

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

[2025] SGHCR 32

Originating Claim No 45 of 2024 (Summons No 2052 of 2025)

Between

Wesley Widjaja

... Claimant

And

- (1) Ng Wei San @ Oei Wei San @
Wilson Hasan Widjaja
- (2) Jaya Asri Pte. Ltd.
- (3) Kelvin Lim
- (4) Widjaja, Jethro Roi Longos
- (5) Crawford Trust Company LLC

... Defendants

GROUND OF DECISION

[Civil Procedure — Privileges — Legal professional privilege]

[Civil Procedure — Production of documents]

TABLE OF CONTENTS

INTRODUCTION	1
BACKGROUND	3
THE PARTIES AND THE SUIT	3
WESLEY’S APPLICATION FOR PRODUCTION OF DOCUMENTS	6
WESLEY’S FILING OF SUM 2052 AND SUBSEQUENT EVENTS	8
THE PARTIES’ ARGUMENTS	11
ISSUES TO BE DETERMINED	13
PRELIMINARY ISSUE: SHOULD THE RESPONDENTS BE GRANTED PERMISSION TO FILE A FURTHER AFFIDAVIT?	14
ISSUE 1: WHAT WOULD A PARTY NEED TO DO TO ASSERT PRIVILEGE OVER DOCUMENTS HE HAS BEEN ORDERED TO PRODUCE?	18
IS AN AFFIDAVIT NECESSARY TO ASSERT PRIVILEGE?	19
WHAT SHOULD AN AFFIDAVIT ASSERTING PRIVILEGE CONTAIN?	22
<i>The pre-ROC 2021 authorities</i>	22
<i>The authorities under the ROC 2021</i>	26
WHAT WEIGHT SHOULD BE GIVEN TO AN ASSERTION OF PRIVILEGE ON AFFIDAVIT?	32
SUMMARY OF THE RELEVANT PRINCIPLES	33
ISSUE 2: HAD THE RESPONDENTS ESTABLISHED THAT THE DISPUTED CATEGORY 1 DOCUMENTS WERE PROTECTED BY PRIVILEGE?	34
THE APPLICABLE LAW	36

MY DECISION	38
ISSUE 3: HAD THE RESPONDENTS WAIVED PRIVILEGE OVER THE DISPUTED CATEGORY 1 DOCUMENTS?	44
ISSUE 4: SHOULD THE COURT INSPECT THE DISPUTED CATEGORY 1 DOCUMENTS?	47
CONCLUSION.....	49

This judgment is subject to final editorial corrections approved by the court and/or redaction pursuant to the publisher's duty in compliance with the law, for publication in LawNet and/or the Singapore Law Reports.

Wesley Widjaja
v
Ng Wei San (alias Oei Wei San alias Wilson Hasan Widjaja)
and others

[2025] SGHCR 32

General Division of the High Court — Originating Claim No 45 of 2024
(Summons No 2052 of 2025)

AR Wee Yen Jean

18 August 2025

23 September 2025

AR Wee Yen Jean:

Introduction

1 Legal professional privilege is “concerned with the interaction between two aspects of the public interest in the administration of justice”: see *Regina v Derby Magistrates’ Court, ex parte B* [1996] 1 AC 487 (“*Derby Magistrates’ Court*”) at 510, *per* Lord Nicholls of Birkenhead. The first aspect of the public interest is that “the justice system depends for its vitality on full, free and frank communication between those who need legal advice and those who are best able to provide it” (in the case of legal advice privilege), and the efficacy of the adversarial process requires parties to litigation to be allowed to “prepare their contending positions in private, without adversarial interference and without fear of premature disclosure” (in the case of litigation privilege): see *Minister of Justice v Sheldon Blank (Attorney General of Ontario, The Advocates’*

Society and Information Commissioner of Canada (Intervenors)) [2006] SCC 39 at [26]–[27], *per* Fish J (delivering the judgment of McLachlin CJ and Binnie, Deschamps, Fish and Abella JJ). The second aspect of the public interest is that “all relevant material should be available to courts when deciding cases”, and “[c]ourts should not have to reach decisions in ignorance of the contents of documents or other material which, if disclosed, might well affect the outcome”: see *Derby Magistrates’ Court* at 510 (*per* Lord Nicholls).

2 The rules and principles governing legal professional privilege have been developed with this in mind. In the context of the production of documents under O 11 of the Rules of Court 2021 (“ROC 2021”), O 11 r 5(3) expressly provides that, subject to any written law, the court “must not order the production of any document which is subject to any privilege”. A claim of legal professional privilege – if correctly made – thus allows a party to withhold documents that it would otherwise be required to produce because they are material to the issues in the case or could otherwise aid in disposing fairly of the proceedings. For this reason, it is important for the court to apply at least some scrutiny to a party’s assertion that documents are protected by privilege, especially where this is disputed by the other party. At the same time, at the interlocutory stage of proceedings at which these disputes typically arise, the evidence before the court – including evidence of the factual basis for any assertion of privilege – is limited to what is set out in the parties’ affidavits.

3 The questions of how a party should assert legal professional privilege as a reason for withholding the production of documents, and how the court should deal with such assertions of privilege, were squarely engaged in the present case. In HC/SUM 2052/2025 (“SUM 2052”), the claimant in HC/OC 45/2024 (“the Suit”) sought an order for the defendants to produce certain documents that they had previously been ordered to produce, but which

they now claimed were protected from disclosure by legal professional privilege. I heard SUM 2052 on 18 August 2025 and granted the orders sought by the claimant, with brief reasons. These are the detailed grounds of my decision.

Background

4 I begin by summarising the background to the parties’ dispute in so far as this is relevant to SUM 2052. I also set out the procedural history of and leading up to SUM 2052 in some detail, as this is necessary to provide context for the positions taken by the parties at the hearing of SUM 2052.

The parties and the Suit

5 The Suit is, at its heart, a dispute between family members about their inheritance. The claimant, Mr Wesley Widjaja (“Wesley”), is the grandson of the late Mr Oei Hong Bie @ Hadi Widjaja @ Ng Kim Tjing (“the Testator”). Mr Ng Wei San @ Oei Wei San @ Wilson Hasan Widjaja (“Wilson”) is Wesley’s father and one of the Testator’s sons, and is also the sole executor of the Testator’s estate.¹ Mr Kelvin Lim (“Kelvin”) is Wilson’s first cousin once removed and Wesley’s second cousin.² Mr Jethro Roi Longos Widjaja (“Jethro”) is another of the Testator’s sons, and Wilson’s half-brother.³

¹ Statement of Claim (Amendment No 3) dated 1 November 2024 (“SOC”) at paras 1–2; 1st Defendant’s Defence (Amendment No 1) dated 6 November 2024 (“Wilson’s Defence”) at paras 2–3.

² 3rd Defendant’s Affidavit of Evidence-in-Chief dated 13 February 2025 (“Kelvin’s AEIC”) at para 4.

³ 4th Defendant’s Affidavit of Evidence-in-Chief filed on 25 February 2025 (“Jethro’s AEIC”) at para 4.

6 At the centre of the parties’ dispute is Jaya Asri Pte Ltd (“Jaya Asri”), a Singapore-incorporated company carrying on the business of wholesale of rubber and rubber brokers.⁴ Wilson is the Managing Director of Jaya Asri. Kelvin and Jethro are directors of Jaya Asri, and each held 50% of Jaya Asri’s shares (“the Jaya Asri Shares”) from its incorporation on 3 September 2018 until on or around 8 April 2024.⁵

7 Wesley is one of the beneficiaries of the Testator’s will and is entitled to (among other things) 40% of the Testator’s residuary estate, with Wilson being entitled to (among other things) the remaining 60% of the Testator’s residuary estate.⁶ After the Testator’s passing on 4 October 2022, Wilson filed the Testator’s Schedule of Assets, which did not include the Jaya Asri Shares.⁷

8 On 23 January 2024, Wesley commenced the Suit against Wilson, claiming that Kelvin and Jethro had held the Jaya Asri Shares on trust for the Testator; that Wilson ought to have included the Jaya Asri Shares in the Testator’s Schedule of Assets; and that Wilson’s failure to do so had deprived Wesley of his entitlement to 40% of the Testator’s residuary estate.⁸

9 A few months after the Suit was commenced, on or around 8 April 2024, Kelvin and Jethro transferred the Jaya Asri Shares to Crawford Trust Company LLC (“Crawford Trust”), which the parties have described as “a United States

⁴ SOC at para 3; Wilson’s Defence at para 4.

⁵ Kelvin’s AEIC at para 5; Jethro’s AEIC at paras 5, 28 and 41; SOC at para 32; Wilson’s Defence at para 46.

⁶ SOC at paras 40–41; Wilson’s Defence at paras 10–11.

⁷ SOC at para 11; Wilson’s Defence at para 12.

⁸ Statement of Claim dated 23 January 2024 at paras 20 and 45.

of America entity”.⁹ Crawford Trust is presently said to hold the Jaya Asri Shares on trust for Wilson.¹⁰

10 On 3 May 2024, Jaya Asri, Kelvin, Jethro and Crawford Trust were added as the second, third, fourth and fifth defendants in the Suit respectively.¹¹ Wesley’s statement of claim in the Suit was amended to add claims that Kelvin and Jethro had acted in breach of trust and/or their fiduciary duties to the Testator by transferring the Jaya Asri Shares to Crawford Trust; that Wilson had dishonestly assisted with and/or procured this breach of trust and/or fiduciary duty; that Crawford Trust was a knowing recipient of the Jaya Asri shares and held them on constructive trust for the Testator; and that legal title to 40% of the Jaya Asri Shares be transferred by Crawford Trust to Wesley.¹² Subsequently, on 1 November 2024, Wesley’s statement of claim was further amended to add a claim that Wilson had been unjustly enriched at his expense, through his procurement of Kelvin and Jethro’s transfer of the Jaya Asri Shares to Crawford Trust, and his wrongful retention of the beneficial interest in 40% of the Jaya Asri Shares.¹³

11 The defendants deny these claims. In particular, Wilson avers that he is entitled to the beneficial ownership of the Jaya Asri Shares pursuant to a settlement agreement that he entered into with Wesley on or around 3 November 2022 (“the Settlement Agreement”).¹⁴ Wesley, however, contends

⁹ SOC at para 6; Wilson’s Defence at para 7.

¹⁰ Wilson’s Defence at para 55.

¹¹ HC/ORC 2519/2024.

¹² Statement of Claim (Amendment No 1) dated 3 May 2024 at paras 36–39 and pp 20–22.

¹³ SOC at para 35A.

¹⁴ Wilson’s Defence at para 51.

that the terms of the Settlement Agreement were materially varied by two subsequent variation agreements that were signed on 24 March 2023 and 17 April 2023 respectively, and that the Jaya Asri Shares fell outside the proper scope of the Settlement Agreement.¹⁵ On their part, Kelvin and Jethro’s pleaded defence to Wesley’s claims of breach of trust and/or fiduciary duty is that they performed a purely facilitative role in transferring the Jaya Asri Shares to Crawford Trust and received no benefit from doing so; that they reasonably believed that Wilson was the beneficial owner of the Jaya Asri Shares; and that they were merely following instructions from Wilson, in his capacity as executor of the Testator’s estate, when they transferred the Jaya Asri Shares to Crawford Trust.¹⁶

Wesley’s application for production of documents

12 On 3 April 2025, Wesley filed a Single Application Pending Trial in HC/SUM 898/2025 (“SUM 898”) seeking, among other things, the production of two categories of documents by Wilson, Kelvin and Jethro:

(a) all correspondence and communications between and/or amongst Wilson, Kelvin and/or Jethro regarding the Jaya Asri Shares and/or Kelvin and Jethro’s transfer of the Jaya Asri Shares to the Crawford Trust on Wilson’s instructions from 4 October 2022 (this being the date of the Testator’s passing) to date (“the Category 1 Documents”); and

(b) the “trust agreement for the WS Fund” signed by Wilson and Crawford Trust on 6 July 2023. According to Wilson, the “WS Fund”,

¹⁵ SOC at paras 29 and 30.

¹⁶ 3rd and 4th Defendants’ Defence dated 20 June 2024 at para 46.

of which Crawford Trust is the trustee, is the sole owner of the Jaya Asri Shares pursuant to the Settlement Agreement, and Wilson is its primary beneficiary.¹⁷ This category of documents is not the subject of SUM 2052, and I briefly mention it here only to note the limited scope of Wesley’s application for production in SUM 898.

13 In the rest of these grounds of decision, I will refer to Wilson, Kelvin and Jethro collectively as “the Respondents”.

14 On 5 May 2025, SUM 898 was heard by an assistant registrar (“the AR”) who ordered, by consent, that the Respondents produce the Category 1 Documents from 4 October 2022 to 8 April 2024 (this being the accepted date on which the Jaya Asri Shares were transferred to Crawford Trust), and that they file an affidavit confirming that no further documents existed after 8 April 2024.¹⁸ At a further hearing of SUM 898 on 20 May 2025, the AR directed that the Category 1 Documents be produced – or an affidavit be filed by Wilson, Kelvin and/or Jethro if they asserted that these documents did not exist or were not in their possession or control (“Possession/Control Affidavit”) – by 5.00pm on 3 June 2025.¹⁹

15 However, the Category 1 Documents were not produced. On 3 June 2025, Wilson filed his Possession/Control Affidavit, stating that the Category 1 Documents from 4 October 2022 to 8 April 2024 (“the Disputed Category 1 Documents”) were protected by legal advice and/or litigation privilege, and that

¹⁷ Wilson’s Defence at paras 19(e) and 19(f).

¹⁸ 7th Affidavit of Wesley Widjaja dated 23 July 2025 (“Wesley’s Supporting Affidavit”) at p 358 (certified transcript of the hearing on 5 May 2025 at p 5 lines 27–28).

¹⁹ Wesley’s Supporting Affidavit at p 376 (certified transcript of the hearing on 20 May 2025 at p 6 lines 5–11).

the Category 1 Documents after 8 April 2024 did not exist or were never in his possession or control. In respect of the Disputed Category 1 Documents, Wilson stated as follows:²⁰

5. I have reviewed the documents in my possession and/or control and while the Requested Documents [*ie*, the Category 1 Documents] for the period of 4 October 2022 to 8 April 2024 do exist, they are protected by legal advice and/or litigation privilege. I am advised that such documents are protected from disclosure and I do not intend to waive any privilege over these said documents.

6. Through my solicitors, I have always taken the position that I was agreeable to the production of the Requested Documents for the period of 4 October 2022 to 8 April 2024, to the extent that such documents are not protected by privilege. See for example Column D of the Claimant's Summary Table filed in respect of the Hearings [*ie*, the hearings before the AR on 5 May 2025 and 20 May 2025], being my submissions on the issue. Consequently, given my review above, I shall not be obliged by law to produce these documents.

16 Kelvin did not file his Possession/Control Affidavit until 23 July 2025. In his Possession/Control Affidavit, Kelvin asserted legal professional privilege over the Disputed Category 1 Documents in terms materially identical to what I have set out at [15] above.²¹

Wesley's filing of SUM 2052 and subsequent events

17 In compliance with directions given at a Registrar's Case Conference on 16 July 2025 ("the RCC"), Wesley filed SUM 2052 on 23 July 2025, seeking orders that:

²⁰ Wesley's Supporting Affidavit at p 382 (affidavit of the 1st Defendant dated 3 June 2025 at paras 5–6).

²¹ Wesley's Supporting Affidavit at p 460 (affidavit of the 3rd Defendant dated 21 July 2025 (filed on 23 July 2025) at paras 5–6).

(a) in compliance with the AR’s orders in SUM 898 made at the hearings on 5 May 2025 and 20 May 2025, the Respondents produce the Category 1 Documents from 4 October 2022 to 8 April 2024, within seven days; and

(b) if Jethro asserted that the Category 1 Documents were not in his possession or control, that Jethro file an affidavit stating whether he had had possession or control of any such Category 1 Documents previously, and if so, when he parted with possession or control and what had become of those documents.

18 In his affidavit in support of SUM 2052, Wesley noted that counsel for the defendants, Attorneys Inc LLC (“AIL”), had informed the court at the RCC that Wilson was asserting privilege over the Disputed Category 1 Documents because “for one reason or another, names of solicitors have been copied into the correspondence [between the 1st, 3rd and 4th Defendants]” (“AIL’s RCC Statement”).²²

19 On 25 July 2025, Jethro filed his Possession/Control Affidavit, which was dated 23 July 2025. Like Kelvin, Jethro asserted legal professional privilege over the Disputed Category 1 Documents in materially identical terms to those set out at [15] above.²³ In the light of this development, Wesley withdrew his prayer for Jethro to file his Possession/Control Affidavit (as set out at [17(b)] above), save that he sought wasted costs in respect of Jethro’s conduct.²⁴

²² Wesley’s Supporting Affidavit at para 18.

²³ Affidavit of the 4th Defendant dated 23 July 2025 at paras 5–6.

²⁴ Claimant’s written submissions dated 11 August 2025 (“CWS”) at para 18; certified transcript of the hearing on 18 August 2025 (“Transcript”) at p 11 lines 4–11.

20 On 30 July 2025, Wilson filed an affidavit in response to SUM 2052 (dated 29 July 2025) on behalf of himself, Kelvin and Jethro. Among other things, that affidavit:²⁵

- (a) emphasised that their consent to the production of the Disputed Category 1 Documents was “always subject to the protection of privilege”, and that the AR’s orders “could not have extended to require the production of privileged documents”;
- (b) stated that they had never waived privilege over or given unqualified consent to produce the Category 1 Documents; and
- (c) further stated as follows:

We understand that parties relying on privilege are not required to take any additional step to cloak documents with privilege or to clarify the scope of the production of such documents. We also understand that it is not necessary for us to substantiate or prove that the documents are privileged, or for the Court to make any specific order limiting the production of documents to take privilege into account. We shall leave it to our solicitors to make the relevant legal submission on this matter at the appropriate juncture.

21 As directed at the RCC, the parties then filed and exchanged their written submissions for SUM 2052 on 11 August 2025. In their written submissions, the Respondents took the position that the Disputed Category 1 Documents were protected by both legal advice privilege and litigation privilege, and explained the basis for their assertion of privilege as follows:²⁶

... [T]he Disputed Documents are clearly protected by both legal advice privilege and litigation privilege as following the 1st, 3rd

²⁵ Affidavit of Ng Wei San @ Oei Wei San @ Wilson Hasan Widjaja dated 29 July 2025 (“Respondents’ Response Affidavit”) at paras 8–13.

²⁶ Respondents’ written submissions dated 11 August 2025 (“RWS”) at para 19.

and 4th Defendants’ review of the documents in their possession, they discovered that *their solicitors were copied in all of the written correspondence between themselves regarding the Jaya Asri shares and/or its transfer for the purpose of attaining legal advice to ensure that the transfer was done in accordance with the relevant laws, in light of Wesley’s claim in HC/OC 45/2024.*

[emphasis added]

22 On 18 August 2025, the day of the hearing of SUM 2052, AIL wrote to the court stating that – after having carefully considered Wesley’s written submissions – the Respondents wished to seek the court’s permission for Wilson to “file a further affidavit to confirm and regularise the statement made by [AIL] during the RCC”, as quoted in Wesley’s supporting affidavit and set out at [18] above (*ie*, AIL’s RCC Statement).²⁷ Counsel for Wesley, Rajah & Tann Singapore LLP (“RTS”), objected to this request.²⁸ I directed counsel to address me at the hearing on the Respondents’ request for permission to file a further affidavit. I will return to this issue at [29] below.

The parties’ arguments

23 I begin by noting that it was not disputed that the Disputed Category 1 Documents existed and that they were in the Respondents’ possession or control. The sole basis on which the Respondents sought to withhold the Disputed Category 1 Documents from production was that, according to the Respondents, they were protected by privilege.²⁹

24 In brief, Wesley submitted that the Respondents should be ordered to produce the Disputed Category 1 Documents for the following reasons:

²⁷ AIL’s letter to the court dated 18 August 2025 at paras 3–4.

²⁸ RTS’s second letter to the court dated 18 August 2025 at paras 3–4.

²⁹ Transcript at p 11 lines 13–19.

(a) First, the Respondents’ assertion of privilege over the Disputed Category 1 Documents was without basis. The Respondents’ respective Possession/Control Affidavits contained only bare assertions of privilege, and they had not made any attempt to prove the facts to show how the requirements of legal advice privilege and/or litigation privilege had been established. Further, the facts referred to in AIL’s RCC Statement were insufficient to establish privilege.

(b) Second, even if the Disputed Category 1 Documents were privileged, the Respondents had expressly or impliedly waived privilege over these documents.

25 As I have noted at [21] above, the Respondents initially submitted that the Disputed Category 1 Documents were protected by *both* legal advice privilege and litigation privilege. The Respondents further submitted that:

(a) It was not necessary for them to “take any additional step to cloak documents with privilege, to clarify the scope of the production of such documents or ... to prove that the documents are privileged”. The Respondents’ Possession/Control Affidavits, in which they had asserted privilege over the Disputed Category 1 Documents, were conclusive, and there was no reason for the court to go behind them.³⁰

(b) In any event, the Disputed Category 1 Documents were clearly protected from disclosure by both legal advice privilege and litigation privilege, for the reasons set out at [21] above.

³⁰ RWS at paras 15 and 18.

(c) The Respondents had never consented to the production of privileged documents or waived privilege, whether expressly or impliedly. The AR's orders could not and should not be read to require the Respondents to produce even privileged documents.

26 However, at the hearing of SUM 2052, AIL clarified that the Respondents were *only* asserting *litigation privilege* over the Disputed Category 1 Documents, and were no longer asserting legal advice privilege.³¹

Issues to be determined

27 Three main issues arose in SUM 2052:

(a) First, what would a party need to do in order to assert legal professional privilege over documents that he had been ordered to produce?

(b) Second, in the present case, had the Respondents succeeded in establishing that the Disputed Category 1 Documents were protected by privilege? My analysis of this issue focused on litigation privilege, as this was ultimately the only form of privilege asserted by the Respondents over the Disputed Category 1 Documents.

(c) Third, if the Disputed Category 1 Documents were protected by privilege, had the Respondents waived privilege over these documents?

28 In addition, two procedural issues were relevant to how I dealt with SUM 2052:

³¹ Transcript at p 8 lines 1–8 and p 11 lines 13–19.

- (a) whether the Respondents should be granted permission for Wilson to file a further affidavit; and
- (b) whether the court should inspect the Disputed Category 1 Documents under s 164(3) of the Evidence Act 1893 (2020 Rev Ed) (“the EA”).

Preliminary issue: Should the Respondents be granted permission to file a further affidavit?

29 I deal first with the preliminary issue of whether the Respondents should have been granted permission for Wilson to file a further affidavit in response to SUM 2052.

30 The starting point in this regard is O 3 r 5 of the ROC 2021, which provides that an application to the court in an action must be supported by an affidavit (O 3 r 5(1)), and any party who wishes to contest the application must file and serve an affidavit in opposition to the application (O 3 r 5(5)). These affidavits “must contain all necessary evidence in support of or in opposition (as the case may be) to the application” (O 3 r 5(7)). Order 3 r 5(6) provides that, except in a “special case”, the court will not allow any further affidavits to be filed after this initial round of affidavits from each party.

31 Where an applicant seeks permission to file a further affidavit in reply to the respondent’s affidavit, the fact that new issues are raised in the respondent’s affidavit may constitute a special case if those issues *could not reasonably have been within the applicant’s contemplation* when he filed his affidavit in support of his application: see *CZD v CZE* [2023] 5 SLR 806 (“*CZD*”) at [21]. Where it is the *respondent* who seeks permission to file a further affidavit in opposition to the application, it would in my view be

extremely difficult to surmount this threshold, given that the respondent would have been served with the applicant's supporting affidavit 14 days before his own affidavit was due to be filed, and as such would ordinarily have had ample opportunity to respond to the issues raised in the applicant's affidavit in his affidavit in response to the application. While I would not go so far as to say that a party in the position of a respondent will *never* be able to establish a special case for the purposes of O 3 r 5(6) of the ROC 2021, it seems to me that such a party would need to be able to point to truly exceptional circumstances in order to show that this is indeed a special case.

32 In my view, the Respondents fell far short of establishing a special case.

33 First, the Respondents were well aware of the issues in dispute in SUM 2052 at the time their affidavit in response to SUM 2052 was filed on 30 July 2025. The issue of whether the Disputed Category 1 Documents were privileged was raised by the Respondents in their Possession/Control Affidavits, the first of which was filed by Wilson on 3 June 2025. AIL's RCC Statement was made on 16 July 2025. Wesley's affidavit in support of SUM 2052 – which was filed on 23 July 2025 – set out AIL's RCC Statement and expressly stated Wesley's position that this did not justify the Respondents' assertion of privilege over the Disputed Category 1 Documents.³² By the time the Respondents' response affidavit was filed on 30 July 2025, the basis for SUM 2052 had been plainly stated in Wesley's supporting affidavit. Furthermore, given that it was the Respondents who wished to assert privilege over the Disputed Category 1 Documents, the facts and evidence that they would have needed to rely on in opposition to SUM 2052 were well within their contemplation, and they had ample opportunity to raise them in their response

³² Wesley's Supporting Affidavit at paras 14, 18 and 22.

affidavit. I did not see why the Respondents should be permitted to supplement their affidavit evidence at this late juncture, and I agreed with RTS’s submission that this was an attempt to have a second bite of the cherry.

34 Second, I was unable to agree with AIL’s suggestion that the fact that SUM 2052 involved an assertion of privilege made this an “extraordinary” or special case, or with AIL’s submission that a solicitor’s explanation of why certain documents were privileged would justify the filing of a further affidavit.³³ In my view, there was no principled reason why the court should adopt a different or more liberal approach to requests for permission to file further affidavits simply because the application required the court to determine whether or not certain documents were protected by privilege. If anything, the importance of legal professional privilege to a party’s interests made it all the more crucial for his lawyers to ensure that all the evidence that he wished to rely on was placed before the court in his *initial* affidavit, instead of adopting the kind of “wait-and-see approach” of which the court in *CZD* took a dim view (see *CZD* at [21]).

35 Third, the intended scope of the Respondents’ further affidavit reinforced my view that this was not a special case. In AIL’s letter to the court on the day of the hearing, AIL stated that the further affidavit was intended to “confirm and regularise” AIL’s RCC Statement, and to ensure that the court had “all of the relevant information” before proceeding with the hearing of SUM 2052. When I questioned AIL on what the Respondents’ further affidavit was intended to contain, AIL initially said that they wished to state on affidavit the exact wording of their statement to the court at the RCC on 16 July 2025, and also elucidate the basis on which the Respondents were asserting privilege

³³ Transcript at p 5 lines 12–30.

(such as the details of how they came to be copied in the Disputed Category 1 Documents). However, after hearing RTS's objections to the filing of any further affidavit, AIL confirmed that all that the further affidavit was intended to contain was AIL's RCC Statement as it was set out in Wesley's supporting affidavit – the accuracy of which AIL was not disputing – together with words to the effect of “by virtue thereof, [the Respondents] are claiming litigation privilege”.³⁴

36 I found the Respondents' request to file such a further affidavit rather puzzling. Putting aside the fact that an affidavit setting out the exact wording of AIL's statement at the RCC ought to be made by AIL, and not by Wilson, it was wholly unclear to me why it would be necessary or helpful for a further affidavit to be filed setting out a *statement made by counsel at a hearing* about the basis for their client's assertion of privilege, where the contents of that statement were not in dispute, and where the basis for asserting privilege *itself* (here, the fact that counsel were copied into the relevant correspondence) – rather than *what AIL said* at the RCC about what that basis was – ought to have been set out in the Respondents' response affidavit.

37 Ultimately, it was not necessary for me to rule on the Respondents' request for permission to file a further affidavit because, after both parties' positions on the request were ventilated at the start of the hearing, both AIL and RTS confirmed that they were happy to proceed with the hearing of SUM 2052 on the basis of the material currently in evidence – including AIL's RCC Statement, as set out in Wesley's supporting affidavit – and that AIL no longer

³⁴ Transcript at p 2 line 15 to p 4 line 21, p 7 line 2 to p 8 line 30 and p 10 lines 2–9.

wished to file a further affidavit.³⁵ However, for the reasons I have explained above, I would have refused to grant such permission in any event.

Issue 1: What would a party need to do to assert privilege over documents he has been ordered to produce?

38 I turn to the first substantive issue, which was what a party would need to do in order to assert legal professional privilege over documents that he has been ordered to produce under O 11 of the ROC 2021. This issue arose because of the Respondents’ position that their assertions of privilege over the Disputed Category 1 Documents in their Possession/Control Affidavits were conclusive, and that it was sufficient to rely on the circumstances of this case to establish litigation privilege.³⁶

39 I begin with the legal principles that govern the assertion of privilege. The legal burden lies on the party asserting privilege to prove that the preconditions for privilege to subsist are present, and such a party must at least make out a *prima facie* case: see *ARX v Comptroller of Income Tax* [2016] 5 SLR 590 (“*ARX*”) at [50] and *Cachet Multi Strategy Fund SPC (on behalf of Cachet Special Opportunities SP) v Feng Shi and others* [2024] SGHC 327 (“*Cachet*”) at [30]. It is not enough for a party to merely assert that all known adverse documents in his possession are subject to privilege; “[h]e has to support that assertion, even if only on a *prima facie* basis”, and if he does not wish to disclose some of the documents requested, “he bears the legal burden of identifying documents or classes of documents which are privileged and explaining why they are privileged”: see *Cachet* at [35]. If the party asserting privilege successfully discharges this legal burden, then the

³⁵ Transcript at p 10 lines 11–25 and p 24 lines 14–18.

³⁶ Transcript at p 13 lines 21–24.

tactical burden shifts to the requesting party (*Cachet* at [30]) to adduce material to rebut this *prima facie* case (see *ARX* at [50]; see also *Singapore Civil Procedure 2024* (Cavinder Bull SC gen ed) (Sweet & Maxwell, 2024) at para 11/5/7). Thus, in so far as the Respondents took the position in their response affidavit (see [20] above) and their written submissions³⁷ that it was not necessary for them to prove that the documents were privileged, this did not appear to be correct as a matter of law.

40 What, then, must the party asserting privilege do in order to show on a *prima facie* basis that the preconditions for privilege to subsist are present? As the authorities may appear not to speak entirely with one voice on this issue, I consider the cases in turn before setting out a distillation of the applicable principles. In my view, three distinct questions arise here:

- (a) first, whether an affidavit is *necessary* to assert privilege;
- (b) second, what an affidavit asserting privilege should *contain*; and
- (c) third, what *weight* should be given to an assertion of privilege on affidavit.

Is an affidavit necessary to assert privilege?

41 I deal relatively briefly with the first question. The short answer to this is that, while the filing of an affidavit is not a prerequisite for asserting privilege, an affidavit setting out the claim of privilege will need to be filed in most if not all cases where the production of documents is resisted on the ground of privilege under the ROC 2021. I pause briefly to note that the latter point did not appear to be seriously disputed, given that the Respondents had in fact filed

³⁷ RWS at para 15.

an affidavit in response to SUM 2052; the more pertinent issue was the sufficiency of the *contents* of that affidavit, which is the second question I will address. However, the Respondents’ arguments on this first question provided an opportunity to consider the interaction between the pre-ROC 2021 authorities and the provisions in the ROC 2021 on affidavits in applications in an action.

42 AIL relied on the decision of the High Court in *United Overseas Bank Ltd v Lippo Marina Collection Pte Ltd and others* [2018] 4 SLR 391 (“*Lippo*”) for the proposition that privilege could be asserted without an affidavit so long as “the circumstances manifest a clear invocation of that privilege”, and that “privilege may be asserted in different ways”, with the essential question being “whether the claim of privilege is expressed clearly in some form, so that the matter can be readily determined by the court” (see *Lippo* at [42]).

43 In *Lippo*, the first defendant sought specific discovery of an affidavit that had been affirmed by the second defendant, on behalf of himself and the third defendant, relating to the nature and extent of the first defendant’s involvement in alleged wrongdoing that was the subject of the plaintiff’s suit. The plaintiff resisted disclosure on the grounds of litigation privilege and/or without prejudice privilege. The second and third defendants – whose solicitors had discharged themselves not long after the discovery application was filed – filed no affidavits and made no appearances or arguments in the discovery application, but appeared to resist disclosure on the ground of litigation privilege: see *Lippo* at [1], [18] and [41].

44 It was in this context that the court in *Lippo* held that the absence of a supporting affidavit by the second and third defendants asserting litigation privilege did not prevent them from asserting such privilege. On the facts of *Lippo*, the second and third defendants were held to have clearly declined the

first defendant's discovery request by means of a letter from their then-solicitors, which stated that the affidavit was subject to litigation privilege, and which had been acknowledged by and annexed to the first defendant's affidavit in support of its discovery application. For these reasons, the court found that the second and third defendants had clearly invoked litigation privilege over the affidavit: see *Lippo* at [41]–[44].

45 But that is not the end of the inquiry. The fact that the absence of an affidavit asserting privilege is *not fatal* to the *assertion* of privilege by a party does not mean that such an affidavit is not needed to support that party's claim that privilege *in fact exists* over the relevant documents. Indeed, in *Lippo* itself, the court went on to consider whether the elements of litigation privilege were fulfilled on the facts: see *Lippo* at [45]–[46]. Where the party claiming privilege fails to file an affidavit to support that claim, that may "leave [him] exposed to having the matter determined only on undisputed facts or on the law": see *Lippo* at [42]. That is the risk that the Respondents, by choosing not to include any of the facts that they wished to rely on to establish privilege in their affidavit in response to SUM 2052 (see [20] above), chose to run in the present case.

46 I add that, in the scheme of the ROC 2021, there is little if any justification for a party who asserts privilege as a reason for withholding the production of documents not to set out that assertion on affidavit. As I noted at [30] above, O 3 rr 5(5) and 5(7) of the ROC 2021 provide that any party who wishes to contest an application in an action must file and serve an affidavit in opposition to the application, which must contain "all necessary evidence ... in opposition ... to the application". Order 3 r 5(5) is a new provision that has no equivalent in the Rules of Court (2014 Rev Ed) ("ROC 2014"), while O 3 r 5(7) has no equivalent in the ROC 2014 that applied generally to applications in an action – O 14 r 2(8) of the ROC 2014 applied only to applications for summary

judgment (see *Singapore Rules of Court: A Practice Guide* (Chua Lee Ming editor-in-chief; Paul Quan gen ed) (Academy Publishing, 2023) at para 03.013). A party who wishes to rely on privilege to resist the production of documents will therefore be expected to say so, and set out “all necessary evidence”, in his affidavit in response to the production application.

What should an affidavit asserting privilege contain?

47 This brings me to the second question, which is what such an affidavit asserting privilege should contain. At the outset, it is worth reiterating that the party asserting privilege ultimately bears the legal burden of proving on a *prima facie* basis that the preconditions for privilege are satisfied. The affidavit asserting privilege should therefore assist that party in discharging this burden. The question is *what* that party must state in his affidavit in order to discharge that burden.

The pre-ROC 2021 authorities

48 I start by considering the pre-ROC 2021 authorities on this point, beginning briefly with *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and other appeals* [2007] 2 SLR(R) 367 (“*Skandinaviska*”). In *Skandinaviska*, several banks sought specific discovery of, among other things, draft reports that had been prepared by Pricewaterhouse Coopers (“the Draft Reports”). The Court of Appeal agreed with the judge below that the Draft Reports were protected by both legal advice privilege and litigation privilege. The court started from the premise that “a mere assertion of privilege is not sufficient to found privilege” and that it had to “examine all the evidence before [it]”, but was ultimately satisfied that the judge’s findings that the requirements of litigation privilege

and legal advice privilege had been met were supported by the facts and evidence in this case: see *Skandinaviska* at [81], [84] and [98]–[99].

49 I turn to *ARX*. There, the Comptroller of Income Tax had commenced suit against a company (“*ARX*”) and its subsidiary to seek recovery of tax refunds that the Comptroller had paid to *ARX*’s subsidiary, as the Comptroller had concluded that the corporate restructuring and financing arrangement (“the Arrangement”) adopted by *ARX* and its subsidiary were a tax avoidance arrangement. The Comptroller had obtained advice from lawyers from its in-house legal department (“the Advice”), and the issue before the Court of Appeal was whether the Comptroller should be compelled to produce the Advice, or whether the Advice was protected by legal professional privilege. For privilege to be established in respect of communications with in-house legal counsel, three requirements had to be satisfied: (a) the Advice had to have been rendered by a legal professional; (b) the legal professional had to have been acting *qua* legal adviser when he provided the Advice; and (c) the communications had to have been made in confidence (see *ARX* at [25]–[29] and [43]).

50 Two affidavits filed on the Comptroller’s behalf were relevant to the issue of privilege:

- (a) First, an affidavit filed *before* *ARX*’s application for the production of the Advice, which had stated (among other things) that after receiving and considering advice from the Law Division of the Inland Revenue Authority of Singapore (“the Law Division”), the Comptroller had concluded that the Arrangement was a tax avoidance arrangement, but that “this should not be taken or construed in any way as a waiver of privilege” (“Ms Ng’s 2nd Affidavit”) (see *ARX* at [10]–[11]).

(b) Second, a later affidavit filed in reply to a *separate* application taken out by ARX’s subsidiary seeking discovery of the Advice, which stated (among other things) that “[t]he Law Division comprises in-house legal officers whose work is concerned with providing independent legal input and advice and dealing with legal issues on a confidential basis” (“Ms Ng’s 9th Affidavit”) (see *ARX* at [49]).

51 ARX submitted that the Comptroller had not discharged its legal burden of proving that the three requirements for privilege were satisfied because the Comptroller had not adduced any *positive* evidence either of the confidential nature of the communications or of the independence of the lawyers who rendered the Advice. The Court of Appeal disagreed with that submission. On the facts, it was clear that the Comptroller had approached the Law Division for legal advice, and this – coupled with the assertion in Ms Ng’s 2nd Affidavit that privilege subsisted in the Advice and had not been waived – sufficed to present a *prima facie* case that the Advice was privileged. ARX had not adduced any material to rebut this *prima facie* case; it had not said that the officers from the Law Division might not have been acting in their capacity as professional legal advisers in rendering the Advice, or that the Advice had not been communicated confidentially. The court further held that, if ARX’s complaint was simply that there were no *specific averments* in the affidavit filed on the Comptroller’s behalf that the communications were “confidential” and that the Law Division was “independent”, “the objection was not so much one of substance as it was about form and [the court] would reject it” (see *ARX* at [43], [48] and [50]). Having said that, however, the court opined that “more could perhaps have been done” by the Comptroller, and accepted that “a paragraph such as that which was found in Ms Ng’s 9th Affidavit [as quoted at [50(b)] above]) should have been included in her 2nd Affidavit”, though the court “preferred to take a

broader view of things in this case and accepted that the requirements for the assertion of privilege were satisfied”.

52 In arriving at these conclusions, the Court of Appeal also referred to the decision of the Supreme Court of Victoria (delivered by Gillard J) in *Australian Hospital Care (Pindari) Pty Ltd v Duggan (No 2)* [1999] VSC 131 (“*Australian Hospital Care*”), where it was held that the party asserting privilege could discharge its burden – at least in the first instance – by affirming an affidavit in which privilege was asserted, because the assertion of privilege implied also the assertion that the requirements for privilege to subsist had been satisfied. In *Australian Hospital Care*, the question was whether privilege attached to documents produced by in-house counsel, which required the party asserting privilege to prove that two requirements had been satisfied: first, that the communications had been made confidentially; and second, that the legal adviser had exercised independent judgment in rendering the advice. Gillard J held that there was no need for the party asserting privilege to include a specific averment that the legal advisor was acting “independently”, since “the law did not require a ritual of formalities” (see *ARX* at [44]–[45]).

53 When the decision in *ARX* is read more closely, I do not think it supports the Respondents’ position that an affidavit asserting privilege is conclusive, or that it stands for the proposition that the party asserting privilege can discharge his legal burden simply by setting out a bare assertion of privilege in his affidavit. It bears emphasis that both *ARX* and *Australian Hospital Care* involved documents that had been produced by in-house legal counsel. Those facts, if undisputed, would themselves have gone towards establishing a *prima facie* case that the documents were privileged. Even then, the Court of Appeal in *ARX* took the view that the Comptroller *should* have included, in its earlier affidavit, statements explaining that the Law Division’s work concerned the

provision of independent legal advice on a confidential basis. Where the factual basis on which privilege is asserted is *not* already apparent from the undisputed facts and the description of the relevant documents, it would be all the more important for the party asserting privilege to ensure that that factual basis is stated on affidavit.

The authorities under the ROC 2021

54 I turn to the authorities under the ROC 2021 touching on this issue, starting with the decision of the General Division of the High Court in *Lutfi Salim bin Talib and another v British and Malayan Trustees Ltd* [2024] 5 SLR 86 (“*Lutfi*”), which the Respondents relied on to support their submission that their Possession/Control Affidavits were conclusive.

55 In *Lutfi*, the court held that for the purposes of deciding a specific production application under O 11 r 3(1) of the ROC 2021, a respondent’s opposing affidavit – and any subsequent affidavits filed in response to a previous order under O 11 rr 3(1) or 3(2) – are “generally conclusive subject to exceptions”, and the court should not go behind the affidavits unless it is *plain and obvious* from the documents that have been produced, the respondent’s affidavits or pleadings, or some other objective evidence before the court, that the requested documents (a) must exist or have existed; (b) must be or have been in the respondent’s possession or control; or (c) are not protected from production (see *Lutfi* at [22] and [32]).

56 I will return to *Lutfi* when considering the third question, which is what weight should be given to an assertion of privilege on affidavit. For present purposes, the question is what the implications of the “plain and obvious” test for the conclusiveness of an affidavit filed to resist production are, in terms of

what such an affidavit would first need to *contain*. That question was considered by the General Division of the High Court in *Wuhu Ruyi Xinbo Investment Partnership (Ltd Partnership) v Shandong Ruyi Technology Group Co, Ltd and another* [2024] SGHC 308 (“*Wuhu*”).

57 In *Wuhu*, Wuhu Ruyi Xinbo Investment Partnership (Ltd Partnership) (“Xinbo”) had been ordered to produce certain documents. The party that had applied for production, European Topsoho S.à.r.l. (“ETS”), contended that the documents produced by Wuhu were incomplete, and applied for an unless order to secure Xinbo’s full compliance with the production order, failing which (among other things) Xinbo’s application for permission to enforce an arbitral award would be dismissed. The unless order was made. Xinbo subsequently filed a further supplementary list of documents, and Xinbo’s representative deposed an affidavit stating that it had produced all documents in its possession or control that were responsive to the categories of documents covered by the production order, and explaining that Xinbo had no further documents in its possession or control responsive to any of the categories in the production order. ETS then applied to enforce the unless order. At first instance, an assistant registrar held that Xinbo had breached the unless order and that the stated sanctions in the unless order should take effect. This decision was affirmed on appeal by S Mohan J.

58 Mohan J explained that a party against whom a specific production order was made had two distinct and independent obligations: (a) first, to produce the document or state on affidavit that it was unable to do so for some reason; *and* (b) if it was unable to do so, explain why that was so. *Both* of these obligations had to be complied with – in letter and substance – before a party could be said to have complied with its obligations under the order for production. Consequently, a party’s assertion that he had complied with his production

obligations by itself only satisfied one half of his obligations; the separate obligation to provide a satisfactory account “acts as a counterweight against attempts at abusing the conclusiveness of an affidavit filed in response to a document production application or order”, because the party relying on the “plain and obvious” test “cannot simply make bald and unsubstantiated assertions that it has complied with its production obligations” (see *Wuhu* at [75]–[76]). On appeal, the Court of Appeal agreed with Mohan J’s analysis on this point, and observed that “[i]mplicit in any order for production is a corresponding obligation for a party to provide an *adequate explanation* if it claims not to possess or control the requested documents. Otherwise, it would be far too easy for parties to make bare and unsubstantiated assertions that they do not possess or control the requested documents” [emphasis in original]: see *Wuhu Ruyi Xinbo Investment Partnership (Ltd Partnership) v European Topsoho Sàrl* [2025] SGCA 32 at [26] and [28].

59 Mohan J also referred to the decision of the English Court of Appeal in *Gardner and another v Irvin and another* (1878) 4 Ex D 49 (“*Gardner*”), where a discovery order had been made against the defendants and they resisted discovery by asserting privilege over the documents in question. Brett LJ opined that the defendants “ought to verify on oath the facts on which they claim the privilege”, and that their affidavit was “clearly insufficient” because such facts had been “wholly omitted” (see *Gardner* at 52). Cotton LJ elaborated on the point further, as follows (see *Gardner* at 53):

... [T]he plaintiffs have a right to call upon the defendants to file a better affidavit. How can it be said that this affidavit is sufficient; in the body of the affidavit the defendants simply say “that the same are privileged,” and in the schedule they set out the documents, some of which clearly are not privileged. *They ought to say not only that the documents are privileged, which is a statement of law, but they ought to set out the facts from which we can see that the defendants’ view of the law is right.* ...

An affidavit in answer to an application for discovery must be construed strictly, because the other side cannot adduce evidence to contradict it. *The person seeking discovery is bound by the affidavit made by his opponent, and therefore it ought to be full.* It is not sufficient for the affidavits to say that the letters are a correspondence between a client and his solicitor, the letters must be professional communications of a confidential character for the purpose of getting legal advice. ...

[emphasis added]

60 Thus, as Mohan J noted, “it is *precisely because* the court accords a measure of deference to a party’s affidavit and generally treats it as conclusive that it is incumbent on that party to supply sufficient particulars” [emphasis in original] (see *Wuhu* at [79]).

61 Mohan J went on to lay down “some general expectations as to affidavits filed in compliance with a party’s document production obligations”, which Mohan J observed were “matters that would (or should) occur to any party who approaches its document production obligations in good faith and a dose of common sense”. I summarise these as follows (see *Wuhu* at [81]–[86]):

- (a) The affidavit should address *all* documents that the production order relates to (or should address a particular disputed category of documents in its *entirety*), and not merely a subset of the documents.
- (b) The court would expect “some particularity in terms of a party’s explanation”.
- (c) If there is an “obvious follow-on question” to what a party has put on affidavit, that would be “a fair indication that that question should be proactively addressed, so as to complete the explanation, as opposed to leaving the point hanging”.

(d) The affidavit “should not be framed in equivocal terms that allow prevarication”. Thus, if a party does not produce a document on the basis that it is not in his possession or control, he should commit to that position (after taking all proper means to acquire the documents or information on them) and cannot ordinarily state that he is “unsure” or “not certain” if the document is in his possession or control.

62 Finally, notwithstanding the safeguard of requiring a proper explanation in the affidavit of a party who does not produce a document that it has been ordered to produce, Mohan J expressed the view that there was “a fair argument that the courts ought to apply greater scrutiny to explanations under the ROC 2021, as the ‘plain and obvious’ test is more susceptible to abuse than the ‘reasonable suspicion’ test” (see *Wuhu* at [87]).

63 It should be noted that the central issue in *Wuhu* was not whether Xinbo should be compelled to produce certain documents, but rather whether Xinbo had failed to fully comply with the production order such that it had breached the unless order made against it. Nevertheless, I respectfully suggest that the principles and general expectations set out by Mohan J, in relation to the sufficiency of the contents of affidavits filed to discharge a party’s production obligations, should also apply where the court is called upon to determine whether documents may properly be withheld from production on the ground of privilege.

64 Indeed, the case for such an approach to be taken is even stronger where production is resisted on the ground of privilege than where production is resisted on the ground that the documents do not exist or are not in the respondent’s possession or control. In the latter situations, there is a logical limit to how much a respondent can state on affidavit, given that proving these

assertions requires the respondent to prove a negative. In contrast, where documents are withheld on the ground of privilege, the party asserting privilege is making a *positive assertion* that the documents – which do exist and which are within his possession or control – are protected from production because the preconditions for a particular head of privilege to subsist are satisfied on the facts. Such a party should be expected to provide adequate substantiation for that assertion if he wishes for the court to accept it.

65 In my view, where the court is being asked to determine whether or not privilege has been properly asserted over documents that would otherwise need to be produced, the party asserting privilege must have placed before the court *sufficient facts and evidence to support its claim that the preconditions for the relevant head of privilege are met* – at least on a *prima facie* basis, and albeit without disclosing the allegedly privileged material itself. I draw support for this not only from *Wuhu* and *Gardner*, but also from the following views expressed in Colin Liew, *Legal Professional Privilege* (Academy Publishing, 2nd Ed, 2023) (“*Colin Liew*”) at paras 3.98 and 3.100–3.103, with which I respectfully agree:

... An assertion that a communication or document is protected by legal professional privilege will almost certainly have to be supported by *evidence*, typically by way of an affidavit, *that the substantive requirements of the head of legal professional privilege in question (or perhaps both) have been satisfied*.

...

... [A]ffidavits claiming privilege should be “*specific enough to show something of the deponent's analysis of the documents or, in the case of a claim to litigation privilege, the purpose for which they were created*”, and it is desirable that they should refer to such contemporary material as is possible without disclosing the very materials for which privilege is claimed.

...

Thus, it would be good practice for the affidavit to state clearly which head of legal professional privilege is being relied upon.

If legal advice privilege, the confidential character of the advice should be explained, together with an identification of who gave the advice and to whom it was given, and the context in which it was given and its purpose. As for litigation privilege, it should similarly be shown that the creation of the communication was for the dominant purpose of use in or in connection with actual or pending litigation.

[emphasis added]

66 The inclusion of these particulars is necessary in order for the requesting party to have a fair and meaningful opportunity to argue that the facts do *not* establish privilege (in order to discharge its tactical burden), and in order for the court to fairly decide the dispute based on the factual and legal material before it. And while a party's failure to include these particulars in his affidavit may not necessarily be fatal to his assertion of privilege, such a party would be far less likely to be able to discharge his legal burden of proving that assertion – even on a *prima facie* basis – unless he is able to persuade the court that the undisputed facts themselves provide sufficient basis upon which to conclude that privilege is indeed established.

What weight should be given to an assertion of privilege on affidavit?

67 After the party asserting privilege has set out on affidavit the facts on which he wishes to rely to establish privilege, the court will generally regard this statement of facts as conclusive, and should not go behind the affidavits unless it is plain and obvious – from the documents that have been produced, that party's affidavits or pleadings, or some other objective evidence before the court – that the requested documents are not protected from production. This is because, at this interlocutory stage of the proceedings, “the court cannot resolve a dispute as to the sufficiency of affidavits relating to production of documents based on contentious affidavits”, and “[l]ogic and principle require a high threshold to be met before the court can go behind the affidavits relating to

production of documents”: see *Lutfi* at [32] and [33]. For the reasons explained at [47]–[66] above, I do not think this means that a bare assertion on affidavit that the requested documents are privileged will be regarded as conclusive in determining whether the documents are indeed privileged; but, if the party asserting privilege has set out the factual basis for that assertion in his affidavit, the court will accept those statements on affidavit as *prima facie* evidence of how the preconditions for privilege to subsist are satisfied in the case at hand, unless it is plain and obvious that the documents are not protected by privilege.

Summary of the relevant principles

68 I conclude this section of the analysis with a summary and synthesis of the principles that seem to me to apply where a party seeks to resist the production of documents on the ground of privilege:

(a) Where the production of documents has been applied for or ordered, and a party seeks to withhold those documents on the ground that they are privileged, he should state in his response affidavit that he is resisting production on this ground, and identify the relevant head of privilege. Ideally, privilege should be raised in response to the application for production itself – had the Respondents raised privilege in their response to SUM 898, this would have spared the parties the time and costs occasioned by SUM 2052.

(b) The party asserting privilege bears the legal burden of proving, at least on a *prima facie* basis, that the preconditions for privilege to subsist are present in respect of the documents over which privilege is asserted.

(c) To discharge that burden, the party asserting privilege must place before the court sufficient facts and evidence to support its claim that the preconditions for the relevant head of privilege are met – at least on a *prima facie* basis, and albeit without disclosing the allegedly privileged material itself. Where the party asserting privilege has chosen not to depose those facts on affidavit, he will need to try to persuade the court that there is sufficient basis, on the undisputed facts, for the court to accept that privilege is established.

(d) If the party asserting privilege succeeds in discharging his legal burden, the tactical burden shifts to the party seeking production to adduce material to rebut this *prima facie* case. It may do so by arguing that the facts put forward by the party asserting privilege do not support the claim of privilege, or by putting forth other facts that contradict or undermine the factual basis on which privilege is asserted. However, the statement of facts on affidavit by the party asserting privilege will generally be conclusive, unless it is plain and obvious that this is erroneous or incomplete, or that the documents are for some other reason not protected by privilege.

Issue 2: Had the Respondents established that the Disputed Category 1 Documents were protected by privilege?

69 I now turn to the second substantive issue: whether the Respondents had succeeded in establishing that the Disputed Category 1 Documents were protected by privilege, and specifically litigation privilege.

70 In my view, what the Respondents did to assert privilege in the present case fell far short of what was expected. The Respondents' Possession/Control Affidavits contained only a bare assertion that the Disputed Category 1

Documents were “protected by legal advice and/or litigation privilege” (see [15]–[16] and [19] above). The Respondents’ affidavit in response to SUM 2052 contained no further facts and evidence to support their claim that the preconditions for the head(s) of privilege they wished to rely on were met, even on a *prima facie* basis; indeed, in that affidavit, the Respondents expressly took the position that it was *not necessary* for them to “take any additional step ... to clarify the scope of the production of” the allegedly privileged documents, or “to substantiate or prove that the documents are privileged” (see [20] above).

71 The factual basis for the Respondents’ assertion of privilege – which was essentially that their solicitors had been copied in all of the correspondence and communications constituting the Disputed Category 1 Documents – was stated for the first time at the RCC (see [18] above), and thereafter only in the Respondents’ written submissions for SUM 2052 (see [21] above). Even then, it was unclear until the hearing of SUM 2052 that these “solicitors” referred to AIL – a point that was not obvious because, while AIL had been acting as Wilson’s solicitors in the Suit since 30 January 2024,³⁸ the Disputed Category 1 Documents dated from 4 October 2022 to 8 April 2024. The omission of these particulars from the Respondents’ affidavit in response to SUM 2052 was all the more puzzling because AIL had referred to the fact that the solicitors had been copied into the relevant correspondence at the RCC on 16 July 2025 – one week before SUM 2052 was filed on 23 July 2025, and two weeks before the Respondents’ response affidavit was due on 30 July 2025.

72 Thus, by the time the Respondents’ response affidavit was filed, it would have been abundantly clear to the Respondents that Wesley’s position was that the facts referred to in AIL’s RCC Statement did not justify their belated and

³⁸ Notice of Appointment of Solicitor in HC/OC 45/2024 dated 30 January 2024.

bare assertion of privilege.³⁹ Yet, the Respondents chose not to offer *any* material in their response affidavit to support their claim that the preconditions for privilege to subsist were present in respect of the Disputed Category 1 Documents. All this was made even more unsatisfactory by the fact that it was only at the hearing of SUM 2052 that the Respondents clarified that they were relying only on litigation privilege, and not also on legal advice privilege. While the Respondents did seek permission to file a further affidavit on the day of the hearing of SUM 2052, this request was ultimately not pursued, and I would in any event have refused it for the reasons I have explained at [29]–[37] above.

73 Be that as it may, I will take the Respondents’ factual case at its highest and proceed on the basis that the Respondents’ solicitors were indeed copied in *all* of the written correspondence between the Respondents constituting the Disputed Category 1 Documents, and that this was done “for the purpose of attaining legal advice to ensure that the transfer was done in accordance with the relevant laws, in light of Wesley’s claim in [the Suit]”, as asserted in the Respondents’ written submissions (see [21] above). Even on this approach, however, I was not satisfied that the Respondents had discharged their legal burden of proving, even on a *prima facie* basis, that the preconditions for litigation privilege to subsist were satisfied in the present case.

The applicable law

74 I begin with the legal principles governing litigation privilege. The Singapore courts have accepted that litigation privilege exists by virtue of the common law, and it is well established that two conditions must be satisfied in order for litigation privilege to apply (see *Skandinaviska* at [67]–[77],

³⁹ Wesley’s Supporting Affidavit at paras 18 and 22.

Mykytowych, Pamela Jane v V I P Hotel [2016] 4 SLR 829 (“*Mykytowych*”) at [52] and *Cachet* at [29]):

(a) First, the party claiming such privilege must show that there is a *reasonable prospect of litigation*. There is no requirement that the chances of litigation must be higher than 50%, nor that there must be a virtual certainty of litigation. The question here is whether the party had the prospect of litigation in mind at the relevant time.

(b) Second, the *dominant purpose* for which the advice was sought or obtained, or the communication was made, must have been *for litigation*. Where there is more than one purpose, litigation need not be the *sole* purpose, but must be the *dominant* purpose.

75 These conditions are fundamental to the assertion of litigation privilege because this head of privilege is ultimately concerned with protecting information and materials created and collected for the dominant purpose of litigation. As the Court of Appeal explained in *Mykytowych* at [51], the rationale of litigation privilege is “to allow a party to maintain the confidentiality of his strategy in litigation and the preparation of his case”, and it is thus “linked to the nature of the adversarial process and the autonomy of a party to prepare and draw up strategies for his case as he sees fit, free from prying eyes”. In contrast, legal advice privilege is the head of privilege concerned with protecting confidential communications between lawyers and clients. It is for these reasons that litigation privilege, in contrast to legal advice privilege, applies to every communication – whether confidential or otherwise – so long as it is for the purpose of litigation, and also applies to communications from third parties, whether or not they were made as an agent of the party. Thus, although litigation privilege may overlap with legal advice privilege, and the same facts will often

give rise to both forms of privilege, they have different functions and remain conceptually distinct: see *Skandinaviska* at [23] and [44].

76 Given the potentially far-reaching scope of the communications that might be said to be protected by litigation privilege, especially once litigation is pending or contemplated, the key limiting factor is the requirement that the communications must have been made *for the dominant purpose of litigation*. If this requirement is not satisfied, litigation privilege is not established, and the public interest in ensuring that all relevant material should be available to the court in arriving at its decision (on which see [1] above) ought to prevail.

77 Further, in my view, the requirement that the communications were made for the dominant purpose of litigation cannot be met merely by one party's *assertion* that it was so. Ultimately, the court must still be *objectively* satisfied, on the material placed before it, that there is at least a *prima facie* case that the communications were indeed made for the dominant purpose of litigation; and while a statement on affidavit by the party asserting litigation privilege as to the purpose of the relevant communications may be given considerable weight, it will not be determinative. Otherwise, that party could cloak broad swathes of communications with litigation privilege simply by *claiming* that they were all made “for the dominant purpose of litigation”.

My decision

78 With that in mind, I return to the facts of the present case. I was prepared to accept that there was at least a *prima facie* case that the first condition for litigation privilege – that there was a reasonable prospect of litigation at the relevant time – was met. The correspondence and communications comprising the Disputed Category 1 Documents took place from 4 October 2022 to 8 April

2024. Although the Suit was commenced only against Wilson on 23 January 2024, and Kelvin and Jethro were only added as defendants on 3 May 2024, I accepted that litigation might have been a reasonable prospect from as early as 4 October 2022, when the Testator passed away. In this regard, I note that Wesley’s own affidavit of evidence-in-chief (“AEIC”) stated that disputes had arisen between himself and Wilson regarding the division of certain assets following the Testator’s passing, as a result of which they were engaged in discussions “[f]or most of October 2022 and early November 2022”.⁴⁰ Given that Kelvin and Jethro each held 50% of the Jaya Asri Shares, litigation involving them could also be said to have been a reasonable prospect from this time.

79 However, in my judgment, the Respondents had failed to establish that the second condition for litigation privilege – that the dominant purpose of the Disputed Category 1 Documents was for litigation – was satisfied.

80 The Respondents submitted that, because the Disputed Category 1 Documents comprised correspondence that was copied to AIL after the Suit had been commenced (on 23 January 2024) and after AIL had been instructed to act for Wilson, and that correspondence dealt with the Jaya Asri Shares and their transfer (on or around 8 April 2024) which formed the subject of the Suit, the Disputed Category 1 Documents were for the dominant purpose of litigation and were protected by litigation privilege.⁴¹ However, based on the material placed before me, I was not persuaded that the Disputed Category 1 Documents were indeed for the dominant purpose of litigation, and I did not think that the

⁴⁰ Claimant’s Affidavit of Evidence-in-Chief dated 21 February 2025 (“Wesley’s AEIC”) at paras 70–71.

⁴¹ Transcript at p 13 lines 5–13, p 20 lines 10–14 and p 24 lines 1–10.

mere fact that AIL was copied in the Disputed Category 1 Documents made them so. I now elaborate on these points.

81 The Disputed Category 1 Documents comprised correspondence and communications between or among Wilson, Kelvin and/or Jethro regarding the Jaya Asri Shares and/or Kelvin and Jethro’s transfer of the Jaya Asri Shares to the Crawford Trust on Wilson’s instructions. While the Jaya Asri Shares were the subject of Wesley’s claims in the Suit, it did not follow that any and all correspondence or communications about them after the commencement of the Suit would automatically have been made for the dominant purpose of the Suit. Such correspondence or communications would likely have been highly *relevant* to the Suit, but that was very different from saying that the Suit was the dominant reason for their creation.

82 At the hearing, AIL referred me to certain paragraphs of the Respondents’ AEICs that, they said, set out the facts in relation to “what really transpired” in respect of the Disputed Category 1 Documents at the material time and showed that these were made for the dominant purpose of litigation.⁴² But those paragraphs of the Respondents’ AEICs did not assist them. Indeed, Jethro’s AEIC stated that he was “not aware of any disputes which had arisen between Wilson and Wesley” at the time he transferred his portion of the Jaya Asri Shares to Crawford Trust,⁴³ while Kelvin’s AEIC stated that he “did not hear of any issues or disputes in relation to the split of assets that related to Jaya Asri, as nobody had informed [him] of any”.⁴⁴ Wilson’s AEIC similarly stated that Kelvin and Jethro were “not aware of the subject matter of the dispute

⁴² Transcript at p 23 lines 18–22.

⁴³ Jethro’s AEIC at paras 41–42.

⁴⁴ Kelvin’s AEIC at para 36.

between Wesley and [Wilson]”, and also explained that his instructions regarding the transfer of the Jaya Asri Shares were given as part of his “preparations for the Jaya Asri Shares to be subsumed and incorporated into the WS Fund”, which he had started making because Wesley had not made any proposal regarding the transfer of the Jaya Asri Shares to him in exchange for returning certain sums to the WS Fund.⁴⁵ Thus, the relevant paragraphs of the Respondents’ AEICs did not support the Respondents’ position that their correspondence and communications regarding the Jaya Asri Shares at the material time were made *for the purpose of the Suit*, or any other litigation.

83 The Respondents then sought to argue that the fact that their solicitors were *copied* in the Disputed Category 1 Documents made a crucial difference to the analysis. Indeed, at the hearing, AIL submitted that it would have been “fundamentally different” if solicitors had not been involved, and that if the communications had taken place without the involvement of solicitors, they would have been discoverable; it was the “[m]ere fact that [the] solicitors were copied into the communications and made privy to what was discussed”, where those communications “required [their] scrutiny and attention”, that resulted in these communications being protected by litigation privilege.⁴⁶

84 I disagreed. The fact that AIL was copied in the relevant correspondence and communications could not, without more, establish that that correspondence and those communications were made for the dominant purpose of litigation. If that were so, a party against whom litigation was pending or imminent would easily be able to withhold any material that he did not wish to

⁴⁵ Wilson’s AEIC at paras 201–202 and 204.

⁴⁶ Transcript at p 25 lines 16–22 and p 26 lines 9–29.

disclose – and which might be highly relevant to the determination of the dispute – simply by copying his solicitors into the relevant correspondence.

85 Further, the Respondents’ written submissions stated that AIL had been copied in the Disputed Category 1 Documents “for the purpose of attaining legal advice *to ensure that the transfer was done in accordance with the relevant laws, in light of Wesley’s claim in HC/OC 45/2024*” [emphasis added] (see [21] above). At the hearing, AIL submitted that the documents had been copied to them “to ensure that everything was in compliance with the law”.⁴⁷ This undermined, rather than supported, the Respondents’ assertion that the Disputed Category 1 Documents were made *for the dominant purpose of litigation* in the Suit. On the contrary, it seemed that the dominant purpose of the Disputed Category 1 Documents was for Wilson to give instructions on the Jaya Asri Shares to Kelvin and Jethro; and it seemed, based on these submissions, that the purpose of *copying AIL* in that correspondence was to ensure that the transfer of the Jaya Asri Shares would be carried out in a legally sound manner, *against the backdrop of* Wesley’s claims in the Suit that Wilson ought to have included the Jaya Asri Shares (which, according to Wesley, Kelvin and Jethro had held on trust for the Testator) in the Testator’s Schedule of Assets. It was only after the transfer of the Jaya Asri Shares to Crawford Trust took place, and after this was discovered by Wesley on or around 15 April 2024,⁴⁸ that Kelvin and Jethro were added as defendants to the Suit, with Wesley amending his pleadings in the Suit to add claims that the transfer had been carried out in breach of trust and/or fiduciary duty.

⁴⁷ Transcript at p 23 lines 16–18.

⁴⁸ Wesley’s AEIC at paras 143–144.

86 Notably, the Respondents did not contend that any of the Disputed Category 1 Documents contained any advice or input from AIL regarding the Suit, the transfer of the Jaya Asri Shares, or how the transfer of the Jaya Asri Shares might come to be relevant to the Suit. At the hearing, AIL suggested that there “could be a whole litany of things discussed in these documents for which [the Respondents were] asserting privilege”,⁴⁹ but without offering any indication of what those things might be or on what specific basis they would be privileged. The Respondents also – somewhat curiously, given their submission that AIL had been copied for the purpose of obtaining legal advice – expressly abandoned any claim that the Disputed Category 1 Documents were protected by legal advice privilege, and sought to assert only litigation privilege.

87 At the hearing, I questioned AIL further about the basis on which the Respondents were asserting privilege over the Disputed Category 1 Documents *as an entire class*. AIL explained that this was because all of the correspondence and communications comprising the Disputed Category 1 Documents had been copied to them.⁵⁰ I note, at this juncture, that the Respondents had initially consented to the production of the Disputed Category 1 Documents as a class (see [14] above), without raising any specific reasons for asserting privilege over any of them. The only reason offered by the Respondents for this abrupt change of position was that they had since reviewed the Disputed Category 1 Documents and discovered that AIL had been copied in them (see [21] above). This strongly suggested that the basis on which the Respondents were now asserting privilege had nothing to do with the *contents* of any or all of the Disputed Category 1 Documents, but instead rested solely on the fact that AIL had been *copied*. As I have explained above, this alone could not suffice.

⁴⁹ Transcript at p 26 lines 4–7.

⁵⁰ Transcript at p 14 line 20 to p 15 line 9.

88 For these reasons, I concluded that the Respondents had not discharged their legal burden of proving, even on a *prima facie* basis, that the preconditions for litigation privilege to subsist were present in respect of the Disputed Category 1 Documents. I arrived at this conclusion even after taking the Respondents' factual case at its highest, and not confining my analysis to the bare assertions of privilege in the Respondents' affidavits. In my view, the facts relied on by the Respondents were simply insufficient to establish litigation privilege. For completeness, I add that even if *Lutfi* had required the assertions of privilege in the Respondents' Possession/Control Affidavits to be generally regarded as conclusive, I would have been satisfied that it was plain and obvious that the material and arguments adduced by the Respondents did not show that the Disputed Category 1 Documents were protected by litigation privilege.

Issue 3: Had the Respondents waived privilege over the Disputed Category 1 Documents?

89 My conclusion on the second substantive issue meant that the third substantive issue – which was whether the Respondents had waived any privilege over the Disputed Category 1 Documents – did not arise for determination. Nevertheless, as both parties made submissions on this issue, I address it briefly.

90 Even if the Disputed Category 1 Documents had been protected by litigation privilege, I would have been inclined to agree with Wesley⁵¹ that the Respondents had impliedly waived such privilege over some if not all of these documents, by stating in their respective AEICs that Wilson had instructed Kelvin and Jethro to sign directors' resolutions to transfer the Jaya Asri Shares

⁵¹ CWS at para 31.

to Crawford Trust on 3 or 5 April 2024.⁵² Indeed, Kelvin and Jethro’s assertion that they reasonably believed that Wilson was the beneficial owner of the Jaya Asri Shares, and were merely following Wilson’s instructions when they transferred the Jaya Asri Shares to Crawford Trust, forms a key plank of their defence to Wesley’s claims against them for breach of trust and/or fiduciary duty (see [11] above). The correspondence and communications regarding those instructions were the very documents Wesley sought the production of in SUM 898 and subsequently SUM 2052, and in my view – applying the principles set out by the Court of Appeal in *ARX* at [69] – “fairness and consistency” would have required their disclosure.

91 However, I would have been hesitant to accept Wesley’s submission that AIL’s confirmation at the hearing of SUM 898 on 5 May 2025 that the Respondents were willing to provide the Disputed Category 1 Documents, without any mention of or qualification for privilege, would have amounted to express or implied waiver.⁵³ In my view, this could not have amounted to a “voluntary, informed and unequivocal election” by the Respondents not to claim privilege or raise an objection based on privilege (see *Rahimah bte Mohd Salim v Public Prosecutor* [2016] 5 SLR 1259 (“*Rahimah*”) at [48]), which Wesley accepted was the test for establishing *express* waiver.⁵⁴ In *Rahimah*, the High Court also endorsed the view that waiver of a right as fundamental as privilege “must be clear and done in complete awareness of the result” (see *Rahimah* at [48]), and I did not think this high threshold was met in the present case.

⁵² 1st Defendant’s Affidavit of Evidence-in-Chief dated 19 February 2025 (“Wilson’s AEIC”) at paras 202 and 204; Kelvin’s AEIC at paras 38–39; and Jethro’s AEIC at paras 41–42.

⁵³ CWS at para 32.

⁵⁴ CWS at para 29(a).

92 I also did not think this act by AIL would have amounted to *implied* waiver. In their submissions in response to SUM 898, the Respondents expressly stated that they were agreeable to the production of the Disputed Category 1 Documents “to the extent that such documents are in their possession or control *and to the extent that such documents are not protected by privilege*” [emphasis added].⁵⁵ There was no doubt a degree of inconsistency in the Respondents’ conduct, in that they initially consented to the production of the Disputed Category 1 Documents subject only to a general caveat for privilege, before subsequently seeking to withhold the *entire* category of Disputed Category 1 Documents on the ground of privilege. However, I did not think this inconsistency occasioned unfairness to Wesley of the sort that would demand disclosure on this ground alone. As the Court of Appeal explained in *ARX*, not all instances of inconsistent conduct will lead to an implied waiver of privilege, as the unfairness that will demand disclosure is “of a very particular sort: it is the unfairness that arises from the inconsistency of the posited act with the subsequent maintenance of privilege that impels a remedy”, such as where a party voluntarily puts privileged material before the court and attempts to rely on the advantageous aspects of that material to advance his case while claiming privilege in respect of the less advantageous aspects of the material for fear that it might damage his case (see *ARX* at [65] and [67]). While AIL’s omission to raise any specific issues of privilege when confirming the Respondents’ willingness to provide the Disputed Category 1 Documents did nothing to strengthen the Respondents’ case on privilege (for the reasons explained at [87] above), I did not think it crossed the threshold for implied waiver.

⁵⁵ Respondents’ Response Affidavit at p 10 (completed summary table in respect of SUM 898, S/N 1, column D).

93 However, as I found that the Respondents had not established that the Disputed Category 1 Documents were protected by litigation privilege to begin with, there was nothing for the Respondents to have waived.

Issue 4: Should the court inspect the Disputed Category 1 Documents?

94 I turn to a final procedural issue. After I had heard both parties' oral submissions on SUM 2052, I asked counsel whether either party was asking me to exercise the court's discretion to inspect the Disputed Category 1 Documents under s 164(3) of the EA, or if either party had any position on whether or not I should do so.⁵⁶ AIL took no position on this,⁵⁷ while RTS submitted that this discretion should not be exercised because the Respondents had failed to show even a *prima facie* case that litigation privilege applied to the Disputed Category 1 Documents; instead, the Respondents should simply be ordered to produce these documents.⁵⁸

95 In *Skandinaviska*, the Court of Appeal observed that one of the "major difficulties" facing the court in situations involving a claim of legal advice privilege or litigation privilege was "the fact that the claim is invariably based on affidavit evidence", and that an inspection by the judge pursuant to s 164 of the EA "would quickly solve the dispute between the parties, thus saving time and money for the parties". Such an approach, the court noted, might be "an effective and practical 'middle ground' which ensures that the claim to legal professional privilege is not abused, hence ensuring that the competing public policy that all available evidence ought to be disclosed is fulfilled to the fullest extent possible" (see *Skandinaviska* at [102]–[103]). Nevertheless, the Court of

⁵⁶ Transcript at p 22 lines 27–31.

⁵⁷ Transcript at p 22 line 33.

⁵⁸ Transcript at p 23 lines 2–7.

Appeal concluded that this discretion should perhaps be conservatively exercised, and ought to be used only in cases where the court “has a real doubt about the claim of the party seeking to resist discovery on the ground of legal professional privilege” (see *Skandinaviska* at [104]).

96 For the reasons explained above, I had more than a real doubt about the Respondents’ claim of litigation privilege over the Disputed Category 1 Documents, based on the material placed before me. However, given that neither party was asking me to exercise this discretion, I did not do so.

97 In any event, there are in my view several reasons why a court faced with a disputed claim of legal professional privilege should decline to inspect the documents over which privilege is asserted – even where inspection is requested by either or both parties, and especially in proceedings governed by the ROC 2021:

- (a) First, there is some doubt over whether s 164 of the EA applies in the context of an interlocutory application like the present. Section 2(1) of the EA provides that Parts 1 to 3 of the EA (within which s 164 is found) do not apply to “affidavits presented to any court or officer”, which may be interpreted (although not without some difficulty) to mean that they do not apply to interlocutory proceedings: see *Lippo* at [40] and the discussion of this issue in *Colin Liew* at paras 2.168 to 2.181. A further difficulty is that, while O 24 r 13(2) of the ROC 2014 provided that the court could inspect a document over which privilege from production was claimed for the purpose of deciding the validity of that claim, the ROC 2021 contains no equivalent provision – a point also noted in *Colin Liew* at para 3.115.

(b) Second, it is for the party asserting privilege to prove, at least on a *prima facie* basis, that the preconditions for privilege to subsist are present in respect of the documents over which privilege is asserted. The party seeking the production of those documents then has an opportunity to attempt to rebut this *prima facie* case, and both parties can make and respond to one another's submissions with reference to the material placed before the court. Where, however, the court inspects the documents and arrives at a determination on whether they are privileged on the basis of that inspection, the party seeking production would not have been given an opportunity to argue the matter fully. This concern was noted by the High Court in *Comptroller of Income Tax v ARW and another (Attorney-General, intervener)* [2017] SGHC 180 at [121].

(c) Third, inspecting the documents over which privilege is asserted would undermine the conclusiveness of affidavits in response to production applications under O 11 r 3 of the ROC 2021 by requiring the court to go behind those affidavits and examine the documents for itself. Such an approach would seem to run counter to the approach set out in *Lutfi*, as discussed at [55] and [67] above.

98 I therefore determined that it would not have been appropriate for me to inspect the Disputed Category 1 Documents for the purposes of deciding whether or not they were protected from production by litigation privilege.

Conclusion

99 For these reasons, I allowed SUM 2052 and directed the Respondents to produce the Disputed Category 1 Documents in compliance with the orders made in SUM 898. As for the timeframe for production, I was not persuaded by AIL's reasons for requesting a period of 14 days instead of the period of seven

days prayed for by Wesley in SUM 2052, and I therefore ordered that the Respondents produce these documents within seven days. In my view, this timeframe struck a fair balance between the interests of both parties.

100 Having heard both parties' submissions on costs, I fixed the costs of SUM 2052 at \$6,500 (all in), to be paid by the Respondents to Wesley. I considered this to be fair and reasonable in all the circumstances of this case.

Wee Yen Jean
Assistant Registrar

Foo Xian Fong and Jodi Siah Be Koen (Rajah & Tann Singapore
LLP) for the claimant;
Tan Hiang Teck Simon and Wong Bao Liang Nikolas (Attorneys Inc
LLC) and Amy Seow (Adroit Law LLC) for the defendants.