

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 207

Originating Summonses No 816 of 2015

Between

- 1. LEE WEI LING**
- 2. LEE HSIEN YANG**

And

ATTORNEY-GENERAL

JUDGMENT

[Contract] — [Contractual terms]
[Copyright] — [Ownership]

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**Lee Wei Ling and another
v
Attorney-General**

[2016] SGHC 207

High Court — Originating Summonses No 816 of 2015
Tay Yong Kwang JA
14 July 2016

28 September 2016

Judgment reserved.

Tay Yong Kwang JA:

1 This Originating Summons No 816 of 2015 concerns the interpretation of an interview agreement signed in 1983 (“the Interview Agreement”) by Lee Kuan Yew (“LKY”), the first Prime Minister of Singapore, Wong Chooi Sen (“Wong”), the then Secretary to the Cabinet and Mrs Lily Tan (“Tan”), the then Director of the Archives and Oral History Department, Ministry of Culture, concerning the tape recordings and transcripts of the interviews conducted with LKY between 8 July 1981 and 5 July 1982 (“the Transcripts”). The Transcripts are presently in the custody of Tan Kee Yong, the current Secretary to the Cabinet (“Cabinet Secretary”).

2 The Plaintiffs are the daughter and the younger son of LKY. As executors of the estate of LKY (“the LKY estate”), they brought this

Originating Summons seeking the following declaratory relief in respect of the Interview Agreement and costs of these proceedings:

- (a) All rights accorded to LKY under the Interview Agreement are vested in the LKY estate (“Declaration (a)”);
- (b) The LKY estate is entitled to use, and have copies of the Transcripts (“Declaration (b)”);
- (c) There shall be no access to, supply of copies of, or use of the Transcripts by anyone until 23 March 2020 without the express written permission of the LKY estate (“Declaration (c)”); and
- (d) The Cabinet Secretary, as custodian of the Transcripts, is under a duty to inform the LKY estate of any request made after the death of LKY for access to, supply of copies of, or use of the Transcripts, and of the grant of any such request without the express written permission of the LKY estate (“Declaration (d)”).

3 The Government, through the Attorney General, opposed the application in its entirety on the basis that the Transcripts were protected by the Official Secrets Act (Cap 213, 2012 Rev Ed) (“OSA”) and that the Plaintiffs did not have the right under the Interview Agreement to demand the use and copies of the Transcripts.

The factual background

4 The contents of the Interview Agreement are set out as follows:

I, Lee Kuan Yew, do hereby give to the Director, Archives and Oral History Department, Ministry of Culture, and the Secretary to the Cabinet for use and administration, on the terms and conditions hereinafter provided, the tape recordings

and transcripts of the interview conducted with me between 8 Jul 1981 – 5 Jul 1982.

2. The use and administration of the recordings and transcripts shall be subject to the following terms and conditions:-

(a) I retain to myself all copyright including literary property rights to the recordings and transcripts until the year two thousand (2000) or 5 years after my death, whichever is later, at which time all copyright including any literary property rights in the recordings and transcripts shall vest in the Government of Singapore;

(b) The recordings and transcripts shall be kept in the custody of the Secretary to the Cabinet until the year two thousand (2000) or 5 years after my death, whichever is later, when it may, at the discretion of the Government, be handed over to the custody of the Director, Archives and Oral History Department;

(c) There shall be no access to, supply of copies of or use of the recordings and transcripts by anyone until the year two thousand (2000) or 5 years after my death, whichever is later, without my express written permission, and subject to such conditions as may be stated therein;

(d) After the year two thousand (2000) or 5 years after my death, whichever is later, the recordings and transcripts may be made available for such research as the Government may approve.

3. Nothing in this agreement precludes any use I may want to make myself of the recordings and transcripts or the information therein. In the event of the publication by me of the transcripts of the interview all copyright including any literary property rights in the recordings and transcripts shall, notwithstanding the provisions of clause 2(a) of this Agreement, continue to be retained by me even after the year two thousand (2000) or 5 years after my death, whichever is later. In such an event the Government shall have the right to make the recordings and transcripts available for research approved by it and such other rights over the recordings and transcripts as I may grant.

4. This agreement may be revised or amended by mutual consent of the parties thereto.

LKY signed as interviewee on 21 February 1983. Tan signed as Director, Archives and Oral History Department on 7 March 1983 and Wong signed as Secretary to the Cabinet on 22 February 1983.

5 The three signatories to the Interview Agreement are all deceased.¹ LKY passed away on 23 March 2015. The drafter of the Interview Agreement appeared to be the then Attorney General Tan Boon Teik who is also deceased.² There is thus no direct evidence available as to the circumstances and discussions that led eventually to the Interview Agreement. Therefore, the interpretation of the Interview Agreement has to be based on the documents in existence at the material time insofar as they are still available now.

6 During the initial stages of this matter, there was an application by the Plaintiffs in Summons No 5810 of 2015 to admit a further affidavit setting out the circumstances as to how the Transcripts, then kept at 38 Oxley Road (LKY's home) while LKY was alive, came into the possession of the Cabinet Secretary after LKY passed away. In my view, those details were unnecessary and quite irrelevant to my decision on the issues before me. The details would only serve to distract from the real issues. The real issues were the interpretation of the Interview Agreement and whether the OSA had any bearing on its interpretation. Accordingly, I dismissed the Plaintiffs' application and expunged those parts of any affidavits and other documents which set out or referred to the same details. At the request of the solicitors for the Plaintiffs and with the consent of the Attorney General, the time for any application for leave to appeal against my decision as set out in this paragraph

¹ The Government's letter to the Court dated 13 July 2015, para 3(a) and (b)

² The Government's letter to the Court dated 13 July 2015, para 3 (c)

was extended to 7 days after the release of the judgment for this Originating Summons.

7 The relevant background facts to this case are as follows:

(a) The Transcripts were in 38 Oxley Road at the time of LKY's death on 23 March 2015. There is no record of the circumstances under which the Transcripts were temporarily transferred from the Cabinet Secretary to LKY before his death.³

(b) Sometime between 23 March 2015 and 5 May 2015, a member of LKY's family, thinking that the Transcripts were official government documents, took the Transcripts and handed them over to the Cabinet Secretary. This was done without the knowledge or consent of the LKY estate.

(c) The LKY estate first became aware of the existence of the Transcripts when it was told by the said family member on 10 May 2015 that there was an acknowledgment of receipt of the Transcripts from the Cabinet Secretary.

(d) Sometime in late May 2015, the Second Plaintiff requested to peruse the Transcripts.

(e) The Government agreed to this request on condition that the Second Plaintiff do so at the Ministry of Home Affairs ("MHA") and sign an undertaking as to secrecy under the OSA in respect of the Transcripts before perusal.

³ The Government's letter to the Court dated 13 July 2015, para 3(e)

(f) The Second Plaintiff, on the understanding that the Transcripts were covered by the OSA and having been told by the said family member that they were marked “Secret”, complied accordingly and was permitted to look through the Transcripts at the MHA.

(g) After looking through the Transcripts, the second Plaintiff realized that the Transcripts were not marked “Secret”.

8 In response to my queries and directions made before the hearing on 14 July 2016, the Government produced a Bundle of Documents containing correspondence between the former Attorney General Tan Boon Teik and Wong, who was also the Secretary to LKY, regarding the drafting of the Interview Agreement (“the Correspondence”). The Bundle of Documents also included Parliamentary Debates suggesting the existence of a government project to record oral history for Singapore. The Government confirmed that there were no other documents available in its possession that would shed light on the drafting of the Interview Agreement. The Government also confirmed that there is no express statement in the Transcripts that it is covered by the OSA.

The Plaintiffs’ arguments

9 The Plaintiffs took the position that to the extent the OSA was found to apply to the Transcripts, the LKY estate would comply with the OSA. However, they argued that the issue in contention was a purely contractual one regarding competing interpretations of certain clauses of the Interview Agreement. In their view, the issue of the applicability of the OSA to the Transcripts was irrelevant to the present case.⁴ This was so for the following reasons:⁵

(a) The Interview Agreement was entered into with the Director, Archives and Oral History Department, Ministry of Culture and was intended to provide for the archival, vesting of copyright, use and future publication of the Transcripts.

(b) The Interview Agreement contained no reference, explicit or implicit, to the OSA or other confidentiality considerations.

(c) The Interview Agreement is not itself subject to the OSA. There is nothing that permits the importation of the OSA to vary or modify the appropriate interpretation of contractual rights under the Interview Agreement.

(d) Section 5(1) of the OSA applies only to actual communication or use of secret official documents. Even if the Transcripts were found to be covered by the OSA, the contractual rights governing their use, including the LKY estate's right to receive and hold a copy of the Transcripts, are not and cannot be affected by the OSA.

10 Thus, the Plaintiffs argued that assertions made by the Government regarding the contents of the Transcripts are irrelevant, and that no finding as to the contents of the Transcripts should be made as the Transcripts were not placed before the court.⁶

11 The Plaintiffs argued that Declaration (a) should be granted as the copyright vests in the estate of the copyright holder upon his death pursuant to

⁴ Plaintiffs' submissions, para 18

⁵ Plaintiffs' submissions, paras 15-17

⁶ Plaintiffs' submissions, para 11(b)

s 194(1) of the Copyright Act (Cap 63, 2006 Rev Ed) (“CA”).⁷ The language of the Interview Agreement, which includes phrases like ‘the year 2000 or 5 years after my death, whichever is later’, suggests that LKY intended for the copyright to the Transcripts to survive LKY’s death for the benefit of his estate.⁸ In addition, while it is possible for LKY to limit the copyright such that it would not vest in the LKY estate under s 194(3) of the CA, there is no written limitation in this regard⁹ and thus no indication that the copyright was personal to LKY. Thus, all references to ‘I’, ‘myself’ and ‘me’ in the Interview Agreement should be read to mean “LKY or the LKY estate after LKY’s death”, so as to cohere with the wording of the entire Interview Agreement. The Plaintiffs also argued that even if the Transcripts were created as part of a government project, as alleged by the Government, the Interview Agreement qualifies under s 197(6) of the CA as an express agreement with the Government such that the copyright in the work or recording would vest in the maker, contrary to s 197(1) of the CA.¹⁰ Thus, based on copyright legislation and the clear wording of the Interview Agreement, there is no basis for any claim that the rights therein are not transmissible to the LKY estate, or that they are somehow personal to LKY.

12 If Declaration (a) were granted such that the copyright to the Transcripts is recognized as having vested in the LKY estate, the Plaintiffs argued that it follows that Declaration (b) and (c) should also be granted. The LKY estate is entitled to use and have copies of the Transcript under Declaration (b), since the right to make copies is the founding principle of

⁷ Plaintiffs’ submissions, para 19

⁸ Plaintiffs’ submissions, para 21

⁹ Plaintiffs’ submissions, para 23

¹⁰ Plaintiffs’ submissions, paras 28-29

copyright. The Plaintiffs also relied on s 26(1) of the CA to support their argument that the right to reproduce the work is one of the fundamental features of copyright.¹¹ Since access, supply and use of copyright material are part of the exclusive rights accorded to the copyright holder under s 26(1) of the CA, if the court were to find that the LKY estate has the copyright to the Transcripts, then the LKY estate should also have control over such access, supply and use in accordance with the terms of cl 2(c) of the Interview Agreement.

13 Finally, the Plaintiffs argued that Declaration (d) should be granted as “the Government has a contractual duty to uphold its obligations under the Interview Agreement.”¹² The Plaintiffs took the position that the Government’s obligations are two-fold under the Interview Agreement – firstly the Government has to inform the LKY estate of any request for copies and/or access to the Transcripts, and secondly, the Government also has to inform the LKY estate whether it has granted access or copies without the express permission of the LKY estate.¹³ This was because the Cabinet Secretary had custody of the transcripts, so only he would be in a position to receive and act on requests for access or copies. If he were not under an obligation to notify the LKY estate of such requests, the LKY estate would be “deprived of its ability to grant or withhold its written permission”, and would essentially be deprived of its ability to exercise one of its exclusive rights as copyright holder.¹⁴ The Plaintiffs also pointed out that this obligation was in line with s 198(4) of the CA, which imposes a statutory duty on the

¹¹ Plaintiffs’ submissions, para 27

¹² Plaintiffs’ submissions, para 32

¹³ Plaintiffs’ submissions, para 33

¹⁴ Plaintiffs’ submissions, para 34

Government to inform the owner of the copyright when any infringing acts are done for the service of the Government under s 198(1) of the CA.¹⁵

14 In relation to the contents of the Government's Bundle of Documents, the Plaintiffs argued that the correspondence between the then Attorney General and the Secretary to the Prime Minister showed that LKY, who was the Prime Minister at the material time, was seeking a more comprehensive set of restrictions under the Interview Agreement in a personal capacity. There were no OSA considerations as the OSA was not mentioned in any of the documents. They took the position that LKY was willing to be interviewed only if there were safeguards against anyone quoting him out of context years down the road. They conceded that the correspondence indicated that the political sensitivity of the Transcripts was a consideration,¹⁶ but even then it was not related to the OSA. The contents of a memorandum in February 1983¹⁷ from the Wong to Tan also suggested that some parts of the interview with LKY were of a personal nature. Further, the Plaintiffs also pointed out that the Parliamentary Debates did not include any discussion regarding the OSA.

The Government's arguments

15 The Government's general position was that the Transcripts were produced as part of a government project to record the oral history of LKY, as evidenced from the excerpts of the Parliamentary Debates in the Government's Bundle of Documents. Due to the political sensitivity of the Transcript's contents, it was LKY's intention that that there would be a five

¹⁵ Plaintiffs' submissions, para 37

¹⁶ DBD, p 5

¹⁷ DBD, p 53

year moratorium after LKY's death over the use of the Transcripts, which contained his "personal and unvarnished accounts of important events and affairs of State in Singapore's history", such that there would be no copy or use of the Transcripts without prior written permission from LKY.¹⁸ The Government did not intend to use the Transcripts during this five year period.

Applicability of the OSA

16 The Government's position was diametrically opposed to the Plaintiffs regarding the applicability of the OSA to the Transcripts – it took the position that the applicability of the OSA was relevant to the present case as it would affect the contractual interpretation of the Interview Agreement.¹⁹ In respect of this issue, the Government argued that s 5(1)(e) of the OSA was applicable to the Transcripts by operation of law and no express reference to the OSA in the Interview Agreement was required. The Government relied on the comments of the High Court in *Elbow Holdings Pte Ltd v Marina Bay Sands Pte Ltd* [2014] SGHC 26 ("*Elbow Holdings*") that "under s 5(1)(e), the OSA applies to any document or information which a person has obtained owing to his position as someone who holds or has held a contract made on behalf of the Government or any specified organisation. There is no requirement that the document or information has to be of a confidential (let alone secret) nature."²⁰ The Government thus argued that the Transcripts are covered by the OSA for the following reasons:²¹

¹⁸ Defendant's submissions, para 1

¹⁹ Defendant's submissions, para 2

²⁰ Defendant's submissions, para 17

²¹ Defendant's submissions, paras 18-24

(a) The Transcripts were created as part of a government project to record the oral history and was not a personal enterprise by LKY to record his memoirs for his own benefit.

(b) The information contained in the Transcripts was acquired through LKY's capacity as Prime Minister, in the service of the Government. In addition, much of that information is very politically sensitive as it records his candid and unvarnished personal insights into events in pre-independence Singapore and also his account of state affairs that were experienced by him as Prime Minister. The politically sensitive nature of the Transcripts was reinforced in the Correspondence – in one letter to the then Attorney-General, the Secretary to the Prime Minister emphasized that “the difference between the tapes/transcripts retained by the Oral History Unit and those by the Cabinet Office is their political sensitivity”.²² Moreover, even if the information were not confidential, the OSA should and would apply as this was information that LKY had “obtained owing to his position as Prime Minister”.

(c) The “construction of a strict system of controls concerning the use of, access to and supply of copies of the recordings and the Transcripts” in the Interview Agreement point to the fact that the Transcripts are covered by the OSA.

(d) When one considers the position immediately after the creation of the Transcripts, which was that the Prime Minister of Singapore had documented his unvarnished accounts of important affairs of State, the

²² DBD 24

inference would be that the Transcripts are covered by the OSA such that any copying or disclosure of the document without the Government's authorisation must attract sanctions. Accordingly, if the Transcripts have not been declassified by the Government, then they must still be covered by the OSA today.

17 By virtue of the Transcripts being covered by the OSA, the Government argued that even LKY himself did not have “an unqualified legal right to compel the Government to give him a copy” of the Transcripts. He also could not divulge the contents of the Transcripts to another person without the Government's authorisation.²³ By extension, contrary to Declarations (b) and (c) that are sought by the Plaintiffs, the LKY estate would not have the right to demand copies, or to grant the access, use of or supply of copies of the Transcripts without the Government's authorisation.

Contractual interpretation of the Interview Agreement

18 In relation to the contractual interpretation of the Interview Agreement, the Government argued that the wording of the Interview Agreement indicates that this was no “ordinary commercial copyright agreement where LKY sought to secure a personal benefit for himself”.²⁴ For instance, the Interview Agreement provided for the custody of the Transcripts to be with the Cabinet Secretary, which was contrary to the usual case where custody of the copyright material would follow the copyright holder.²⁵ Further, even after the copyright vests in the Government, there are restrictions placed on the

²³ Defendant's submissions, paras 21, 23

²⁴ Defendant's submissions, para 4(b)

²⁵ Defendant's submissions, para 4(c)(ii)

Government’s exercise of this copyright – the Government may only make the Transcripts available for research purposes.²⁶ Therefore, the Interview Agreement was not an ordinary commercial contract and LKY did not intend for the rights that he reserved for himself in the Interview Agreement to devolve to his estate. The wording of the Interview Agreement also did not provide that “LKY would have the unfettered right to use and have copies of the Transcripts” and it follows that his estate would not have such a right either.²⁷ Thus, contrary to Declarations (b) and (c) sought by the Plaintiffs, cl 2(c) of the Interview Agreement should be interpreted to mean that “LKY’s *personal* express written permission had to be obtained first before access to, supply of copies, or use of the Transcripts could be granted to a person” (emphasis added).²⁸

19 The Government also submitted that the court should take a contextual approach to the interpretation of the Interview Agreement, similar to that adopted in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] SGCA 27 (“*Zurich Insurance*”), in identifying and giving effect to the parties’ intention which is objectively ascertained.²⁹ In doing so, the Government submitted that the following are relevant considerations:³⁰

- (a) The fact that the Transcripts are protected by the OSA, the basis of which had been discussed above (at [16]).

²⁶ Defendant’s submissions, para 4(c)(iv)

²⁷ Defendant’s submissions, paras 23, 31

²⁸ Defendant’s submissions, para 31

²⁹ Defendant’s submissions, para 34

³⁰ Defendant’s submissions, paras 35-39

(b) That the Interview Agreement is not an ordinary commercial copyright agreement.

(c) The fact that LKY intended to create a “two-key” system, beyond just safekeeping the Transcripts, to “formally bifurcate copyright ownership and physical possession of the Transcripts” *via* cl 2(b) of the Interview Agreement, such that the Transcripts could not be easily used or exploited by either the copyright holder or the Government. Otherwise, the parties could simply have provided for the Transcripts to be locked up by the copyright holder by default, instead of providing that the Transcripts be kept in the custody of a senior Government office-holder.

20 The Government argued that the most coherent explanation for cll 2(a), 2(b) and 2(d) of the Interview Agreement is that LKY had sought to safeguard the confidentiality of the Transcripts through the imposition of various restrictions.³¹ Clause 2(a) prevents the Government from exploiting what would otherwise be a government document, while cl 2(b) prevents any subsequent copyright holder from publishing or using the Transcripts at will. This should guide the construction of cl 2(c), such that the rights stated therein should be read as being personal to only LKY and to the exclusion of his estate. Since LKY did not grant “express written permission” for the Plaintiffs to have any of the rights mentioned in cl 2(c), the Plaintiffs cannot be granted Declarations (b) and (c) without offending LKY’s original intent.

21 The Government pointed out that the Plaintiffs’ construction of cl 2(c) would render it “effectively redundant” because if LKY had intended for his

³¹ Defendant’s submissions, para 39

estate to inherit the right to grant permission for access, use or supply of copies of the Transcript, it would have been covered by operation of cl 2(a). Under that construction, cl 2(c) “would be a mere reiteration of what [cl 2(a)] already provides, save as to add that such permission be “*express*” and “*written*””.³² Thus, the Government submitted, the more satisfactory construction of cl 2(c) is that the rights contained therein are exclusive to LKY.

22 The Government argued that in the alternative, even if the court does not adopt its construction of cl 2(c), there are still good reasons for the court to imply a term that the rights in cl 2(c) did not devolve to the LKY estate.³³ One could analyse the Interview Agreement as part of a class of contracts known as “personal contracts”, such that where “contractual rights are based on personal considerations related to the individual identity of the contracting party, they do not devolve on the personal representatives, but extinguish on the death of the contracting party”.³⁴ The Government submitted that if its construction of cl 2(c) is not accepted, “the Interview Agreement must be recognised as being silent” on what happens to LKY’s rights under cl 2(c) after his death. In that situation, to give efficacy to the intention of the contracting parties, it would be necessary to imply a term to address this gap with respect to his ‘second key’ in the five year period after his death. Taking into consideration all the circumstances surrounding the creation of the Transcripts, the Government submitted that “parties would have responded “Oh, of course!” if asked to confirm that LKY’s right to give permission to use, access and supply copies of the Transcripts, did not pass on to his estate.”³⁵ This is because LKY would

³² Defendant’s submissions, para 41

³³ Defendant’s submissions, para 44

³⁴ Defendant’s submissions, para 44

not be able to know at the time of contracting who the eventual executors of his estate would be and given the highly sensitive nature of the Transcripts' contents, he could not have intended that an unknown third party, with unknown political acumen, could acquire his rights in the Transcripts under cl 2(c).

23 Specifically, regarding the Plaintiff's asserted right to obtain a copy of the Transcripts, the Government took the position the LKY estate does not have such a right. This was because the retention of copyright to LKY under cl 2(a) was for a special purpose and different from the "usual commercial exploitative reasons", evidenced by the separation of possession of the copyrighted material from the copyright holder, unlike the usual scenario where the copyright holder retains physical possession. The Government sought to draw a distinction between the ownership of the copyright in the Transcripts and ownership of the tangible medium in which they were expressed, relying on the High Court's decision in *Lee Kien Meng v Cintamani Frank* [2015] SGHC 109, by submitting that while LKY retained ownership of the copyright, the physical custody of the tape recordings and Transcripts produced therefrom remained with the Government under the terms of the Interview Agreement.

The Court's decision

24 I agree with the Government that the applicability of the OSA is a relevant issue and that the OSA is applicable to the Interview Agreement. I also agree with the Government's interpretation of cll 2(a) and (c) of the Interview Agreement, which were the clauses in dispute.

³⁵ Defendant's submissions, para 46(d)

25 In coming to my conclusion, the Correspondence, which was produced only on the day before the hearing, was helpful in revealing what LKY's intent was in the Interview Agreement.

Applicability of the OSA

26 I do not agree with the Plaintiffs' argument that because the Interview Agreement contained no explicit or implicit reference to the OSA or other confidentiality considerations, the issue of whether the Transcripts fall within the OSA becomes irrelevant. The OSA as a statute operates by law and needs no explicit reference. In this regard, I accept the Government's arguments above at [16] citing the High Court's comments in *Elbow Holdings* at [48], that s 5(1)(e) of the OSA would apply to any document or information which a person has obtained owing to his position as someone who holds a contract made on behalf of the Government, regardless of whether it was confidential. Where s 5(1)(e) applies, it would restrict anyone in possession or control of the Transcripts from dealing with the Transcripts without Government authorization. The Transcripts, which recorded LKY's observations gleaned from his time as the Prime Minister, could come within this category of protected information. Thus, the applicability of the OSA to the Transcripts is a relevant issue in interpreting the Interview Agreement, which, in restricting certain dealings with the Transcripts, engages some of the concerns underlying s 5(1)(e) of the OSA. The Interview Agreement cannot be interpreted based solely on contractual principles applicable to a normal copyright assignment.

27 Do the Transcripts come within the purview of the OSA? Although the Transcripts were not placed before me, having reviewed the Correspondence and the Parliamentary Debates contained in the Government's Bundle of Documents, I am of the view that they do.

28 The purpose of creating the Transcripts could be discerned from the Parliamentary Debates during that time. S. Dhanabalan, Minister for Culture, at the February 1981 sitting of the Parliament, stated as follows:³⁶

An Oral History Programme, capturing the people's memories of important past events on tape recordings, is underway. The Unit has started two recording projects, namely Political Development of Singapore 1945-65 and The Pioneers of Singapore.

29 In fact, LKY, as Prime Minister, said in Parliament that the oral history project “was the result of a discussion [he] had with the First Deputy Prime Minister.”³⁷ The Oral History Programme was given further elaboration by Mr Chai Chong Yii, the Senior Minister of State for Culture:³⁸

The aim of the Oral History Programme is to record the experiences of key persons involved in events of historical, political and social significance, particularly during the post-war years. These recordings will contain first-hand information on important events. The Unit is conducting and recording interviews on its first two projects: (i) Pioneers of Singapore; and (ii) Political Developments in Singapore, 1945-1965. The interviewees for the Pioneers of Singapore project are successful businessmen who have contributed to the economic and social development of Singapore. Eighteen persons have been interviewed for the Pioneers of Singapore project and 17 for Political Developments in Singapore 1945-1965.

[...]

The Department of Archives and Oral History will catalogue and index all tapes and transcripts. These materials will be part of the national archival collections and may be referred to by researchers, civil servants, teachers, students, broadcasters and members of the public, subject to conditions, if any, laid down by the interviewees.

³⁶ Singapore Parliamentary Debates, Official Report (3 February 1981) vol 40 at col 50

³⁷ Singapore Parliamentary Debates, Official Report (25 March 1981) vol 40 at col 1202

³⁸ Singapore Parliamentary Debates, Official Report (6 March 1981) vol 40 at cols 311-312

30 In my view, the excerpts above support the Government’s position that the Transcripts were not created as a personal enterprise by LKY to record his observations for his own benefit. Instead, they were one of a series of similar recordings that were created as part of the Government’s project to document the history of Singapore, then a city-state with shallow historical roots.

31 The Correspondence, spanning the period from 6 July 1982 to 2 February 1983, also shed light on the nature of the Transcripts and the purpose of the Interview Agreement. It confirmed the existence of other similar tapes and transcripts of interviews with other key appointment holders. In the first of the letters exchanged, LKY directed through Wong that drafts for the Interview Agreement were to be prepared by the Attorney General with reference to foreign precedents, as he found the drafts in existence “scanty and inadequate and contain[ing] many loopholes and problems.” He further commented that “the drafts may be all right for the average interviewees but they will not do for key participants”.³⁹ To me, this letter and the ones that followed indicate that LKY was acting in his capacity as Prime Minister by asking the Attorney General, as the Government’s chief legal counsel, to draft the Interview Agreement in line with his directions. The tone of the Correspondence was not that of negotiations between the Government’s chief legal counsel and a private individual. I therefore do not accept the Plaintiffs’ assertion that LKY was acting as a counter-party in negotiations with the Government.

32 I accept the Government’s argument that the politically sensitive nature of the Transcripts was reinforced in the Correspondence. LKY, again through Wong, emphasized that “the difference between the tapes/transcripts

³⁹ DBD 5

retained by the Oral History Unit and those by the Cabinet Office is their political sensitivity”⁴⁰ and he sought the Attorney General’s suggestions as to how to safeguard the politically sensitive ones. In response, the Attorney General advised that “the agreement should be between the Cabinet Secretary and Director, Archives & Oral History Department on the one hand and the person interviewed on the other in respect of the six politically sensitive tapes... the rest of the tapes that are in the custody of the Director, Archives & Oral History Department, the agreement should be between the Director, Archives & Oral History Department and the person interviewed.”⁴¹ The Correspondence suggested that the politically sensitive tapes and transcripts should be kept by the Cabinet Secretary while the non-sensitive ones should be kept by the Director, Archives & Oral History Department. The fact that the Interview Agreement provided that the Transcripts were to be kept in the custody of the Cabinet Secretary and the fact that it was signed by three parties - LKY, Wong and Tan - thus lend support to the Government’s claim that the Transcripts dealt with politically sensitive matters. The politically sensitive contents of the Transcripts would explain why LKY wished to safeguard the confidentiality of the Transcripts and this justifies the Government’s characterisation of the Interview Agreement as one that was intended to prevent the exploitation of the Transcripts *via* a “two-key” system.

33 Having discerned the purpose and the nature of the Transcripts, I am of the view that the Transcript comes within the purview of OSA. While the contents of the Transcripts have not been revealed in court, it is not difficult to see why revealing the said contents would be self-defeating.

⁴⁰ DBD 24

⁴¹ DBD 26

34 I accept the Government’s argument that even LKY himself did not have “an unqualified legal right to compel the Government to give him a copy” of the Transcripts.⁴² Flowing from this conclusion, I see no basis for Declarations (b) and (c), even if the Plaintiffs can establish their copyright to the Transcripts. I will elaborate further below.

Construction of the Interview Agreement

35 I now turn to examine the contractual interpretation of the Interview Agreement, bearing the OSA in mind. The contextual approach to contractual interpretation set out in *Zurich Insurance* seeks to discern from an objective viewpoint what the parties ultimately agreed upon.

36 The first point of enquiry for contractual interpretation is the text of the contract. In Singapore, copyright is currently governed by the CA. At the time of the Interview Agreement, the legislation in force was the United Kingdom Copyright Act 1911, also known as the Copyright Act 1911, which was inherited from Singapore’s colonial days. The wording of cl 2(a) of the Interview Agreement was explicit that LKY reserved the copyright of the Transcripts to himself “until 2000 or 5 years after [his] death, whichever is later”, and thus altered the default position under s 18 of the Copyright Act 1911, mirrored by s 197(1) of the current CA, which had the copyright of the Transcripts vested in the Government. Section 5(1) of the Copyright Act 1911, which indicates the transmissibility of copyright, read together with s 10(1) of the Civil Law Act (Cap 43, 1999 Rev Ed), which allows all causes of action vested in a deceased to survive for the benefit of his estate, suggest that LKY’s copyright would survive for the benefit of his estate. The words “until 2000 or

⁴² Defendant’s submissions, paras 21, 23

5 years after [his] death, whichever is later” appear to be consistent with the reading that LKY’s copyright would survive him and that it was not merely a personal right, contrary to the Government’s arguments. Implicit in the Government’s argument at [19(c)] above of a “two-key” system, where copyright ownership and physical possession of the Transcripts are separated, has to be the acknowledgement that the copyright is vested in someone other than the Government.

37 The drafting history of the Interview Agreement unfortunately does not assist in the interpretation of the Interview Agreement. In the drafts of the Interview Agreement in the Correspondence, the phrase “until the year two thousand (2000) or 5 years after my death, whichever is later” was absent. Instead, the drafts merely stated “until the year two thousand (2000) or after my death whichever is later”. The insertion of “5 years” was the basis for the Plaintiffs’ argument that it was clearly envisaged that someone would exercise the rights in the Interview Agreement in the 5-year period after LKY’s death. However, the Correspondence does not indicate who inserted the phrase “5 years” or when and why it was inserted. Neither party before me was able to shed light on the reason for the insertion.

38 Based on a plain reading of the Interview Agreement, I agree with the Plaintiffs’ interpretation of cl 2(a) that the LKY estate inherited the copyright to the Transcripts for the 5-year period after LKY’s death. However, this copyright is a limited one and does not entitle the Plaintiffs to Declarations (a), (b) and (c).

Right to grant access, supply of copies of or use of the Transcripts

39 The justification for declining the Plaintiffs’ application for Declarations (a) and (c) is three-fold.

40 Firstly, given my finding above that the OSA applies to the Transcripts, the LKY estate cannot grant access, supply of copies of or use of the Transcripts without the Government’s authorisation; otherwise, it would run afoul of s 5(1)(i) of the OSA and commit an offence. Viewed in that light, the contractual rights that accrue to the LKY estate under the Interview Agreement are curtailed by the OSA.

41 Secondly, as a matter of construction of the Interview Agreement, I accept the Government’s argument that if LKY had intended his estate to inherit the right to grant express permission for access, use or supply of copies of the Transcript, it would have been covered by operation of cl 2(a) which was a generic clause that had the effect of reserving the copyright of the Transcripts to the LKY estate. Clause 2(c) under the Plaintiff’s construction would be a mere reiteration of what cl 2(a) already provides, save as to add that such permission be “express” and “written”. It is a canon of construction that in construing a contract, all parts of it must be given effect where possible, with no part treated as inoperative or redundant (see Sir Kim Lewiston, *The Interpretation of Contracts* (Thomson Reuters, 6th Ed, 2015) at para 7.03). Thus, between competing interpretations, one that gives effect to all the clauses and does not leave a part of the agreement superfluous is preferred. The Government’s interpretation of cl 2(c) is to be preferred for this reason.

42 Thirdly, it is doubtful that it was LKY’s intention to allow his estate the right to “grant access, supply copies of or use of the Transcripts” under cl

2(c). Looking at the Correspondence as part of the background to the Interview Agreement, it appears that the right in cl 2(c) was intended to be personal to LKY; there was no contemplation of the LKY estate being involved with the Transcripts, for the following reasons:

(a) The Correspondence made no mention of LKY's estate or family. The Plaintiffs confirmed at the hearing that there was no known will of LKY in existence before the 1990s and certainly not at the time of the Interview Agreement in 1983. Under the circumstances, and given LKY's obvious concern as Prime Minister about the confidentiality of the Transcripts contents as shown in the Correspondence, it is unreasonable to believe that LKY intended that some unknown person in the future after his death would be able to exercise his right in cl 2(c) with the power to grant access or use of the Transcripts. This is even more so when one contemplates the possibility that if LKY's executor were to pass away in the period provided in the Interview Agreement, the executor's heir, possibly a third party unknown to LKY, might gain control of the Transcripts and the information therein.

(b) The LKY estate did not even know about the existence of the Transcripts until it was notified by a letter from the Cabinet Secretary acknowledging receipt of the Transcripts.

(c) The LKY estate was not given a copy of the Transcripts. Under the terms of the Interview Agreement, there was no other copy of the Transcripts mentioned other than the copy to be kept with the Cabinet Secretary.

43 Copyright is essentially a bundle of separate and divisible rights relating to certain works. The copyright owner is able to assign or license his copyright and impose conditions. He is also able to assign the copyright in parts and to different individuals or entities. The corollary of that is that different persons may be the legal owners of the separate acts and classes of acts conferred by copyright. While it may appear inimical to the usual concept of copyright to deny the Plaintiffs the contents of Declaration (c) despite acknowledging their copyright in the Transcripts, it is not a matter of course that a copyright holder would possess all the exclusive rights associated with the copyright of a work. As pointed out by the learned author of *Susanna Leong, Intellectual Property of Singapore* (Academy Publishing, 2013) (“*Susanna Leong*”) at para 8.004:

... not every copyright work or “subject matter other than works” enjoys the same or all of the exclusive rights associated with it.

[...]

When considering the issue of exploitation of rights or infringement, it is necessary to look at the particular work or “subject-matter other than work”.

[emphasis in original in italics; emphasis added in bold italics]

44 Flowing from the comments in *Susanna Leong*, it is important to examine the copyright for this particular set of Transcripts, having regard to the overarching purpose of the Transcripts. Since the LKY estate is not the original copyright holder of the Transcripts, the bundle of rights that vests in the estate is subject to limitations that LKY would have imposed. In the light of the reasons I have given above, the preferred construction of cl 2(c) ought to be that the rights contained therein were exclusive to LKY. In other words, the copyright that vested in the LKY estate does not include the right to grant access, supply of copies of or use of the Transcripts. It is thus not true that all

rights of LKY under the Interview Agreement have vested in his estate, as claimed under Declaration (a).

Right to have copies of the Transcripts

45 I now consider the rights sought in Declaration (b). The reasons for declining to grant Declaration (c), discussed in the preceding section, are applicable here as well. Further, there is no other copy of the Transcripts in existence, as far as the parties are aware. There was apparently no written permission given by LKY before his death for the Plaintiffs to have copies of the Transcripts. The Interview Agreement also makes no mention of LKY having the right to keep a copy of the Transcripts although they were in his home at the time of his death. The parties were not able to tell me how or when the Transcripts were brought to LKY's home. However, the fact that the Transcripts were specified to be kept by the Cabinet Secretary, instead of by LKY, indicates that the Interview Agreement was not the usual copyright agreement. Considering this and my finding that the rights in cl 2(c) are personal to LKY and do not vest in the LKY estate, the Plaintiffs would not be able to grant themselves the right to use or possess a copy of the Transcripts either.

46 I also accept the Government's argument that the effect of cl 2(b) of the Interview Agreement separating custody of the Transcripts from the copyright holder was that even the copyright holder could not exploit the Transcripts easily. This would prevent the subsequent copyright holder from dealing with or publishing the Transcripts at will without the Government's approval or without it being satisfied that the said person had express written permission from LKY. Viewed in that light, to grant the Plaintiffs Declaration

(b) would be to go against the intention elicited from the Interview Agreement.

Nature of the LKY estate's copyright

47 My findings above result in the LKY estate obtaining the copyright to the Transcripts but without the right to possess or to grant access, use or supply of the Transcripts. What then would be the rights that remain with the LKY estate under cl 2(a)?

48 In my view, this copyright was vested in the LKY estate only for the limited purpose of safeguarding the confidentiality of the Transcripts, *i.e.*, ensuring that the Government abides by the Interview Agreement. Since no one thus far appeared to have been given express written permission by LKY to deal with the Transcripts, the five year moratorium as argued by the Government would result. This is in line with LKY's undisputed intent not to have his politically sensitive comments quoted after his death.

49 The LKY estate would have the right to prevent any exploitation of the Transcripts, whether by the Government or anyone else, that contravenes the terms of the Interview Agreement. However, I am confident that this Government will act in good faith in relation to the Transcripts and abide by the Interview Agreement. I think that if the Government were to make use of the information in the Transcripts in contravention of the Interview Agreement during the five-year moratorium period, it would be quite apparent as the Government would inevitably have to attribute any of LKY's comments to their source. In such a case, the LKY estate would be able to enforce its copyright by way of an injunction if necessary.

50 The Government acknowledged in the course of the hearing that there was a technical breach of cl 2(c) of the Interview Agreement when it allowed the Second Plaintiff to go through the Transcripts at the MHA. This is because under cl 2(c), only LKY could have given the express written permission required. However, I accept the explanation that it was done because of the request made by the LKY estate, and, as mentioned before, the executors are LKY's daughter and younger son. The technical breach was therefore minor and does not change my belief that this Government will act honourably and in accordance with the spirit of the Interview Agreement.

51 Although it appeared that no one had been given permission under cl 2(c), it would also be proper for the Government to inform the solicitors for the LKY estate whether LKY had, during his lifetime, given express written permission to anyone for access to, supply of copies of or use of the Transcripts and if such permission had been given, to provide evidence of the express written permission to the solicitors for the LKY estate. This is to be done within 2 weeks from the date of this judgment unless the Government requests a longer period for compliance.

Conclusion

52 Accordingly, I dismiss the Plaintiff's application for the declarations set out in [2] above. Instead, I make the following declaration and order:

- (a) The LKY estate has the copyright to the Transcripts but only for the purpose of ensuring the Government's compliance with the terms of the Interview Agreement.
- (b) The Transcripts are to remain in the custody of the Cabinet Secretary according to the terms of cl 2(b) of the Interview Agreement.

(c) In relation to cl 2(c), the Government is to inform the solicitors for the LKY estate whether LKY had, during his lifetime, given express written permission to anyone for access to, supply of copies of or use of the Transcripts and if such permission had been given, to provide evidence of the express written permission to the solicitors for the LKY estate. This is to be done within 2 weeks from the date of this judgment unless the Government requests a longer period for compliance.

53 As requested, I reserve my decision on costs of these proceedings as the parties wish to make submissions on costs only after the outcome is known. The Plaintiffs are to file and serve their written submissions on costs of the entire proceedings within 2 weeks of this judgment. The Government is to file and serve its response within 1 week thereafter. I will give my decision on costs based on the written submissions unless there is reason why oral arguments should be heard.

Tay Yong Kwang
Judge of Appeal

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