigation/prosecution team unless and until so instructed by the attorney in charge of the privilege team.* Privilege team lawyers should be available either on or off-site, to advise the agents during the course of the search, but should not participate in the search itself. [emphasis added]

40 If it is anticipated that computers will be seized, the USJM also advises that federal prosecutors are further expected to follow the following guidelines issued by the Computer Crime and Intellectual Property Section of the DOJ ("CCIPS guidelines"):[15]

> When agents seize a computer that contains legally privileged files, *a trustworthy third party must examine the computer to determine which files contain privileged material. After reviewing the files, the third party will offer those files that are not privileged to the prosecution team.* Preferred practices for determining who will comb through the files vary widely among different courts. In general, however, there are three options. First, the court itself may review the files in camera. Second, the presiding judge may appoint a neutral third party known as a "special master" to the task of reviewing the files. Third, *a team of prosecutors or agents who are not working on the case may form a "filter team" or "taint team" to help execute the search and review the files afterwards.* The filter team sets up a so-called "ethical wall" between the evidence and the prosecution team, permitting only unprivileged files to pass over the wall.
>
> Because a single computer can store millions of files, *judges will undertake in camera review of computer files only rarely.* …

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14 Defendant's Bundle of Authorities dated 27 July 2020 ("DBOA"), at pp 132–133 (Justice Manual, Chapter 9-13.420, section E)

15 DBOA at pp 262–263 (*Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations*, Computer Crime and Intellectual Property Section, Criminal Division, U.S. DOJ, at pp 110–111).

> *Instead, the typical choice is between using a filter team and a special master.* Most prosecutors will prefer to use a filter team if the court consents. A filter team can usually review the seized computer files fairly quickly, whereas special masters often take several years to complete their review.
>
> Although no single standard has emerged, courts have generally indicated that evidence screened by a filter team will be admissible only if the government shows that its procedures adequately protected the defendants' rights and no prejudice occurred. … One approach to limit the amount of potentially privileged material in dispute is to *have defense counsel review the output of the filter team to identify those documents for which counsel intends to raise a claim of privilege*. Files thus identified that do not seem relevant to the investigation need not be litigated. Although this approach may not be appropriate in every case, magistrates may appreciate the fact that defense counsel has been given the chance to identify potential claims before the material is provided to the prosecution team.
>
> [emphasis added]

41 The AG also referred me to the case of *United States v Grant*, No. 04 CR 207BSJ, 2004 U.S. Dist. LEXIS 9462 (S.D.N.Y., 25 May 2004) ("*Grant*"). In that case, the defendants, who were non-lawyers, were indicted and charged with various drug and conspiracy offences. The defendants' items, including certain documents that related to the defendants' prior *civil* lawsuits, were seized. The government did an initial review of the seized documents, which did not include a review of the documents' contents, and segregated out documents that were identified as legal in nature (the "segregated documents").

42 The defendants motioned for judicial review of the seized documents. The government proposed that a privilege team of Assistant United States Attorneys who are not involved in the trial should conduct the review of the segregated documents' contents. The privilege team would first determine which documents are not privileged, and then the defendants would be able to review these materials to identify any objections. Any disputes would then be settled by the court. On the other hand, the defendants submitted that this review

should be conducted by a special master, a magistrate judge, or the court. A "special master" would be a neutral third party appointed by the court under Rule 53 of the US Federal Rules of Civil Procedure.

43 The District Court for the Southern District of New York denied the defendants' motion. The court held (at *5) that, "[w]hile the attorney-client privilege" – akin to our concept of legal professional privilege – "is an important privilege … the documents at issue here were lawfully seized pursuant to a valid warrant". Therefore, "[a]lthough some of these documents likely contain attorney-client privileged communications, the Government should be allowed to make fully informed arguments as to privilege if the public's strong interest in the investigation and prosecution of criminal conduct is to be adequately protected": at *5–6. For this to happen, the government should be given the opportunity to first review the documents: at *4–5. The District Court also held (at *4) that the defendants "will not be prejudiced" because the defendants will have the opportunity to make objections to the court before any documents are turned over to the government's trial team.

44 In so holding, the District Court was also "mindful of the burden that magistrates and district court judges would face if they were to routinely review lawfully-seized documents in every criminal case in which a claim of privilege was asserted": at *7. Instead, "[p]ermitting the Government's privilege team to conduct an initial review of the documents will narrow the disputes to be adjudicated and eliminate the time required to review the rulings of the special master or magistrate judge, thus reducing the possibility of delay in the criminal proceedings": at *7.

45 The foregoing principles enunciated in *Grant* ([41] *supra*) are consistent with the DOJ's guidelines highlighted at [39] to [40] above. However, *Grant*

itself also shows that the position in the US is more nuanced. The district court in *Grant* was also cognizant of the fact that "there [were] no Sixth Amendment concerns in [that] case" because "the seized documents were not in the files of a *criminal defense lawyer*, and *relate to civil, not criminal, litigation* that predates the indictment in this case" [emphasis added]: at *6–7. The Sixth Amendment of the US Constitution guarantees, *inter alia*, "criminal defendants the right to counsel and supports an expectation of privacy regarding a defendant's legitimate communications with the defendant's attorney": see *United States v Gallego*, No. 4:18-cr-01537, 2018 US Dist. LEXIS 152055 at *2 (D. Ariz., 6 September 2018) ("*Gallego*"). The USJM and the CCIPS guidelines in fact also acknowledge that there are *three* options as to who should conduct the review of seized documents for privilege – the court, the prosecution's "filter team" (*ie*, "privilege team"), or a "special master" – and "the typical choice is between using a filter team and a special master" (see [40] above). Therefore, the default position in the US is not necessarily that it would be the government's filter or privilege team that would be doing the review of seized documents for privilege.

46 In fact, it appears that, where documents are seized from a criminal defendant who is a *criminal defence attorney*, US courts have taken the position that a special master, rather than a government "privilege team", should conduct the privilege review of the seized documents. I will examine two recent US cases that illustrate this principle: *Gallego* and *United States v Under Seal (In re Search Warrant Issued June 13, 2019)*, 942 F.3d 159 (4th Cir, 2019) ("*Under Seal*").

47 *Gallego* is one such case involving a criminal defendant who was a lawyer. The government executed a search warrant at the defendant's law office and seized documents, computers and other items. The defendant submitted

that the government seized active case files belonging to his clients, which contained information unrelated to the investigation, and these files were protected by attorney-client privilege and attorney-work-product doctrine (which is privilege over materials prepared by an attorney acting for his client in anticipation of litigation).

48 The question facing the District Court for the District of Arizona was who should conduct the review of the seized materials for privilege and responsiveness to the search warrant: the government "taint team" (*ie*, a "privilege team") or a special master? The court noted (at *5) that both review procedures are contemplated by the United States Attorneys' Manual (which has now been revised as the USJM). In addition, both review procedures have been approved and authorized by US courts (citing, *inter alia*, *Grant*).

49 The court further observed (at *6–8):

> "[T]aint teams present inevitable, and reasonably foreseeable, risks to privilege." … The Government's taint team may "have a more restrictive view of privilege" than the defense. … In addition, the Government's conflicting interests in both preserving privilege and pursuing the investigation present inherent risks. … Taint teams "have been implicated in the past in leaks of confidential information to prosecutors." … And even if no leaks occur, the use of walled-off taint teams undermines the *appearance* of fairness and justice. … "It is a great leap of faith to expect that members of the general public would believe" that a wall separating members of the taint team from members of the prosecution "would be impenetrable."
>
> ***Furthermore, the Government has not identified any cases approving use of taint teams in situations like the one presented here, where materials—including active case files—have been seized from the law office of a criminal defense attorney***. "[A] search of the law offices of a criminal defense attorney raises Sixth Amendment concerns not otherwise present in the search of the offices of a civil litigation attorney."
>
> ***In the present case, the seized materials do not relate to clients of attorneys other than Defendant, but they do***

> ***likely contain privileged materials pertaining to unrelated clients of Defendant. Accordingly, this case raises Sixth Amendment concerns*** present in *Stewart* but not present in other cases relied upon by the Government. For example, in *Grant*, the court approved use of a taint team but expressly noted that "unlike the situation in *Stewart*, there are no Sixth Amendment concerns in this case" because the "seized documents were not in the files of a criminal defense lawyer and relate to civil, not criminal, litigation." …
>
> [emphasis in italics in original; emphasis added in bold italics]

50 Therefore, the District Court concluded that, "[i]n light of the fact that the materials at issue were *seized from a criminal defense attorney's office*, and given the importance of protecting both the interests and appearance of fairness and justice, the Court finds that exceptional circumstances warrant the appointment of a Special Master to review the items seized from Defendant's law office for privilege and responsiveness to the search warrant" [emphasis added]. Consequently, pursuant to Rule 53 of the Federal Rules of Civil Procedure, the District Court appointed the magistrate judge who was randomly assigned to the case as special master.

51 *Gallego* ([45] *supra*) reinforces the point, also highlighted in the CCIPS guidelines, that the default position in the US is not necessarily that it would be the government's "privilege team" that would be doing the review of seized documents for privilege. A government "privilege team" may not be ideal where the criminal defendant is a *criminal defense counsel*, because there is a higher potential risk of there being an infringement of the Sixth Amendment rights of the counsel's clients. The underlying concern appears to be that potentially privileged materials in a criminal case should not be seen by prosecutors because the Sixth Amendment guarantees a criminal defendant the right to counsel to assist him in his defence, which requires that his communications with the counsel be kept confidential (see [45] above).

52 In the even more recent case of *Under Seal* ([46] *supra*), the United States Court of Appeals for the Fourth Circuit also adopted the position that a government "privilege team" is inappropriate to conduct privilege reviews where the allegedly privileged material was seized from an attorney's law office. In that case, "Lawyer A", a partner of a law firm in Baltimore, Maryland, handled the representation of "Client A" – who is also a Maryland lawyer – in an investigation conducted by federal authorities in Maryland. Client A was suspected of assisting drug dealers in illicit activities, including money laundering and obstruction of federal investigations. The government eventually also initiated an investigation of Lawyer A because they suspected that Lawyer A was obstructing their investigation of Client A.

53 The government applied for a warrant to search Lawyer A's law firm's office. The magistrate judge approved the search warrant application and issued the warrant, which authorised the search of the law firm and the seizures of client-related materials concerning Lawyer A's representation of Client A. The magistrate judge also authorised the government's use of a "filter team" to inspect privileged attorney-client materials. The filter team comprised lawyers from the United States Attorney's Office in Maryland's Greenbelt Division; a legal assistant and a paralegal who also worked there; agents of the Internal Revenue Service ("IRS") and Drug Enforcement Administration ("DEA"); and forensic examiners. The filter team members were not involved in the investigations of Lawyer A and Client A. Pursuant to the search warrant, members of the filter team seized voluminous materials from Lawyer A's law firm, including documents concerning Lawyer A's representation of Client A.

54 Lawyer A's law firm applied to enjoin the filter team's review of the seized materials on the grounds of attorney-client privilege. The District Court denied the law firm's request. The Court of Appeals for the Fourth Circuit

reversed the District Court's decision and held that the use of the filter team was improper. In particular, the Court of Appeals made the following pertinent findings.

(a) An adverse party's review of privileged materials "seriously injures the privilege holder": at *175.

(b) There is the possibility that a filter team — even if composed entirely of trained lawyers — will make errors in privilege determinations and in transmitting seized materials to an investigation or prosecution team: at *177, citing the Court of Appeals for the Sixth Circuit's opinion in *In re Grand Jury Subpoenas*, 454 F.3d 511 (6th Cir, 2006) ("*In re Grand Jury Subpoenas*") at *523.

(c) Filter team errors can arise from differences of opinion regarding privilege. A filter team's members might have a more restrictive view of privilege than the subject of the search, given their prosecutorial interests in pursuing the underlying investigations. This could cause privileged documents to be misclassified and erroneously provided to an investigation or prosecution team: at *177, citing *In re Grand Jury Subpoenas* at *523.

(d) By creating appearances of unfairness to the law firm's clients who are unrelated to the government's investigation of Client A, the filter team and its review process contravene the public interest: at *182, citing, *inter alia*, *Gallego* at *4–6. Appearances of unfairness are especially apparent in those proceedings, as the filter team included prosecutors employed in the same judicial district where the law firm's clients were being investigated or prosecuted by. It would be difficult for reasonable members of the public to believe that those members of

> the filter team would disregard information in Lawyer A's emails that might be relevant to other criminal inquiries in Maryland. Federal agents and prosecutors rummaging through law firm materials that are protected by attorney-client privilege and the work-product doctrine is at odds with the appearance of justice: at *182–183.

(2) England and Wales

55 In England and Wales, the substantive review of seized materials for privilege is, as highlighted by the AG, done by a party independent of the prosecution or investigation authorities. While *Bramley* ([18] *supra*) at 419 appears to support the AG's proposition that the Police may examine the seized material to "test" the accused's assertion of privilege, this must be viewed in light of the subsequent line of English cases which clearly held that an "independent lawyer" must be the one to conduct the substantive review of whether seized material is privileged, and a lawyer is only "independent" in such cases if he or she is not employed by the relevant prosecuting or investigating authority. There are three pivotal cases in this regard: *R v Customs and Excise Commissioners ex p Popely and another* [1999] STC 1016 ("*Popely*"); *R v Middlesex Guildhall Crown Court and another, Ex p Tamosius & Partners (a firm)* [2000] 1 WLR 453 ("*Tamosius*"); and *R (Rawlinson and Hunter Trustees and others) v Central Criminal Court and others; R (Tchenguiz and another) v Director of the Serious Fraud Office and others* [2013] 1 WLR 1634 ("*Rawlinson*").

56 First, in *Popely*, the Commissioners of Customs and Excise believed that the applicants – a businessman and his solicitor – had been involved in the evasion of value added tax liabilities. Thus, various items were seized from the applicants pursuant to a search warrant. The second applicant (the solicitor)

submitted that the items seized were not only outside the scope of the search warrant but also privileged. The High Court approved (at 1026) the Customs and Excise's procedure to handle such privilege claims:

> The system *devised by the commissioners* of applying to the Attorney General for him to nominate a member of the Bar to sift through the documents seized before a decision is made as to which of them shall be retained, in my judgment, is a scheme which protects the solicitor concerned and the commissioners and, as this case demonstrates, reduces substantially the areas of dispute. [emphasis added]

57 Second, in *Tamosius*, the Inland Revenue executed search warrants issued under the Taxes Management Act 1970 (c 9) (UK) ("Taxes Management Act") against Mr Tamosius, who was an Illinois attorney in international legal practice in London. The search warrants were issued based on suspicion that Mr Tamosius was involved in, *inter alia*, tax evasion by diverting commissions offshore. Various documents, files and books were then seized by the Inland Revenue from Mr Tamosius's law firm's office. The procedure adopted was as follows. Officers searched for relevant material. Once relevance had been decided, the material was then reviewed by the counsel nominated by the Attorney-General and instructed by the Inland Revenue for the purposes of deciding whether it was subject to legal professional privilege. On the day of the search, the counsel was given a desk in a room of his own. Any document or file thought by the Inland Revenue to be relevant was handed to him. Any document which counsel concluded was subject to legal professional privilege was handed back to solicitors for Mr Tamosius. All the documents the counsel reviewed and his opinion as to those documents were noted and listed.

58 The applicant – Mr Tamosius's law firm – challenged the lawfulness of the execution of the warrants by contending that there was no legal authority for the Inland Revenue's practice of having counsel present during the search to

determine the issues of privilege. Rather, this procedure was "instigated … by H.M. Customs and Excise". The High Court dismissed the application and held that it was permissible for the Inland Revenue to bring independent counsel with them when carrying out the search, as "independent counsel" comes within s 20C(3)(*a*) of the Taxes Management Act, which provides that "[a]n officer who enters the premises under the authority of a warrant under this section may take with him such other persons as appear to him to be necessary". The court also noted (at 463) that the court in *Popely* had already approved this procedure. The applicant's petition for leave to appeal the High Court's decision was refused: *R v Middlesex Guildhall Crown Court , Ex p Tamosius & Partners (A Firm)* [2000] 1 WLR 1034.

59 The third case of *Rawlinson* ([55] *supra*), which was highlighted to me by the plaintiff, has been widely attributed as the case which crystallised the principle that the substantive privilege review of seized documents must be done by independent counsel not employed by the prosecuting authority. In that case, the Serious Fraud Office ("SFO") seized various material from two businessmen suspected of engaging in illegal loan transactions. As it was anticipated that privileged material may be encountered, lawyers employed by the SFO attended the execution of the warrants to determine whether the seized documents were protected by legal professional privilege or not.

60 The High Court granted the applicants' declarations that the search warrants, and the searches and seizures consequent upon them, were unlawful. The court stated (at [264]) that it was "clear" from *Popely* ([55] *supra*) and *Tamosius* ([55] *supra*) that "an independent lawyer should be present to assess claims made for legal professional privilege, without prejudice to the right of the person being searched to go to the court". Second, the court also observed (at [266]) that the position in a criminal case should not be different from the

position in civil search orders, where "the independent lawyer has to come from a different firm: see paragraph 7.6 of Practice Direction 25A, supplementing [Civil Procedure Rules Part] 25". Consequently, the court concluded that the SFO's then practice of using in-house lawyers as "independent" lawyers to conduct the substantive privilege review was unlawful.

61 This position has now been reflected in the Attorney General's Guidelines on Disclosure ("UK AG's Guidelines"), which highlights (at p 26) that the substantive review of seized material for privilege is to be conducted by a lawyer who is "independent of the prosecuting authority", though, as highlighted by the Ethics Committee of the Bar Council in its 2017 publication "*Barristers instructed as "Independent Counsel" to advise upon legal professional privilege in relation to seized material*" at [3], the term "independent counsel" is somewhat of a misnomer, because the "independent counsel" is formally instructed by, and acts for, the investigating agency. The UK AG's Guidelines continue:

> Legal professional privilege
>
> 25. No digital material may be seized which an investigator has reasonable grounds for believing to be subject to legal professional privilege (LPP), other than under the additional powers of seizure in the [Criminal Justice and Police Act] 2001.
>
> 26. The [Criminal Justice and Police Act] 2001 enables an investigator to seize relevant items which contain LPP material where it is not reasonably practicable on the search premises to separate LPP material from non-LPP material.
>
> 27. Where LPP material or material suspected of containing LPP is seized, it must be isolated from the other material which has been seized in the investigation.
>
> 28. Where material has been identified as potentially containing LPP *it must be reviewed by a lawyer independent of the prosecuting authority*. No member of the investigative or prosecution team involved in either the current investigation or, if the LPP material relates to other criminal proceedings, in

> those proceedings should have sight of or access to the LPP material.
>
> 29. *If the material is voluminous, search terms or other filters may have to be used to identify the LPP material. If so this will also have to be done by someone independent and not connected with the investigation.*
>
> 30. It is essential that anyone dealing with LPP material maintains *proper records showing the way in which the material has been handled and those who have had access to it as well as decisions taken in relation to that material.*
>
> …
>
> [emphasis added]

62 As seen at [61] above, the UK AG's Guidelines at [29] also provides that, where digital material is seized from an accused, the electronic search of the seized digital material for potentially privileged documents also has to be done by "someone independent and not connected with the investigation". However, this "independent" person *can* be employed by the investigating authority. This position was clarified by the case of *R (on the application of McKenzie) v Director of the Serious Fraud Office* [2016] 1 WLR 1308 ("*McKenzie*"), which was referred to me by the AG. In that case, the claimant, who was not a solicitor, was arrested on suspicion of conspiracy to commit bribery, and various electronic devices and computers were seized from him. The claimant asserted that those devices contained documents which were protected by legal professional privilege. The SFO's proposed procedure was for search terms to be first agreed with the claimant. The SFO would then use its in-house technical staff to electronically search the content of the seized devices for potentially privileged material by reference to the search terms provided by the claimant. This potentially privileged material would then be isolated for review for privilege by independent counsel.

63 In his application for permission for judicial review, the claimant submitted that even the initial exercise of agreeing and applying the search terms to isolate potentially privileged material should be contracted out by the SFO to independent IT specialists, even though the systems at the SFO are arranged so that investigators do not gain access to the isolated material before it is reviewed by independent counsel.

64 The court dismissed the claim and held that the SFO's procedure was lawful. The court accepted (at [33]) that a seizing authority must "have procedures in place which are intended to prevent investigators reading [legal professional privileged] material and which make it very unlikely that they will do so". Thus, "a seizing authority has a duty to devise and operate a system to isolate potential [privileged] material from bulk material lawfully in its possession, which can reasonably be expected to *ensure that such material will not be read by members of the investigative team before it has been reviewed by an independent lawyer* to establish whether privilege exists" [emphasis added]: at [34]. If "an investigator does by mischance read material subject to [legal professional privilege], that fact [should be] recorded and reported, the potential conflict recognised, and steps taken to prevent information which is subject to privilege being deployed in the investigation": at [36].

65 However, the court drew a distinction between "determining whether something is protected by [legal professional privilege], which involves close consideration of the content and context of a document or communication", and should thus be conducted by independent counsel, and "identifying a document, file or communication as potentially attracting [legal professional privilege], which does not": at [40]. Thus, the latter does not need to be conducted by an independent third party. On the facts of that case, the evidence did not suggest that "any [privileged] material has in fact been read by an investigator": at [36].

The claimant's application for permission to appeal to the UK Supreme Court was refused: *R (McKenzie) v Director of the Serious Fraud Office* [2016] 1 WLR 3621.

66 Therefore, the practice in England and Wales appears to be that an independent lawyer not employed by the prosecuting or investigating authority should be present at the search of the accused person's materials so that the independent lawyer can provide the substantive privilege review of the materials. If the independent lawyer determines that any material is subject to legal professional privilege, that material should be returned to the accused. Where digital materials are at issue, the investigating authority's in-house technical staff may use search terms provided by the person asserting the privilege to electronically search the seized material for potentially privileged material. This process does not require the in-house technical staff to even view the contents of the seized material. The identified pool of potentially privileged material is then provided to independent counsel instructed by the investigating authority for a substantive review of whether they are indeed privileged. This is the case whether the accused is a lawyer or not.

(3) Australia

67 In Australia, the procedure to determine a claim of legal professional privilege, if it is raised during the execution of a search warrant on lawyers' premises (or the premises of Law Societies or like institutions), was devised and agreed upon by the Law Council of Australia and the Australian Federal Police, as outlined in the "*General Guidelines Between The Australian Federal Police And The Law Council Of Australia As To The Execution Of Search Warrants On Lawyers' Premises, Law Societies And Like Institutions In Circumstances*

Where A Claim Of Legal Professional Privilege Is Made".[16] In sum, review of materials is suspended until the court rules on the substantive issue of privilege. Where the lawyer is "prepared to co-operate with the police search team, … no member of the police search team will inspect any document [that is] the subject of the claim until either (a) the claim is abandoned or (b) the claim is dismissed by a court."[17] After the search and seizure of the materials is done, "the lawyer … should, consistent with his/her client's … instructions, cooperate with the police officers *by assisting them in locating all documents which may be within the warrant*. If the executing officer requires access to the office records systems the lawyer … should assist if necessary by explaining the records system to the police officer" [emphasis added].[18] In particular, the lawyer "should be prepared to indicate to the executing officer the grounds upon which the claim is made and in whose name the claim is made".[19] If the lawyer refuses to cooperate, the executing officer "should advise that *the search will proceed in any event* and that, because the search team is not familiar with the office systems of the lawyer …, *this may entail a search of all files and documents in the lawyer's* … office in order to give full effect to the authority conferred by the warrant" [emphasis added].[20]

(4) New Zealand

68 In New Zealand, the procedure to determine whether seized material is protected by privilege is laid down by statute: Search and Surveillance Act 2012

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16 DBOA, Tab 11.

17 DBOA at p 448, at [12].

18 DBOA at p 449, at [22]–[23].

19 DBOA at p 449, at [24(b)].

20 DBOA at p 450, at [34].

(NZ) ("SSA"). During the execution of a search warrant that authorises the search of materials held by a lawyer relating to a client, the lawyer or his representative must be present: s 143(2), SSA. Before executing the search, the person executing the search warrant must give the lawyer or his representative the opportunity to claim privilege on behalf of the lawyer's client or make an interim claim of privilege if instructions have not been obtained from the client: s 143(4), SSA. Section 147(a) of the SSA also specifies that a person who wishes to claim privilege in respect of anything seized or sought to be seized "must provide the person responsible for executing the search warrant or exercising the other search power with a particularised list of the things in respect of which the privilege is claimed, as soon as practicable after being provided with the opportunity to claim privilege or being advised that a search is to be, or is being, or has been conducted". This shows that a person cannot make a blanket claim of privilege for things that are seized or sought to be seized. The substantive determination of whether the material is privileged is then done by the court: ss 142 and 148, SSA. After a claim of privilege is made, the person executing the search must not search the secured seized material unless the claim of privilege is withdrawn or the search is in accordance with the directions of the court determining the claim of privilege: s 146(c), SSA.

(5) Summary

69 In sum, in the United States, court review of seized documents for privilege is rare. Rather, a government privilege team or a special master is used, and the latter is more appropriate where the documents are seized from a criminal defence attorney. Furthermore, the matter only proceeds to court if there is an actual disagreement between the lawyer of the suspect and the government privilege team on the handling of the seized materials: see *Under*

Seal ([46] *supra*) at *166. This is consistent with my findings at [24] above and [98] below.

70 In England and Wales, Australia, and New Zealand, the privilege review is conducted by an independent adjudicator – the court (in Australia and New Zealand) or independent counsel not employed by the prosecuting authority (in England and Wales). However, in all three of these jurisdictions, the lawyer in question assists to first identify the specific seized documents that are allegedly subject to privilege, either by providing search terms to assist in the authorities' electronic search for potentially privileged material (in England and Wales) or by identifying the specific documents that are allegedly privileged (in Australia and New Zealand). In England and Wales, the preliminary electronic search can be done by staff employed by the investigating authority, though this is partly because the electronic search does not require the staff to view the contents of the seized material. In Australia and New Zealand, the preliminary identification of the potentially privileged material is done by the investigating authority with the lawyer's assistance.

71 It is also worth noting that the procedures in these jurisdictions are not necessarily formulated by statute. Other than New Zealand, the procedures in the United States and England and Wales were formulated by the prosecuting authorities and refined by the courts (though the court's power to appoint a "special master" in the United States is provided by statute). In Australia, the procedure was devised and agreed upon by the Law Council of Australia and the Australian Federal Police. In the jurisdictions where the courts played a role in refining the procedure, the courts considered, *inter alia*, established principles of law, case precedents and general practice.

Who should conduct the privilege review?

72 Having reviewed the parties' submissions and the practices in the other jurisdictions, I accept the AG's submission that the AGC, rather than the court, should be the party to conduct a review of seized materials for legal professional privilege, if the lawyer and/or his clients' claim to legal professional privilege is not accepted by the AGC at face value, or if there is a reasonable basis to think that legally privileged material will be encountered in a review of seized material, even if there is no specific claim of legal privilege. This review should be conducted by a team of AGC officers who are not, and will not be, involved in the underlying investigation ("AGC privilege team").

73 While the AG highlighted that this proposal is in line with foreign practice, it is evident that the jurisdiction which is most similar to this proposal is the United States, since there is in that jurisdiction the practice of utilising government "privilege teams" made up of officers who are not involved in the underlying investigation to conduct the privilege review. The framework proposed by the AG is substantially similar to the approach taken in the USJM and the CCIPS guidelines, in that both frameworks prescribe that a "privilege team" of independent prosecutors may undertake a review of material seized from an attorney's electronic device for any privileged material, and that this "privilege team" would also engage the attorney to help to identify the allegedly privileged documents. The alleged privilege holder may also have recourse to the courts if he or she disagrees with the review by the "privilege team". Critically, the seized documents are not handed to the investigation or prosecution team until after any dispute over privilege has been settled by the court.

74 However, the position in the US, as already explained at [45] to [54] above, is actually more nuanced. I accept that there may be lingering concerns about the "independence" of such a privilege team's review, bearing in mind, for instance, the issues raised by the US courts in *Gallego* ([45] *supra*) and *Under Seal* ([46] *supra*) highlighted at [49] and [54] above. This explains why the position in the US is such that a special master, rather than a government "privilege team", is the preferred party to conduct the privilege review of seized documents when the documents are seized from an accused who is a criminal defence attorney. This is in fact consistent with the positions in England and Wales, Australia, and New Zealand, since all these jurisdictions utilise an independent adjudicator – whether it is independent counsel or the courts – to conduct the substantive review of the seized material for privilege. Indeed, the English High Court in *McKenzie* ([62] supra) also stressed that it is important to have procedures in place to prevent investigators from reading privileged material (see [64] above).

75 I am aware that the local context is different from the context in the United States because there is no equivalent provision in the Constitution of Singapore (1985 Rev Ed, 1999 Reprint) that has been interpreted to guarantee what the Sixth Amendment covers: "an expectation of privacy regarding [an accused's] legitimate communications with the [accused's] attorney" (see [45] above). Nonetheless, legal professional privilege is a long-established part of our legal system and tradition. It exists under the EA and the common law and it applies with equal force to both civil and criminal cases.

76 In my view, the heightened risk of harm arising from AGC prosecutors reviewing documents seized from a person (hereinafter referred to in shorthand as "relevant person") who is a criminal defence counsel, as compared to AGC prosecutors reviewing the civil litigation documents of a relevant person, should

be obvious. Ultimately, AGC prosecutors take charge of the conduct of criminal prosecutions in Singapore. Thus, if the relevant person is a criminal defence counsel, it may be, to borrow the language used by the Court of Appeals of the Fourth Circuit in *Under Seal* (see [54(d)] above), "difficult for reasonable members of the public to believe" that the members of the AGC privilege team, if made up of prosecutors, would disregard information found that might be relevant to other criminal investigations and prosecutions against other accused persons. While I am not at all suggesting that AGC officers would act in bad faith, the issue here, as highlighted in *Under Seal*, is about the *appearance* of justice, and it is at odds with the appearance of justice for AGC prosecutors to "rummage through" a lawyer's documents containing privileged material of clients in criminal cases. This concern would not be as acute if materials were seized from a relevant person who is a non-lawyer and the allegedly privileged material only concern the relevant person's civil lawsuits (unless, of course, the AGC is an opposing party in one of these civil lawsuits).

77 Nevertheless, it is not open to me to appoint a "special master" in the present case. There is no statutory provision in Singapore similar to the detailed Rule 53 of the US Federal Rules of Civil Procedure that gives the Court the power to appoint such a special master. Consequently, this Court has no power to appoint such a "special master" to conduct the privilege review. It is also not principled to swing to the other extreme and have the court conduct the initial review because, in my view, that would create serious inefficiencies. Indeed, it bears reiterating that privilege review by the court is rare in the United States. Court review is also not the typical position in England and Wales.

78 Therefore, after a consideration of all the circumstances, I am satisfied that it is reasonable for the AGC privilege team, rather than the court, to carry out an initial review of any claims of privilege. This has the merits of efficiency

and cost-effectiveness, and it ensures that the court is not potentially inundated with copious amounts of seized materials which it would have to sieve through to examine the claim of privilege. This ensures that only narrowly defined disputes as to privilege are brought to court, thereby reducing a wastage of precious court resources. Of course, should the holder of the privilege subsequently apply to the court to challenge the AGC privilege team's determination that certain documents are not privileged, these documents in dispute should not be handed to the investigation or prosecutorial team until after the challenge has been determined by the Court (see [88] below).

79 In arriving at this conclusion, I am of the view that it is not appropriate for this Court to choose the third option – that independent counsel not employed by the AGC should conduct the initial privilege review. First, this was not the position advocated by either the plaintiff or the AG. Second, to require the AGC to instruct independent counsel for such privilege reviews would, necessarily, incur further expense on the public purse. The DOJ's observation in the CCIPS guidelines that "special masters often take several years to complete their review" is particularly pertinent (see [40] above), as it indicates the possible length of time and cost that may be incurred as a result of appointing independent counsel in cases where large amounts of potentially legally privileged materials are seized. Third, appointing an "independent counsel" may raise even more questions of independence than it solves. Checks will have to be done by the "independent counsel" to ensure that not only he, but the other lawyers in his law firm, are not involved in matters involving the person from whom the documents were seized. If the documents were seized from a lawyer, the difficulties with these checks are multiplied because of the need to carry out checks on whether the proposed "independent counsel" or his law firm colleagues are dealing with matters involving the clients of the lawyer.

In my view, given the relatively small size of our legal profession, the use of "independent counsel" would entail a higher risk of privileged material being inadvertently seen by lawyers, who may be involved in matters with which the privileged material is concerned. For these reasons, I do not think that the use of an "independent counsel" in the Singapore context is appropriate.

80 While I am satisfied that the AGC privilege team can conduct the privilege review, I think that additional safeguards should be put in place to ensure that the concerns highlighted at [76] above are assuaged. In this regard, there are four different possible situations under which a claim of privilege could be raised over materials lawfully seized by the Police from a relevant person:

(a) where the relevant person is a lawyer involved in criminal defence work, such as the present case (and *Gallego* ([45] *supra*) and *Under Seal* ([46] *supra*)) ("situation (a)");

(b) where the relevant person is a lawyer not involved in criminal defence work ("situation (b)");

(c) where the relevant person is not a lawyer but is or was involved in other criminal investigations ("situation (c)"); and

(d) where the relevant person is not a lawyer but claims that some of the seized material includes documents protected by legal professional privilege because these documents involve civil lawsuits that the relevant person is or was involved in, such as in *Grant* ([41] *supra*) ("situation (d)").

81 In situations (a) and (c), once the relevant person has specifically highlighted to the investigating authority or the AGC that the seized materials contain privileged documents relating to criminal cases, the AGC privilege team *should not* be made up of officers from the AGC's Crime Division (or any other team handling prosecutorial work), for the reasons highlighted at [76] above. In situations (b) and (d), this restriction against prosecutors being part of the AGC privilege team does not apply. In all four situations, if the relevant person claims that some of the seized material includes documents protected by legal professional privilege because these documents involve civil lawsuits that the relevant person is or was involved in, whether in his own personal capacity or as counsel for a client, *and which the AGC is or was a party to*, then the AGC privilege team should not be made up of officers from the AGC's Civil Division (or any other equivalent team who is involved in the conduct of the government's civil lawsuits). These safeguards will ensure that sufficiently independent officers of the AGC are tasked with the review of the claims of privilege by the relevant person. This would also make the framework more analogous with the practice in the UK, where external counsel is instructed by the investigating authority to conduct the privilege review.

The proper procedure for handling legally privileged material that has been seized

82 As explained, I accept the AG's submission that the correct procedure is for the AGC privilege team rather than the court to carry out the review of the documents for legal privilege. The AGC privilege team is to be made up of AGC officers in the manner as prescribed at [81] above. As is the practice in England and Wales, proper records should be kept showing the way in which the seized material has been handled and those who have had access to it, as well as decisions taken in relation to that material.

83 At the first stage, the lawyer whose items have been seized by the Police (or another investigating authority) should cooperate with the AGC privilege team by identifying the *specific* documents or files amongst the seized documents which are protected by legal privilege belonging to the lawyer's clients ("identified materials"). If what has been seized are hardcopy documents, the lawyer should specifically identify the privileged documents to the AGC privilege team. If what has been seized are softcopy documents, the lawyer should either specifically identify the privileged documents (whether by way of correspondence or in person) or provide search terms or filters identifying the privileged material so that the AGC privilege team may conduct an electronic search of these seized softcopy documents for these privileged material.

84 I should add that, if the lawyer cannot remember which specific documents amongst the seized materials is privileged, he can inform the AGC of this fact, and the AGC privilege team should provide supervised access of the seized materials so that he and/or his clients can properly identify the documents which they claim are privileged.

85 The AGC privilege team may accept a claim of legal professional privilege at face value, or they may review the identified materials to determine if they agree that the identified materials are privileged. If the AGC privilege team takes the view that the identified materials are privileged, they should either return the identified materials to the lawyer, if this is possible (as in the case for hardcopy documents), or isolate or quarantine the identified materials, if a return of the documents to the lawyer is not possible (as in the case where the identified materials are softcopy documents found in an electronic storage device, such as a laptop). This is so that the relevant investigating authority or prosecuting officers would not, subsequently, chance upon these identified

privileged materials. Such an isolation of the documents could be done, for instance, by locking the documents in a password-protected folder.

86 I reiterate once again that the advocate and solicitor has a duty to his clients to cooperate with the AGC by identifying which of the seized materials are claimed to be legally privileged, and, if asked, by providing search terms to the AGC privilege team so that they can electronically search the seized materials for these privileged documents. Indeed, this is consistent with all the jurisdictions highlighted by the AG, as it is impermissible for a person to make a blanket claim of privilege for documents that are seized or sought to be seized in any of these jurisdictions. Even in the three jurisdictions highlighted by the AG where an independent third party (whether a court or counsel) conducts the substantive privilege review (England and Wales, Australia, and New Zealand), the independent third party does not conduct the privilege review from scratch because the lawyer in question assists by first identifying to the investigating authorities the specific seized documents that are subject to privilege (see [70] above).

87 If, after the review, the AGC privilege team takes the view that the identified materials are *not* privileged, and should be given to the investigating authority and the prosecuting officers, the AGC privilege team should inform the lawyer of this *and* the fact that the identified materials will be handed to the investigating authority to carry on its investigations. At this stage, the lawyer should inform the affected client that the investigating and prosecuting authorities wish to view his privileged items. The lawyer should consult with the affected client on whether he wishes to insist on his claim of privilege *or* waive his claim to privilege. If the affected client is content to waive his claim, that is the end of the matter, and the lawyer should document this *and* inform the AGC privilege team of this.

88 However, if the affected client insists on his claim to privilege over the said identified materials and wishes to prevent the investigating and prosecutorial authorities from reviewing these materials, the affected client can take two possible routes. He can either file an application under O 53 of the ROC for leave for a prohibiting order or, if it is not feasible to do so (*eg* because the substantive matter has proceeded or is about to proceed to court), object to the admission into evidence of the material in question on the grounds of legal professional privilege. Indeed, this was also the position submitted by the state counsel for the AG.[21] If the first route is taken and there are judicial review proceedings, then the identified materials should *not* be handed over to the investigating authority and the prosecution team until after the court challenge is decided.

89 If the relevant person or his lawyer refuses to cooperate with the AGC privilege team at the first stage by identifying the specific documents that he claims are privileged, the AGC privilege team may proceed to review the entirety of the contents of the seized materials to determine if privilege exists over any of the seized materials. The AGC privilege team should proceed in the same manner as aforesaid. This is consistent with the Australian position, as described at [67] above. In addition, I stress that, even in this situation, it should be *the AGC privilege team* that is conducting the privilege review of the seized materials. Under no circumstances should a prosecutor or an investigating officer who is involved in the underlying investigation conduct the privilege review. In this regard, this was also the AG's position in these proceedings (see [4(e)] above). I also highlight that, even when the relevant person or his lawyer does not wish to cooperate with the AGC, once the AGC

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or the investigating authority has been given notice or has a reasonable belief that the seized materials contain allegedly privileged material, the AGC and the investigating authority should *not* be resuming investigations into the seized materials until *after* a privilege review is done *by the AGC privilege team*.

90 Finally, I would add that it is obviously in the AG's interest to ensure that it jealously guards against any risk of infringing on legal professional privilege. The AG is the guardian of the public interest: see, *eg*, *Li Shengwu v Attorney-General* [2019] 1 SLR 1081 at [32]. If, for instance, privileged material is seen by non-members of the AGC privilege team, whether accidentally or otherwise, this should be reported and documented so that the viewer is not subsequently deployed to have conduct of the case which involves the privileged material that he or she just saw. This is also the practice in England and Wales (see [61] and [64] above). Furthermore, if the AGC privilege team uncovers potentially incriminating material of the lawyer's client(s) unrelated to its investigation against the lawyer, the AGC privilege team cannot under any circumstances divulge that incriminating material to anyone, especially the relevant prosecutors or investigating authorities. If such privileged material is transferred – whether intentionally or inadvertently – to the prosecution team and is then relied on in the prosecution's case against that client of the lawyer's, then the said client would be able to object to the admission into evidence of this privileged material on the grounds of privilege. This is along the same vein as the practice in the US, as the CCIPS guidelines also noted that "courts have generally indicated that evidence screened by a filter team will be admissible only if the government shows that its procedures adequately protected the defendants' rights and no prejudice occurred" (see [40] above).

91 In my judgment, I am satisfied that the foregoing procedure will strike an adequate balance between public policy undergirding the protection of legal professional privilege and the public interest in ensuring that law enforcement authorities can effectively carry out the investigations and prosecutions without undue hindrance. The procedure described would ensure that sufficiently independent officers of the AGC conduct the privilege review of seized materials. Should there be an actual dispute over whether any particular document or documents are privileged after the initial review by the AGC privilege team, the dispute over privilege is then settled by the Court. The procedure also ensures that the disputed material is not handed over to the relevant investigating or prosecuting authorities until after the Court proceedings are resolved. As such, in my judgment, I am not satisfied that there is a *prima facie* case of reasonable suspicion that the plaintiff will succeed in his main application for a prohibiting order that the Police and the AG be prevented from reviewing the contents of the seized items, pending the ruling by a Court on the "lawfulness, nature and extent" of the alleged legal professional privilege.

Does the plaintiff have standing?

92 It will be fairly obvious from my analysis above that the plaintiff's application in this case is, to put it plainly, premature. It also follows from my analysis that the plaintiff lacks standing to bring this application.

93 There are three ways by which the standing requirement can be satisfied. First, the applicant has standing if he has suffered the violation of a "right personal to [him]" as a result of a breach of a "public duty": *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 at [78]–[80]; *Jeyaretnam* ([8] *supra*) at [64]. Second, the applicant has standing if there has been a violation of a "public

right" as a result of a breach of a "public duty" which has caused him "special damage": *Vellama d/o Marie Muthu v Attorney-General* [2013] 4 SLR 1 ("*Vellama*") at [31] and [33]; *Jeyaretnam* at [64]. Third, even if the applicant has not suffered the violation of a "personal right" or has not suffered any "special damage" as a result of a violation of a "public right", the applicant has standing if a public body has breached a "public duty" and the breach has taken place "in such an egregious manner" that it would be in the public interest to hear the application for judicial review: *Jeyaretnam* at [51], [62] and [64].

94 As aforementioned at [12] above, legal professional privilege exists in two forms: legal advice privilege and litigation privilege. No matter which form legal professional privilege takes, it is uncontroversial that legal professional privilege belongs to the legal professional's *client*, not the legal professional himself: *R (Prudential PLC) v Special Commissioner of Income Tax (Institute of Chartered Accountants in England and Wales and others intervening)* [2013] 2 AC 185 at [22]; *R v Derby Magistrates' Court, ex p B. Same v Same, ex p Same (Consolidated appeals)* [1995] 3 WLR 681 at 693–694, citing *Wilson v Rastall* [1775-1802] All ER Rep 597. Therefore, it is the client's privilege and only the client can invoke the privilege. It is not open to the legal professional to do so, unless acting on behalf of the client: *The Law of Privilege* (Bankim Thanki QC gen ed) (Oxford University Press, 3rd Ed, 2018) at para 1.35.

95 The text of ss 128 and 131 of the EA also leads to the same conclusion. Section 128 provides that "[n]o advocate or solicitor shall at any time be permitted, unless with *his client's* express consent, to disclose any communication" protected by legal advice privilege [emphasis added]. Section 131 provides that "[n]o one shall be compelled to disclose to the court any confidential communication which has taken place between him and his legal professional adviser *unless he offers himself* as a witness" [emphasis added].

As such, the text of ss 128 and 131 of the EA, when read together with the common law, makes it quite clear that legal professional privilege belongs to the client.

96 While the plaintiff conceded in his oral submissions before me that the privilege belongs to his clients and not him, he asserted that he has a duty to assert privilege on behalf of his clients.[22] I accept that a lawyer is allowed to raise privilege for his client. It is for this reason that the lawyer has a duty to identify to the AGC privilege team what specific documents in the seized items are privileged. However, if there is then a dispute between the AGC privilege team and the plaintiff's *client* on whether a specific document is privileged, and *the client* does not want to waive his privilege and instead wants to challenge the AGC privilege team's decision in Court, it is then for *the client* to assert his privilege.

97 In this case, the plaintiff did not identify any particular client in question in his affidavit in support of the OS. Instead, he stated broadly that the seized items contained communications with multiple clients of his. Similarly, the plaintiff also did not clearly identify in his written submissions which client he was asserting privilege on behalf of. It was only in his oral submissions before me, upon my questioning, that he stated that he was asserting privilege on behalf of Mohan and all his "other clients", without identifying who they are.[23]

98 In these circumstances, I find that the plaintiff has no legal standing in this matter. First, the plaintiff has not suffered the violation of a right personal

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22 Minute Sheet dated 3 August 2020 at pp 1–2.

23 Minute Sheet dated 3 August 2020 at p 1.

to him, because the alleged legal professional privilege, if any, belongs to his clients, not him. Furthermore, as I have explained at [24] above, there is also no evidence to show that even *the holders* of the privilege – the plaintiff's clients – have suffered a violation of their personal right, because the plaintiff has not even identified to the AGC privilege team the specific material in the seized items that are subject to his clients' privilege.

99 Second, there has been no breach of any "public right" because legal professional privilege is a privilege that belongs to the legal professional's *client* – it is not a right arising from public duties that is "shared in common with other citizens": *Vellama* ([93] *supra*) at [33]. Even if legal professional privilege were a "public right", the plaintiff has not suffered any "special damage" because his personal interests have not been "directly and practically affected over and above the general class of persons who hold that right": *Vellama* at [43].

100 Finally, no public body has made an "egregious" breach of a "public duty" in this case. This path to standing was described by the Court of Appeal in *Jeyaretnam* ([8] *supra*) at [62] and [64] as a "very narrow avenue" and a "rare case". Here, the AGC and the Police stopped reviewing the seized items once the plaintiff sought to assert his clients' privilege. The AGC also requested for information from the plaintiff so that investigations could be carried out without jeopardising the plaintiff's clients' alleged privilege. As I have already mentioned, the AGC even offered the plaintiff access to the seized items. As such, it cannot be said that the present case involves the rare case of an "egregious" breach of a "public duty".

Conclusion

101 For the reasons set out in this judgment, I dismiss the plaintiff's application for leave to commence judicial review under O 53 r 1 of the ROC. Moving forward, the plaintiff and the AGC should follow the procedure highlighted at [82] to [91] above.

102 I shall deal separately with the question of costs.

Ang Cheng Hock
Judge

The plaintiff in person;
Leong Weng Tat, Charis Low and Cheng Yuxi (Attorney-General's Chambers) for the defendant.