IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2024] SGCA 39

Court of Appeal / Civil Appeal No 30 of 2022

Between

(1) Syed Suhail bin Syed Zin
(2) Gobi a/l Avedian
(3) Datchinamurthy a/l Kataiah
(4) Hamzah bin Ibrahim
(5) Iskandar bin Rahmat
(6) Saminathan Selvaraju
(7) Rosman bin Abdullah
(8) Roslan bin Bakar
(9) Masoud Rahimi bin Merzad
(10) Zamri bin Mohd Tahir
(11) Pannir Selvam a/l Pranthaman
(12) Tan Kay Yong
(13) Ramdhan bin Lajis

… *Appellants*

And

Attorney-General

… *Respondent*

JUDGMENT

[Administrative Law — Public authority — Prisons]
[Administrative Law — Administrative powers — Manner of exercise]
[Administrative Law — Remedies— Declaration]
[Confidence — Duty of confidence]

[Confidence — Breach of confidence]
[Confidence — Remedies — Damages]
[Intellectual Property — Copyright]
[Intellectual Property — Copyright — Remedies — Damages]

Syed Suhail bin Syed Zin and others
v
Attorney-General

[2024] SGCA 39

Court of Appeal — Civil Appeal No 30 of 2022
Sundaresh Menon CJ, Steven Chong JCA and Judith Prakash SJ
20 January, 3 May, 2 August 2023, 10 May 2024

11 October 2024 Judgment reserved.

Judith Prakash SJ (delivering the judgment of the court):

1 There is a complicated backstory to this appeal. This appeal in CA/CA 30/2022 ("CA 30") involves thirteen Appellants who have at all material times been prisoners in Changi Prison after having been convicted on various charges brought against them by the Public Prosecutor. The basic complaint underlying the proceedings is that Singapore Prison Services ("SPS") and the Attorney-General's Chambers ("AGC") have breached the Appellants' right to confidentiality under civil law and that the Appellants are entitled to various remedies for the same. In the court below, the Appellants were partially successful but have appealed because they consider that they are entitled to much more in the way of private law remedies.

2 A brief background account is given here. Complaints about the way in which the prison authorities handled correspondence were first made by one

Mr Datchinamurthy a/l Kataiah ("Mr Datchinamurthy") when he was one of the appellants in CA/CA 23/2020 ("CA 23"). He alleged in those proceedings that, on 21 April 2020, the SPS forwarded copies of documents that his family had passed to him in prison to the AGC. The SPS did not dispute these allegations. Thereafter, it was learnt that the AGC had requested information from the SPS on a different occasion, sometime after 2 April 2020, concerning whether Mr Gobi a/l Avedian ("Mr Gobi"), the other appellant in CA 23, and Mr Datchinamurthy had forwarded a minute sheet to their families. In response, and without a specific request from the AGC for these documents, the SPS forwarded copies of the two prisoners' letters to their families to the AGC. The issue of the disclosure of prisoners' documents was dealt with in the judgment delivered by this court in CA 23 (*viz*, *Gobi a/l Avedian and another v Attorney-General and another appeal* [2020] 2 SLR 883 ("*Gobi*"). This court earlier noted in *Gobi* at [88] that although the SPS was authorised to make copies of Mr Gobi's and Mr Datchinamurthy's correspondence *vide* reg 127A(2) of the Prisons Regulations (Cap 247, 2002 Rev Ed) ("the Prisons Regulations"), this authority did not extend to permitting the SPS to forward copies of such correspondence to the AGC.

3 Subsequently, Mr Datchinamurthy, Mr Gobi and eight others started HC/OS 975/2020 ("OS 975") against the Attorney General ("AG") for, among other things, leave to serve interrogatories regarding the passing of correspondence to the AGC by the SPS. The AGC then made voluntary disclosure of all correspondence which it had received from the SPS, and this turned out to be correspondence involving the 13 Appellants in this appeal (see *Syed Suhail bin Syed Zin and others v Attorney-General and another* [2021] 4 SLR 698 ("*Syed Suhail OS 975*") at [43]). That disclosure led to the initiation of the proceedings from which this appeal arises.

The application below in HC/OS 188/2022 ("OS 188")

4 The Appellants are prisoners at Changi Prison Complex. They are in the order their names appear in the court documents:

(a) First Appellant: Mr Syed Suhail bin Syed Zin ("Mr Suhail");

(b) Second Appellant: Mr Gobi;

(c) Third Appellant: Mr Datchinamurthy;

(d) Fourth Appellant: Mr Hamzah bin Ibrahim;

(e) Fifth Appellant: Mr Iskandar bin Rahmat ("Mr Iskandar");

(f) Sixth Appellant: Mr Saminathan Selvaraju ("Mr Saminathan");

(g) Seventh Appellant: Mr Rosman bin Abdullah ("Mr Rosman");

(h) Eighth Appellant: Mr Roslan bin Bakar ("Mr Roslan");

(i) Ninth Appellant: Mr Masoud Rahimi bin Merzad;

(j) Tenth Appellant: Mr Zamri bin Mohd Tahir;

(k) Eleventh Appellant: Mr Pannir Selvam a/l Pranthaman ("Mr Pannir");

(l) Twelth Appellant: Mr Tan Kay Yong ("Mr Tan"); and

(m) Thirteenth Appellant: Mr Ramdhan bin Lajis ("Mr Ramdhan").

The disclosed correspondence

5 It was undisputed in these proceedings that correspondence belonging to the Appellants (totalling 68 individual documents) had been disclosed by the SPS to the AGC. This emerged from affidavits filed by the then Deputy

Attorney General Hri Kumar Nair SC ("DAG Nair") in OS 975. These correspondence falls into various categories as follows: (a) correspondence with various public or governmental agencies (*eg*, letters to the Supreme Court Registry, the Singapore Police Force, to the President of Singapore); (b) correspondence with other organisations such as the Law Society of Singapore and the Malaysian High Commission; (c) correspondence between the Appellants and their counsel; and (d) letters from Mr Suhail to his uncle.

6 In *Gobi*, this court accepted that although the AGC had not properly considered the importance of prisoners' confidentiality when it obtained correspondence from the SPS, this was an oversight and not an attempt to seek an advantage in court proceedings (at [93]). The AGC had also promptly destroyed its copies of the correspondence upon being informed of the proper procedure it ought to adopt in relation to correspondence from or to prisoners (at [92]).

The prayers sought

7 The Appellants filed OS 188 against the AG as the sole defendant on 25 February 2022. They were then represented by M/s L F Violet Netto. Midway through the proceedings, they appointed M/s Ong Ying Ping Esq to represent them as their new solicitors. Following this change in representation, the Appellants were given the opportunity to amend their originating summons. In the amended originating summons filed on 9 June 2022, the Appellants sought the following:

> (a) a declaration that the AG acted *ultra vires* and unlawfully in requesting the disclosure of personal correspondence or information as to the contents of personal correspondence belonging to the First, Third

and Eighth Appellants without the First, Third and Eighth Appellants' consent ("Prayer 1");

(b) a declaration that the AG acted *ultra vires* and unlawfully when the SPS disclosed the Appellants' correspondence, particularly in respect of the correspondence belonging to the First to Thirteenth Appellants, not requested by the AGC but received from the SPS, without the Appellants' consent ("Prayer 2");

(c) a declaration that the AG committed a breach of confidence by the disclosure and retention of confidential correspondence belonging to the First, Third, Fourth, Fifth, Ninth and Eleventh Appellants ("Prayer 3");

(d) an order for damages and/or equitable relief, to be assessed at the hearing of OS 188, for the First to Thirteenth Appellants for breach of confidence ("Prayer 4");

(e) a declaration that the AG had infringed the Third, Fifth and Seventh Appellants' copyright in their personal correspondence by the reproduction and retention of that correspondence ("Prayer 5");

(f) an order for nominal damages payable by the AG for infringement of copyright ("Prayer 6"); and

(g) an order for such further and/or other reliefs as the court deemed fit.

It should be noted that although the Appellants have asked for declarations that the Respondent's and the SPS's conduct was both *ultra vires* and unlawful, that phrase is a tautology. We will henceforth use only the English term "unlawful".

8 OS 188 was not the first time the Appellants had come to court for relief in relation to the discovery of the disclosure of their correspondence. We set out a summary of previous proceedings in which the Appellants had asked for similar relief.

HC/OS 975/2020

9 *Gobi* was decided on 13 August 2020. Less than two months later, on 1 October 2020, OS 975 was filed. This was an application for pre-action discovery and leave to serve pre-action interrogatories, with a view to identifying the individuals personally involved in transmitting and requesting correspondence and holding them personally liable. It was filed by the 13 Appellants in the present case along with nine other prisoners (the AGC subsequently confirmed it had no correspondence belonging to the latter nine prisoners). OS 975 was dismissed on 16 March 2021 on the basis that the Government Proceedings Act (Cap 121, 1985 Rev Ed) precluded such pre-action disclosure orders from being sought against the AG, and further, that the disclosures were neither necessary nor relevant (see *Syed Suhail OS 975* at [60]–[61]).

HC/OS 664/2021

10 HC/OS 664/2021 ("OS 664") was commenced on 2 July 2021 by the same 13 Appellants as in the present case. Apart from two main differences, the reliefs sought in OS 664 were virtually identical to Prayers 1–6 sought in

OS 188. The differences were that, firstly, the application in OS 664 was one for leave for judicial review under O 53 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC 2014") to pursue these reliefs. Secondly, OS 664 additionally sought leave for orders prohibiting the SPS from sending, and the AGC from requesting, prisoners' personal correspondence, and for a "mandatory order" compelling the AGC to destroy correspondence that it had received from the SPS (see *Syed Suhail bin Syed Zin and others v Attorney-General* [2021] SGHC 270 ("*Syed Suhail OS 664*") at [16]).

11 Counsel for the applicants, Mr M Ravi ("Mr Ravi"), withdrew OS 664 on the day the case was heard. The judge who heard OS 664 noted that, by Mr Ravi's own admission, there was no basis for seeking the requested prerogative orders because it had already been established in *Gobi* that there was no general right to such correspondence (*Syed Suhail OS 664* at [26]). For the same reason, the declarations sought (paralleling Prayers 1 and 2 in OS 188) would not have been granted because there was no "real controversy" between the parties which the court could resolve. Leave to pursue the private law remedies sought in OS 664 (paralleling Prayers 3-6 in OS 188) was premised on leave to apply for judicial review being granted (*vide* O 53 r 7(1) of the ROC 2014), and thus leave to pursue these remedies also could not be granted.

HC/OS 149/2022 and HC/OS 174/2022

12 *HC/OS 149/2022* ("OS 149") and *HC/OS 174/2022* ("OS 174") were applications jointly heard by Kannan Ramesh J (as he then was) for a range of declarations concerning, among other things, prison governance. OS 149 was commenced by the Eighth Appellant, Mr Roslan, and another prisoner, one Mr Pausi bin Jefridin, on 16 February 2022. OS 174 was commenced solely by

the Seventh Appellant, Mr Rosman, on 21 February 2022. Both OS 149 and OS 174 sought by their second prayer a declaration that the death penalty for drug offences was unconstitutional as the administration of justice had been brought into disrepute, as privileged correspondence and/or information between persons on death row and their lawyers and families had been unlawfully forwarded by the SPS to the AGC. OS 174 also included a third prayer seeking a declaration that the forwarding of the applicants' correspondence had been in breach of the law. Both applications were dismissed in an unreported oral judgment, with Ramesh J noting that these were attempts to re-litigate a settled issue from OS 975 and OS 664 (which the applicants had withdrawn). As such, the plaintiffs in the applications were guilty of drip-feeding and an abuse of process.

The decision in OS 188

13 Returning to the present proceedings, through an oral judgment delivered on 1 July 2022, the judge in the General Division of the High Court ("the Judge") dismissed Prayers 1 to 5 of OS 188. In respect of Prayer 6, she granted nominal damages of $10 to the three appellants who had claimed for infringement of copyright.

14 In relation to Prayers 1 and 2, the Judge found that the requirements for standing for declaratory relief set out in *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd and another appeal* [2006] 1 SLR(R) 112 ("*Karaha Bodas*") were not satisfied. Firstly, there was no real controversy for the court to resolve. There was no right of the Appellants that was being threatened or denied since the Respondent and the court had already acknowledged that the Appellants' correspondence could not be shared with the AGC or SPS without

the Appellants' consent or an order of court. The AGC and SPS had already, to the satisfaction of this court in *Attorney-General v Datchinamurthy a/l Kataiah* [2022] SGCA 46 (at [41]), put safeguards in place to prevent the sharing of correspondence. Secondly, the grant of a declaration was a discretionary relief and there was no reason for the court to exercise its discretion, as a declaration would not secure any real relief from any liability, disadvantage or difficulty for the Appellants. This was because the AGC had accepted and taken steps to comply with the position in *Gobi*. The declarations sought would also not strengthen the Appellants' legal position in any way.

15 The Judge, applying the modified approach in *I-Admin (Singapore) Pte Ltd v Hong Ying Ying and others* [2020] 1 SLR 1130 ("*I-Admin*"), also dismissed Prayers 3 and 4 as there was no actionable breach of confidence. Even though an action of breach of confidence had been presumed on the facts as the Appellants' correspondence had the necessary quality of confidence about them and the correspondence had been imparted in circumstances importing an obligation of confidence, this presumption was displaced. The Judge was satisfied that the AGC's conscience was unaffected as any disclosure of correspondence had taken place prior to the decision in *Gobi*, before which neither the SPS nor the AGC had been aware that the SPS was not permitted to forward copies of correspondence to the AGC. The AGC also did not use the information. This court in *Gobi* found the AGC's conduct to be an oversight, and the AGC promptly destroyed the copies once informed of the proper procedure.

16 The Judge also dismissed Prayer 5, noting that a declaration would not be useful as it would not give real relief. In relation to Prayer 6, the Judge

granted nominal damages in the sum of $10 to each of the First, Fifth, and Seventh Appellants.

Proceedings on appeal

17 The Appellants appealed against the entirety of the Judge's decision in OS 188. We set out a brief procedural history of the appeal proceedings.

The first hearing

18 We first heard this appeal on 20 January 2023. At the hearing, the AG was ordered to file further affidavit(s) to explain the circumstances surrounding the disclosure of the 68 documents, including why each document was sent to it and whether it was seen by the officers in the AGC who were involved in the relevant proceedings concerning the Appellants. We made it clear that the Appellants' right to object and to respond to any new information in these affidavits was reserved, along with the right to object to the admissibility of the new information. Pursuant to these directions, Deputy Attorney-General Tai Wei Shyong SC ("DAG Tai") filed an affidavit on behalf of the Respondent on 20 February 2023. Thereafter, on 24 March 2023, the First Appellant filed an affidavit on behalf of the Appellants.

The second hearing

19 The second hearing of the appeal took place on 3 May 2023. We directed parties to address us on the issue of whether declaratory relief was appropriate or necessary. We also expressly sought clarification from the Appellants as to the basis for their claims for damages for breach of confidence and for copyright, noting that the burden was on the Appellants to establish this. After hearing the parties' arguments on these issues, we gave all parties' counsel leave

to file a second round of further submissions and/or affidavits addressing the said issues. The Appellants filed supplementary written submissions and a response affidavit by the Eleventh Appellant on 28 June 2023, with the Respondent filing a second affidavit of DAG Tai on 28 May 2023 and further submissions on 12 July 2023.

20 Following the filing of DAG Tai's second affidavit, we directed the Respondent to address specific queries by way of affidavit; a third affidavit by DAG Tai was thus filed on 1 August 2023.

The third hearing

21 On 2 August 2023, we again heard parties with specific reference to any issues they thought necessary to raise arising from further disclosures made after 3 May 2023. We also pointed out to counsel for the Appellants that (a) it was not clear that the damages they were seeking in respect of breach of confidence and copyright were recoverable as a matter of law; and that (b) some of the Appellants' claims for damages were premised on a loss of fair hearing rights, which alleged loss could not found any civil claim. The alleged loss, if any, could be examined in the context of criminal review proceedings should the Appellants be minded to apply for permission to do so.

22 For this reason, following the third hearing of CA 30, we afforded the Appellants more time to formulate the nature of their claims for damages and granted them leave to file further submissions in three months' time in respect of the heads of claim that they wished to advance in assessment of damages. Specifically, we directed them to identify: (a) the breach by the Respondent that was disclosed on the facts that were deposed to in the affidavits filed by the Respondent and relied on by the Appellant in question; (b) the *prima facie* link

between such breach and the loss that was alleged to have been sustained in the case of each Appellant; and (c) the basis for contending that each such claimed head of loss was admissible as a matter of law. We granted the Respondent leave to file further submissions on this issue.

23 Further, we granted the Appellants leave to bring separate criminal motions for relief under the criminal law to the extent that such motions may arise from the materials disclosed by the AG in the present appeal. Subsequently, seven of the Appellants, namely, the Third, Sixth, Eighth, Ninth, Eleventh, Twelfth and Thirteenth Appellants, filed criminal motions to review their respective convictions and sentences. These motions were heard and dismissed by this court on 1 August 2024. Brief reasons for the dismissal were given orally, and subsequently, a full written judgment was issued which elaborated why the disclosure of the materials did not have any impact on their conviction and/or sentence as claimed by the respective appellants (see *Pausi bin Jefridin v Public Prosecutor and other matters* [2024] SGCA 37).

24 The appeal in CA 30 was eventually heard on 10 May 2024.

Issues to be determined

25 Following the prayers in OS 188, the issues on appeal fall into three main categories:

(a) the appropriate administrative law remedies arising from the unauthorised disclosure of the Appellants' correspondence;

(b) the Appellants' claims for declaratory relief and damages for breach of confidence; and

(c) the Appellants' claims for a declaration and damages in respect of a breach of copyright.

Observations on the disclosure of correspondence

The Practice

26 In DAG Tai's second affidavit dated 28 May 2023, the Respondent provided, for the first time, a general explanation for why most of the documents were disclosed to the AGC. We refer to this explanation as "the Practice":

> 8. The [Ministry of Home Affairs ("MHA")] and the SPS (a department in the MHA) will generally schedule a Prisoner Awaiting Capital Punishment ("PACP") for execution when there are no relevant pending proceedings which require the carrying out of the capital punishment to be held in abeyance. *This will also be the case where there are issues which could give rise to such proceedings.*
>
> *9. Most of the documents were shared with the AGC in the above context. At the time that the documents were shared, the SPS and the MHA would generally keep the AGC – as the Government's legal advisor – informed of developments regarding PACPs, and seek advice on whether there were any relevant pending proceedings, or issues which could give rise to such proceedings, that would require the capital punishment to be held in abeyance. Given that the SPS and the MHA officers handling such matters were not legally trained, if they came across any document that appeared to be legal in nature, they would send it to the AGC for advice. This approach was adopted out of an abundance of caution.*
>
> 10. In respect of a number of the documents shared, this Honourable Court has asked specifically whether the SPS and/or the MHA had appreciated or should have appreciated that the correspondence may have been protected by privilege and/or addressed confidential matters. At the time that the correspondence was shared, the SPS and the MHA had the following understanding about confidentiality and privilege concerning the documents:
>
> (a) Prior to the CA's directions in *Gobi* on 21 May 2020 (see [31] of *Gobi*), the SPS and the MHA believed in good faith that prisoners' correspondence could be shared with the

> AGC for the purposes of seeking legal advice, notwithstanding that the documents might have been confidential or privileged, given the context set out in [8] and [9].
>
> (b) Following the decision in *Gobi* (see [91] of *Gobi*), the SPS and the MHA recognise that these documents ought not to have been sent to the AGC, without first obtaining a court order or the prisoner's consent ("the *Gobi* principle").
>
> [emphasis added]

27 Based on our review of the disclosed correspondence, almost all the disclosures could be explained by the Practice, as the documents concerned past, pending or contemplated proceedings arising from the Appellants' convictions and sentence and the dismissal of the appeals against such convictions and sentences. Such actions or contemplated actions took the form of complaints against former counsel, requests for legal assistance, or related to correspondence over clemency applications. There were, however, some instances of disclosure which had not occurred pursuant to the Practice, which the Respondent disclosed in the third affidavit of DAG Tai. These included:

(a) a letter from Mr Roslan to the State Courts of Singapore;

(b) a letter dated 8 June 2020 from Mr Gobi and Mr Datchinamurthy to the Singapore Police Force ("SPF");

(c) two letters dated 12 and 13 June 2020 from the SPF to Mr Datchinamurthy;

(d) a letter dated 13 January 2020 from Mr Saminathan to the SPF; and

(e) three letters from Mr Datchinamurthy to his former counsel, Mr Thangavelu.

28 The Respondent explained that the disclosures of the abovementioned correspondence arose from the Ministry of Home Affairs ("MHA") or the SPS having wanted to obtain the AGC's advice on how to respond to requests made by or on behalf of the Appellants. In our view, these explanations were consistent with the nature of the correspondence and the circumstances in which they were disclosed. By way of illustration, the letters at (b) and (c) above were disclosed to the AGC by the MHA after Mr Gobi and Mr Datchinamurthy had made a police report requesting an investigation into executions in Singapore which were allegedly not carried out in accordance with the law. There was then an exchange of correspondence between the SPF and both these Appellants. As DAG Tai's affidavit outlined, the letters sent by Mr Gobi and Mr Datchinamurthy were disclosed by the MHA to the AGC to obtain legal advice on the SPF's proposed replies to both Appellants.

CA/CM 28/2020 and CA/CCA 38/2015

29 There is one more significant disclosure that fell outside the Practice. This was the disclosure to the AGC of letters from Mr Suhail to his uncle in March and May 2017. As it happened, this court was first informed of this disclosure in September 2020, some years prior to the commencement of OS 188.

30 Mr Suhail had filed a criminal motion identified as CA/CM 28/2020 ("CM 28") on 16 September 2020. In CM 28, Mr Suhail sought leave to apply for criminal review of his unsuccessful criminal appeal in CA/CCA 38/2015 ("CCA 38"). As set out in *Syed Suhail bin Syed Zin v Public Prosecutor* [2021]

1 SLR 159 ("*Syed Suhail CM 28*") at [12], the AGC became aware in the course of preparing for CM 28 that it had in its possession correspondence between Mr Suhail and his uncle. On 18 September 2020, the AGC brought this fact to this court's attention, and explained that it had not obtained any advantage from the correspondence and that the correspondence would be destroyed in line with the decision in *Gobi*. Mr Ravi (then counsel for Mr Suhail) argued that the entire prosecution team should be disqualified on the basis that they had come into contact with privileged or confidential information in the form of a letter from the applicant to his then-counsel, Mr Ramesh Tiwary and letters between Mr Suhail and his uncle during the course of the proceedings in CCA 38. This submission was rejected. We noted then that there was no justification for disqualifying the entire prosecution team, and no prejudice occasioned to Mr Suhail as regards CM 28 through the disclosure of correspondence. Further, this court sought and obtained confirmation from Mr Francis Ng SC, who headed the prosecution team, that he had not been involved in CCA 38 and that he had not seen the contents of the correspondence (*Syed Suhail CM 28* at [12]).

31 That the AGC had asked for and received Mr Suhail's letters to his uncle was also disclosed by the AG in the affidavit of DAG Nair filed in OS 975 on 18 November 2020 (see above at [5]). This disclosure was accompanied by the claim that the AGC did not use this correspondence or otherwise gain any advantage in any legal proceedings against Mr Suhail.

32 In DAG Tai's three affidavits, however, it was explained that the Deputy Public Prosecutors ("DPPs") involved in Mr Suhail's appeal in CCA 38 *had* seen Mr Suhail's letters to his uncle. The circumstances surrounding this were set out in DAG Tai's second affidavit as follows:

> At the hearing of CA/CCA 38/2015 on 3 May 2018, [Mr Suhail] sought an adjournment of the hearing, in order to file a motion to adduce his uncle's evidence. At the same hearing, [Mr Suhail's] then-counsel, Mr Ramesh Tiwary, informed the Court of Appeal that he intended to seek leave to be discharged as [Mr Suhail's] counsel.
>
> The Court of Appeal gave directions, including – (1) for Mr Tiwary to file his application for leave to be discharged, supported by an affidavit, and (2) for the DPPs to respond to the affidavit, in the event that the Prosecution considered [Mr Suhail] to be acting in abuse of process.
>
> In order to address the Court of Appeal on (2), the DPPs handling CA/CCA 38/2015 requested copies of [Mr Suhail's] previous correspondence with his uncle from the SPS. The letters at S/Nos. 1 and 2 were sent by the SPS to AGC in response to this request.
>
> On 11 June 2018, the DPPs filed submissions explaining why [Mr Suhail] was acting in abuse of process. At [38] of the submissions, the DPPs highlighted that [Mr Suhail] had more than ample time and opportunity since his arrest to produce the uncle's evidence, and noted that "*[Mr Suhail] had also sent letters to the uncle*".
>
> Ultimately, no statutory declaration or affidavit was provided by the uncle.
>
> These letters were not seen by legal officers involved in the subsequent proceedings concerning [Mr Suhail], except the officers handling the Prisoners' Correspondence Proceedings.
>
> However, in the course of preparing for an action filed by this Appellant (CA/CM 27/2020), an AGC officer became aware that these 5 letters were in the AGC's possession. The officer ascertained how these letters came into the AGC's possession, and informed the Court of Appeal the next day (18 September 2020).

33 In essence, it became clear to us that Mr Suhail's correspondence had not only been requested by the AGC, but also used by the Prosecution in CCA 38 in so far as, in its submissions, it had noted the fact that Mr Suhail had sent letters to his uncle. This seemed at odds with the Respondent's previous representation in OS 975 that Mr Suhail's correspondence had not been used in any legal proceedings.

34 With respect, it is hard to reconcile the fact that the DPPs handling CCA 38 had "requested copies of [Mr Suhail's] previous correspondence with his uncle from the SPS" with the statement that "[t]he AGC did not consider itself entitled to these letters". Indeed, the handling of Mr Suhail's correspondence, together with the existence of the Practice, does give rise to some concern. We nevertheless highlight that the effect which disclosure of the correspondence concerned could have had on the criminal proceedings in CCA 38 and other cases are not concerns arising directly in this appeal; our focus is on the bearing that such disclosure has on the *private law* remedies available to the Appellants. In any event, leave was granted to the Appellants to pursue appropriate criminal remedies in respect of the former (see above at [23]), and while some of the Appellants took this course, as we have mentioned, Mr Suhail did not.

Administrative law remedies

Prayers 1 and 2: Declaration that the AGC acted unlawfully in requesting the disclosure of the Appellants' correspondence and that the SPS acted unlawfully in disclosing the same

35 As noted earlier, this court held in *Gobi* that under the prevailing Prisons Act (Cap 247, 2002 Rev Ed) ("Prisons Act") and the Prisons Regulations (as amended by Prisons (Amendment) Regulations 2018 (S 533/2018) which introduced reg 127A), there was no legal basis on which SPS was permitted to disclose the personal correspondence of prisoners (*Gobi* at [87]–[93]). This court held that the AGC ought not to have sought such documents and correspondence, these being the prisoners' personal property and confidential or privileged. If the AGC wished to obtain copies of correspondence, the proper

procedure would have been to obtain the relevant prisoner's consent or an order of court (at [91]).

36 It may be helpful at this point for us to set out reg 127A of the Prisons Regulations ("reg 127A") made pursuant to s 84(1) of the Prisons Act, which states as follows:

> **Screening and recording of letters**
>
> **127A-** (1) Every letter sent by or to a prisoner may be opened and read by a prison officer.
>
> (2) A copy may be made of every letter sent by or to a prisoner.
>
> (3) A letter sent by or to a prisoner may be withheld if it contains anything that affects the security or good order of the prison.
>
> (4) Paragraphs (2) and (3) do not apply to letters written by a prisoner to a prisoner's legal adviser and letters written by a prisoner's legal adviser.

37 Under the general law, correspondence from one person to another belongs to either the sender or the addressee (depending on the circumstances) and may be imbued with the quality of confidentiality. As this court noted in *Gobi* at [90], there is an expectation of confidentiality in a letter or document shared between private parties. Generally, the same should not be read by or interfered or dealt with by a third party in the absence of authorisation from the owner or a recognised legal basis like a statutory provision. Regulation 127A modifies the general legal position in the case of prisoners. It permits prison officers to read all correspondence from or to prisoners and make copies of the same unless they are to or from the prisoner's legal advisor. The modification is a limited one and does not extend to permitting the SPS to make copies of letters to or from lawyers or to give copies of any letters at all to anyone, including the AGC. Accordingly, it would be unlawful for SPS to pass copies

of prisoners' correspondence to the AGC and for the AGC to receive, much less ask for, the same.

38 Notwithstanding the foregoing, we recognise the possibility that the contents of prisoners' correspondence read by the SPS might require the SPS to obtain legal or other advice to ensure the safety and good order of the prison or the public. This possibility may excuse the disclosure of such information to the relevant authorities either for the purpose of action to be taken or to obtain such legal advice. The SPS or the AGC did not assert that the Appellants' documents disclosed pursuant to the Practice required advice of such a nature. We therefore express the following preliminary views on the best practices in such circumstances. It appears to us that if such circumstances put SPS in the position of requiring urgent advice such that it would be impracticable to obtain a court order as mentioned in *Gobi*, the SPS would, at the least, would have to make it clear to the AGC that the disclosure was only for the purpose of obtaining some particular and urgent advice and identify the issue requiring advice. The AGC, for its part, would have to have systems in place to maintain the confidentiality of any documents disclosed for this purpose so that such documents are only disclosed to the officers tasked with providing the necessary advice to the SPS. At the time the Practice was in place, there were no processes adopted by the AGC to maintain the confidentiality of the documents disclosed or to ensure that they were not seen by the officers who dealt with the prosecution of the Appellants. We emphasise that this limited exemption would not permit the AGC to, of its own volition, ask for prisoners' correspondence to be disclosed to it.

39 Counsel for the Respondent, Mr Tan Chee Meng SC, at the second hearing of CA 30 on 3 May 2023, accepted that the forwarding of at least some

of the Appellants' correspondence to the AGC contravened the Prisons Regulations. Of the 68 pieces of correspondence, at least 11 were between the Appellants and their counsel or potential counsel; some of the other correspondence also contained information which would have been covered by privilege, such as instructions to lawyers. Indeed, when this court queried the Respondent on whether disclosure of correspondence under the Practice would be contrary to the Prisons Regulations in force at the relevant time, the Respondent, while noting that the scope of this court's statement in *Gobi* was broader than reg 127A, merely stated that officers in the SPS and the MHA "believed in good faith" that prisoners' correspondence could be disclosed to the AGC for the purpose of seeking legal advice, and to ensure that prisoners' rights were not infringed in terms of further steps being taken with regard to their punishments. That the disclosure was done in good faith was, however, of no assistance in showing that such disclosure was, in fact, lawful or excused under any applicable legal principle. We note for completeness that both the Judge's decision and the Respondent in its submissions on appeal gave no indication that the disclosure of the Appellants' correspondence made by the SPS to the AGC was anything but unlawful.

The conditions for declaratory relief

40 Freestanding declaratory relief may be granted under O 15 r 16 of the ROC 2014 (*Vellama d/o Marie Muthu v Attorney-General* [2013] 4 SLR 1 at [46] and [53]). The established position regarding when declaratory relief may be granted is that the following conditions must be met (*Karaha Bodas* at [14]–[25]):

(a) the court has the jurisdiction and power to award the remedy;

(b) the matter is justiciable in the court;

(c) the declaration is justified by the circumstances of the case (as a discretionary remedy);

(d) the plaintiff has *locus standi* to bring the suit and there is a real controversy for the court to resolve;

(e) any person whose interests might be affected by the declaration is before the court; and

(f) there is some ambiguity or uncertainty about the issue in respect of which the declaration is asked for, so that the court's determination would have the effect of laying such doubt to rest.

41 The Judge found that no declaratory relief was warranted as a declaration would not serve any purpose in the absence of a "real controversy" (condition (d) in *Karaha Bodas*), and because it would not secure any real relief from liability, disadvantage or difficulty (condition (c) in *Karaha Bodas*). On appeal, the Respondent based its opposition to declaratory relief on the same grounds that the Judge had relied on.

Whether there is a real controversy between parties

42 We consider the requirements for a declaration in turn. The first question we decide is whether, post-*Gobi*, there can be said to be a real controversy as to the impropriety of the AGC's conduct given the existing declaration to similar effect in *Gobi*. In this regard, the law is clear that a prior decision or judgment of a judicial body can form a basis for not granting a similar declaration, if this

would effectively redetermine an issue already decided by the judicial body. Thus, in *Salijah bte Ab Latef v Mohd Irwan bin Abdullah Teo* [1995] 3 SLR(R) 233, the High Court refused a declaration that the plaintiff was entitled to sole ownership of her matrimonial home. This was because, due to an order previously granted by the Syriah Court in relation to the matrimonial home, there was no uncertainty about the plaintiff's rights. Similarly in *Scott Latham v Credit Suisse First Boston* [1999] SGHC 302 (upheld on appeal in *Latham v Credit Suisse First Boston* [2000] SGCA 26), Chan Seng Onn JC (as he then was) declined to make a declaratory order regarding the plaintiff's wrongful termination because a clear finding of wrongful termination in the judgment had conclusively determined the whole controversy between the parties.

43 In our view, however, the scope of the declaration in *Gobi* can be distinguished from the declaration sought in this appeal. The existence of the *Gobi* declaration is not, therefore, a bar to the granting of declaratory relief in these proceedings. We explain: the pronouncement in *Gobi* was in the context of an isolated incident of disclosure. However, the disclosure and account of the Practice offered by DAG Tai suggests that this was an intentional and entrenched practice. Even if the conduct of disclosing and requesting disclosure of correspondence is similar to that proscribed in *Gobi*, there is, in our view, a qualitative difference between stating that the individual disclosures were contrary to the Prisons Regulations, and stating that the disclosures were unlawful because they were made pursuant to a practice or policy which was itself contrary to the Prisons Regulations, the legality of such a policy hitherto not having been resolved or commented on. For this reason, we would respectfully disagree with the Judge that there is no real controversy between the parties in respect of which a declaration would operate.

Whether granting a declaration is justified in the circumstances of the case

44 Next, as noted in *Karaha Bodas* at [14(c)], the requirement that a declaration be justified in the circumstances of the case flows from its nature as a discretionary remedy; because of this a declaration will not be granted if it would not give a party relief in any real sense, or if it would not serve any useful or practical purpose (*Attorney-General v Aljunied-Hougang-Punggol East Town Council* [2015] 4 SLR 474 at [158]). For this reason, the Judge observed that since the Respondent had accepted the position in *Gobi* and taken steps to prevent future disclosure of correspondence, a declaration would not give the Appellants any practical relief and was unnecessary.

45 We first observe that whether a declaration has practical utility is a question the court considers when evaluating whether to exercise its discretion to give such a remedy. It is not a question that impacts at all on the court's power to issue the remedy if it thinks fit. For this reason, a court may proceed to hear a case and grant declaratory relief if the circumstances of the case are such that a declaration will be of value to the parties or to the public (*Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 at [143]).

46 In this case, we are of the view that a declaration would be of value to the parties and to the public in affirming the importance of a prisoner's ownership of his correspondence and his right (within the bounds of the law) to maintain the confidentiality and privacy of his communications (which we refer to as a prisoner's "general interest in written communications"). Having regard to the Prisons Regulations and to *Gobi*, the starting position for determination of whether a prisoner's general interest in written communications has been wrongfully interfered with is that this right would not be displaced unless this

is necessary for security or operational reasons as we have explained in [38] above. Regulation 127A(4), which expressly prohibits the copying or withholding of prisoners' correspondence that involves communications with a legal adviser, enshrines the specific importance of prisoners' due process rights and the interest in protecting the proper administration of justice. If, as noted in *Gobi* at [89], reg 127A(2) does not extend to permitting the SPS to forward copies of general correspondence to the AGC, this must be all the more true for *privileged* correspondence. In contrast to this position, the Practice that the Respondent outlined struck us as bereft of any consciousness of a prisoner's general interest in written communications or of a prisoner's specific interest in written communications with their legal advisor. Thus, the objectionable feature of the Practice was that it led to a wholesale passing of the Appellants' correspondence to the AGC without any assessment by either the SPS (who was the party who should have been asking for advice) or the AGC if anything in the correspondence even required the AGC to give the SPS legal advice. In any event, in the absence of any request for legal advice on a matter affecting the security and operation of the prison, the AGC was not entitled to ask for the disclosure of prisoners' correspondence.

47 Notwithstanding that the AGC and the SPS have since taken steps to remedy this situation, the lack of appreciation of a prisoner's general interest in written communications shown by both bodies supports our conclusion that a declaration of the unlawfulness of the Practice would be of value to prisoners and the public. We thus grant two declarations. The first is that the AGC's requests for disclosure of correspondence belonging to the First, Third and Eighth Appellants without the First, Third and Eighth Appellants' consent were unlawful. The second is that the SPS acted unlawfully in disclosing the Appellants' correspondence to the AGC, whether pursuant to the Practice or

otherwise, in the absence of any legal necessity or a court order or the Appellants' consent to the disclosure.

48 For completeness, we observe that the Appellants' submissions on appeal refer to the unlawful *copying* of documents by the SPS; this is outside the ambit of how OS 188 was framed, which was purely in terms of requesting or disclosing correspondence. Accordingly, we decline to grant a declaration on the copying point.

Breach of confidence

Prayer 3: Declaration for breach of confidence

49 We next address whether a declaration should be granted under Prayer 3. Although Prayer 3 was stated by the appellants in OS 188 to relate to the First, Third, Fourth, Fifth, Ninth and Eleventh Appellants, some portions of the Appellants' further submissions on appeal asserted that this prayer ought to extend to *all* the Appellants, in so far as they rely on a "breach of confidentiality" as a basis of claim. We will discuss below whether an extension is appropriate.

50 In relation to the elements of a claim for breach of confidence, parties do not dispute the applicability of the modified *I-Admin* approach, which the Judge adopted. Under this approach (per *I-Admin* at [20], [61] and [62], and *Lim Oon Kuin and others v Rajah & Tann Singapore LLP and another appeal* [2022] 2 SLR 280 ("*Lim Oon Kuin*") at [40]):

> (a) The plaintiff must first establish that: (i) the information in question has the necessary quality of confidence about it; and (ii) it has been imparted in circumstances importing an obligation of confidence.

> Where confidential information has been accessed or acquired without the plaintiff's knowledge or consent, an obligation of confidence (requirement (ii)) will also be found.
>
> (b) If the plaintiff succeeds in establishing both requirements (a)(i) and (a)(ii), a breach of confidence is presumed to exist, and the legal burden of proof shifts to the defendant to prove that its conscience was unaffected by the breach. For example, the defendant may prove that it came across the information by accident, was unaware of its confidential nature, or believed there to be a strong public interest in disclosure. This approach is more plaintiff-friendly than the conventional test in *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, where to succeed, the plaintiff must also prove an unauthorised use of the information to the detriment of the party from whom the information originated.

51 The Judge held that breach of confidence could be presumed in this case; this was accepted by the Respondent, which submitted below that it was prepared to "tak[e] the [Appellants'] case at its highest" and only contend that the presumption was rebutted because the Respondent's conscience had not been affected in any event. On the application of the presumption, we have come to a different conclusion from the Judge in respect of certain correspondence disclosed. While we accept that there is an expectation of confidentiality in a letter or document shared between private parties (*Gobi* at [90]), some of the correspondence involved public institutions rather than private parties. We examine the documents disclosed in more detail below and elaborate on the specific documents which attracted the presumption of confidentiality and whether the Respondent has been able to rebut the presumption that its conscience was affected in those cases. At this juncture, we would emphasise

that in relation to the SPS, the breach of confidence lay only in the disclosure of the documents to the AGC; because of the operation of reg 127A, no breach of confidence arose from its officers opening or perusing of any of the documents.

52 Before we turn to scrutinise the various documents disclosed, we add that in relation to *privileged* documents we entirely agree with the Judge that disclosure of the same would itself trigger a presumption of a breach of confidentiality. Even prior to the decision in *Gobi*, the law was clear that legally privileged correspondence would generally have the necessary quality of confidence (*Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and other appeals* [2007] 2 SLR(R) 367 at [23]). In this regard, other cases have recognised that the court's equitable jurisdiction to restrain breaches of confidence can be invoked to restrain the unauthorised use of privileged material in court proceedings, on the basis that such information would often be of a confidential nature (*Wee Shuo Woon* at [24]; *Harsha Rajkumar Mirpuri (Mrs) née Subita Shewakram Samtani v Shanti Shewakram Samtani Mrs Shanti Haresh Chugani* [2018] 5 SLR 894 at [41]). Viewed in this light, even before *Gobi* was decided, the SPS and the AGC ought to have known that privileged correspondence was confidential and should not have come into the AGC's possession; thus, a systemic Practice that did not prevent the disclosure of privileged correspondence would not have been permissible.

53 We now turn to examine the documents disclosed in more detail. These fall into two categories: those that did not give rise to a breach of confidence and those that did.

Disclosures which did not give rise to a breach of confidence

54 There were four letters written to the Supreme Court dealing with procedural points/updates for cases in which the AG was the counterparty. Three were written by the Second Appellant, Mr Gobi, and the fourth by the Third Appellant, Mr Datchinamurthy. Court proceedings are generally public, not confidential. As the counterparty, the AG should have been copied in on the correspondence or notified of the same and the Appellants could not have expected privacy in these circumstances.

55 Mr Datchinamurthy also wrote to the Judge who had heard his case, requesting it be reconsidered. The Supreme Court replied that the letter had been forwarded to his counsel. In our view, Mr Datchinamurthy cannot reasonably have expected this correspondence to be confidential since any possible reconsideration of his case would have to involve hearing submissions from the Public Prosecutor. The same reasoning applies to a letter which the Twelfth Appellant, Mr Tan, wrote to the Chief Justice in which he also asked for reconsideration of his case.

56 There were two letters jointly from Mr Gobi and Mr Datchinamurthy to the Singapore Police Force ("SPF") requesting the SPF to investigate allegations that illegal execution techniques were being used by the SPS. In response, the SPF wrote two letters to Mr Gobi and one to Mr Datchinamurthy, and the latter then sent a further letter to the SPF. In our view, no expectation of confidentiality can arise in relation to complaints to the SPF which the complainant wants investigated or in any correspondence arising from such complaints. With a request for investigation there must be a reasonable expectation that the SPF would use or disclose the information in the letters to

decide whether to investigate and may require advice from other government departments in that regard. The same applies to two letters written by the Sixth Appellant, Mr Saminathan, to the SPF in which he asked to file a police report against his handwriting expert and to meet with the police.

57 In respect of the Fifth Appellant, Mr Iskandar, there were three documents involving proceedings in the Supreme Court to which the AG was not a party. Two of these were letters from the Supreme Court and the third was an affidavit which the Fifth Appellant had filed in relation to proceedings against the Law Society of Singapore (the "Law Society"). As we have stated, court proceedings are generally public, and therefore, Mr Iskandar could not have expected confidentiality in relation to these documents, especially the affidavit which was filed for the purpose of his claim against the Law Society.

58 There were four pieces of correspondence between the Seventh Appellant, Mr Rosman, and the Supreme Court in relation to his clemency petition, and a further letter on the same subject to the President of Singapore. While the AG was not an addressee of these letters, from an objective viewpoint, the Fifth Appellant cannot have expected that the letters would be kept away from the Public Prosecutor.

Disclosures which gave rise to a breach of confidence

59 All letters the Appellants wrote to or received from their counsel or lawyers who they wished to instruct were subject to legal advice privilege and/or litigation privilege and must have been written and received in the expectation of confidentiality. This category covers one letter written by the First Appellant, Mr Suhail, two letters written by the Second Appellant, Mr Gobi, five letters between the Third Appellant, Mr Datchinamurthy, and two

lawyers in Singapore and a law firm in Malaysia, a letter written by the Legal Aid Bureau to the Fifth Appellant's (*ie*, Mr Iskandar's) sister regarding his financial position, a letter from the Ninth Appellant, Mr Masoud, to a lawyer, a letter from the Tenth Appellant, Mr Zamri, to a lawyer, a letter from the Eleventh Appellant, Mr Pannir, to his counsel and a warrant to act signed by him, a letter from a law firm to the Twelfth Appellant, Mr Tan, and a letter from the Thirteenth Appellant, Mr Ramdhan, to a lawyer.

60 Additionally, some of the Appellants had correspondence with bodies like the Law Society regarding complaints against counsel and requests for advice. Such correspondence was initiated by the Fourth Appellant, Mr Hamzah, the Eighth Appellant, Mr Roslan, as well as by the Fifth Appellant, Mr Iskandar, the Ninth Appellant, Mr Masoud, and the Twelfth Appellant, Mr Tan. Further, Mr Ramdhan corresponded with a body called The Innocence Project, National University of Singapore, seeking an examination of his case. In our view, all such correspondence were covered by an expectation of confidentiality. The same goes for two letters which Mr Ramdhan wrote to the Malaysian High Commission requesting an interview since the purpose of this would have been to seek advice and assistance.

61 The correspondence which Mr Suhail had with his uncle, four letters in all, also falls within this category where disclosure was a breach of confidence. Mr Suhail was in these letters seeking to elicit exculpatory evidence from his uncle, and the letters were confidential documents protected by litigation privilege for they came into existence for the dominant purpose of litigation.

62 We find that the conscience of the AGC and the SPS were affected in respect of the disclosures of the documents mentioned in [59], [60] and [61]

above. This also extends to the retention of the documents, which is an act capable of amounting to a breach of confidence: see *Imerman v Tchenguiz* [2011] Fam 116 at [69], cited in *Clearlab SG Pte Ltd v Ting Chong Chai and others* [2015] 1 SLR 163 at [202]. On an objective assessment of the circumstances, both the SPS and the AGC must be taken to have known of the confidentiality of the documents disclosed. We do not think it necessary for the Appellants to demonstrate some form of prejudice for breach as such to be made out. That is more relevant to whether there is a basis to award substantial damages, as discussed below. We are, however, prepared to issue a declaration of breach of confidence in respect of all the Appellants except the Sixth and the Seventh since none of their correspondence was confidential. Whilst in OS 188 this declaration was sought only by First, Third, Fourth, Fifth, Ninth and Eleventh Appellants, the examination of the disclosures above established that this breach occurred in relation to the Second, Eighth, Tenth, Twelfth and Thirteenth Appellants as well. In our view, in the present circumstances where the main aim is the vindication of the Appellants' position, it would be overly technical if we restrict the declaration only to those appellants who sought it initially.

63 Accordingly, there shall be a declaration in respect of the First, Second, Third, Fourth, Fifth, Eighth, Ninth, Tenth, Eleventh, Twelfth and Thirteenth Appellants that the Respondent committed a breach of confidence by the disclosure and retention of confidential information belonging to them.

Prayer 4: Remedies for breach of confidence

64 It does not follow from a breach of confidence, however, that the claimant would be entitled to a remedy. Because the obligation arises in equity,

only equitable remedies are available, and these are granted at the court's discretion and not as of right (*I-Admin* at [67]; *Uday Mehra v L Capital Asia Advisors and others* [2022] 5 SLR 113 ("*Uday Mehra*") at [248]). The legal burden of proof falls on the Appellants to establish their entitlement to relief, which includes the nature and extent of the remedy, though the evidential burden may, of course, shift to the Respondent (*Uday Mehra* at [253]; *LVM Law Chambers LLC v Wan Hoe Keet and another and another matter* [2020] 1 SLR 1083 at [24]).

65 The Appellants put forward numerous arguments as to why damages would be claimable in respect of their claim for breach of confidence. We analyse these in turn.

Remedies arising from criminal proceedings

66 At multiple points in their Appellants' Case and in both sets of further submissions, the Appellants suggested that there would be damages claimable in respect of criminal proceedings which had been unfairly tainted by disclosure of their correspondence. For example, they alleged that the material that would be filed in the parallel criminal motions "will illustrate some specific evidence or material non-disclosure by the Prosecution which led to [the Appellants'] unfair sentencing". The Appellants also suggested that the disclosure of their correspondence might be linked to some form of impropriety in their criminal proceedings because (a) the Prosecution might have had access to information which enabled them to prepare a response to the Appellants' arguments in court; (b) the Appellants were denied a fair hearing in court; or (c) the disclosures are suggestive of suppression or non-disclosure of *other* evidence by the Prosecution in their respective criminal proceedings.

67 To the extent that fair determination of the Appellants' convictions or sentences may have been affected by the disclosure of their correspondence, or that there may have been a breach of the rules of natural justice in criminal proceedings, as we have already pointed out, this is a matter for criminal review proceedings rather than the present civil appeal. The issue of whether there may be claimable damages arising from unfair convictions/sentences thus does not arise for determination in this appeal.

The Appellants' proposed process for assessing damages

68 In this connection, we address the Appellants' proposal for a "two-tiered judicial process" to assess damages, in which there would be two levels of inquiry:

(a) first, whether monetary damages are appropriate, or, if the prisoner's conviction or sentence should be reviewed, be it under s 394H of the Criminal Procedure Code 2010 (2020 Rev Ed) (the "CPC") or through judicial review; and

(b) second, should monetary compensation be appropriate, whether exemplary damages should be awarded in some, if not all, cases. These would be for breach of constitutional rights, violations of litigation privilege and/or breach of confidentiality.

69 The basis for the Appellant's proposed approach is an article on the remedial practice of the International Criminal Court. We agree with the Respondent that the Appellants' reliance on this article is misplaced; it is not clear why principles governing international criminal law and procedure should apply to the Appellants' domestic civil claim. Moreover, the article cited by the

Appellants did not support their proposed approach, in that it argued for monetary compensation being an appropriate remedy for specific types of due process failure in criminal proceedings, rather than setting out a procedure where the court first evaluates whether an accused person's conviction or sentence should be reviewed. More fundamentally, such an approach would be undesirable in the local context as it would effectively bypass the need for the relevant appellant to make an application for permission to review and the granting of permission on that application (as required under the CPC and the Rules of Court 2021 ("ROC 2021")). The proper recourse where criminal proceedings may have been affected would instead be for the Appellants to file fresh criminal review proceedings – this is, in fact, what the Appellants have been permitted to do by this court.

Punitive damages

70 The Appellants argued that the present case falls within the first category in *Rookes v Barnard* [1964] AC 1129 ("*Rookes v Barnard*") for which punitive damages would be claimable, namely, where there is oppressive, arbitrary or unconstitutional action by servants of the government. They did not identify the prayer under which these damages would be claimable. In their second set of further submissions, the Appellants shifted tack to suggest that punitive damages should be awarded in respect of acts of "trespass on property", breach of confidentiality and breach of litigation privilege.

71 Punitive damages are not, however, an available remedy in respect of all wrongs (such as in the realm of contract: *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd* [2017] 2 SLR 129 at [136]). There are no local decisions awarding punitive damages for a breach of confidence, which lies

outside the traditional domain of such damages in tort law (*ACB v Thomson Medical Pte Ltd and others* [2017] 1 SLR 918 at [176]). The Appellants did not provide any legal basis, in their Appellants' Case or two sets of further submissions, on which this court could rely to extend punitive damages to a claim for breach of confidence. In the absence of any case authority or reasoned basis for awarding punitive damages in respect of a breach of confidence, we decline to make such an award.

72 Even assuming that punitive damages were available, we find that the Appellants' failure to seek punitive damages for a breach of confidence in their originating summons below ought to be fatal to their claim.

73 That a matter is commenced by way of originating summons does not give an appellant *carte blanche* to run new arguments on appeal. First, although an application for leave to introduce a new point on appeal is no longer necessary as per O 57 r 9A(4)(*a*) of the old ROC 2014, an appellant continues to be under the obligation to highlight any new points not raised in the lower court in their Appellant's Case (O 19 r 18(1)(*b*) of the ROC 2021). This latter requirement applied to the present case (*vide* O 1 r 2(3)(*b*) of the ROC 2021). Before the Judge, the Appellants had sought punitive damages in respect of claims in *trespass* and in *copyright*; there was no indication that the "damages and equitable relief" sought in Prayer 4 of OS 188 included punitive damages. The appellants' argument that punitive damages ought to be awarded *for their claim for breach of confidence* is thus a new point that ought to have been highlighted in their Appellants' Case. This was not the case.

74 Secondly, this court has recognised that an attempt to run new arguments on appeal should be disallowed if this would result in prejudice to the other

party, even outside the context of pleadings. In *Kottakki Srinivas Patnaik v Attorney-General* [2024] 1 SLR 239 ("*Kottakki*"), in an appeal against the High Court's decision on a matter commenced by an originating application, this court held that it was not open to the appellant to raise a new argument on appeal where doing so would deprive the respondent of an opportunity to respond (citing *Ng Bok Eng Holdings Pte Ltd and another v Wong Ser Wan* [2005] 4 SLR(R) 561 at [35]) and deprive the court of the benefit of the decision and reasoning of the first instance court on the point (*Kottakki* at [41]). The former concern identified in *Kotakki* is engaged in the present case. The first time the Appellants raised the issue of exemplary or punitive damages was in their first set of further submissions on appeal filed on 28 June 2023, and even then, it was not made clear whether exemplary damages were being sought in relation to their claim for breach of confidence. The first time that it was mentioned that the appellants were claiming punitive damages *in respect of a claim for breach of confidence* was in their second set of further submissions on appeal dated 2 November 2023, where they suggested that punitive damages should be awarded in respect of acts of "trespass on property", breach of confidentiality and breach of litigation privilege. This was belated. By this time, this appeal had been heard thrice, and parties had tendered two rounds of submissions in addition to those tendered to the court below. Entertaining the late claim would cause prejudice to the Respondent due to a lack of opportunity to respond to the new arguments.

Equitable damages

75 Though the Appellants did not expressly seek the same, we consider whether equitable compensation, equitable damages, or an account of profits might be available remedies. We see no basis for an account of profits. As to

equitable compensation, which operates to restore a claimant to the position he would have been in had the breach of confidence not occurred (*I-Admin* at [71]–[72]; *Quality Assurance Management Asia Pte Ltd v Zhang Qing and others* [2013] 3 SLR 631 at [32]–[38]), this would be a "highly speculative exercise" in cases where there has been no actionable use of confidential information (*I-Admin* at [72]). The present case admitted of no realistic manner of assessment of damages on this basis. In particular, equitable damages, being modelled after s 2 of Lord Cairns' Act 1858 (UK), refer specifically to damages that can only be awarded "in addition to or in substitution for [an] injunction" (*Jethanand Harkishindas Bhojwani v Lakshmi Prataprai Bhojwani (alias Mrs Lakshmi Jethanand Bhojwani) and others* [2022] 3 SLR 1211 ("*Jethanand*") at [121]; *Turf Club Auto Emporium Pte Ltd and others v Yeo Boong Hua and others and another appeal* [2018] 2 SLR 655 at [141]). In so far as this appeal concerns only past breaches of confidence, and the relevant correspondence has since been destroyed by the AGC, there is no longer any interest that an injunction would protect, and therefore no basis to award equitable damages in lieu of an injunction.

76 We also consider whether the Appellants might be entitled to equitable compensation for mental distress. The general principle at common law is that emotional or mental distress is not actionable (*Reed, Michael v Bellingham, Alex (Attorney-General, intervener)* [2022] 2 SLR 1156 ("*Bellingham*") at [74]). However, what constitutes a recognised head of damage is a question of policy, and the court can, where appropriate, expand the forms of recognised damage (*Bellingham* at [74]–[75]). In the absence of arguments on this issue, we found no reason to diverge from the conclusion that Kwek Mean Luck JC (as he then was) reached in *Jethanand* at [113] that there was no legal basis for granting damages for mental distress in an action for breach of confidence.

Other bases for the Appellants' claims

77 On more than one occasion, we sought clarification from the Appellants on the exact breaches in respect of which they were seeking damages, the link between the alleged breaches and the loss they allege had been sustained, and the basis for contending that each such claimed loss was admissible as a matter of law. Having given careful consideration to counsel's oral arguments and to the material filed by the Appellants in multiple rounds of submissions, we are satisfied that none of the other bases contended by them showed that an admissible claim for damages under the law of confidence lay in respect of any loss caused by the Respondent's breaches.

78 Firstly, the Appellants' claim for damages for trespass to goods was not prayed for in OS 188, where the damages sought under Prayer 4 were specifically in relation to breach of confidence. Even in matters initiated by originating summons, a plaintiff cannot seek relief which has not been prayed for (*Ahmad Kasim bin Adam (suing as an administrator of the estate of Adam bin Haji Anwar and in his own personal capacity) v Moona Esmail Tamby Merican s/o Mohamed Ganse and others* [2019] 1 SLR 1185 at [77]; *Edmund Tie & Co (SEA) Pte Ltd v Savills Residential Pte Ltd* [2018] 5 SLR 349). Moreover, trespass to goods requires the Appellants to have been in possession of their letters (Michael Jones, Anthony Dugdale and Mark Simpson (eds), *Clerk & Lindsell on Torts* (Sweet & Maxwell, 23rd Ed, 2020) at para 16-138), but possession of the letters would have been with the SPS at the material time – either after the prisoners handed over possession of their letters (to be mailed out), or before possession over external correspondence was transferred to the prisoners. Further, trespass to goods could only conceivably be made out in relation to the *copying or scanning* of the appellants' correspondence – and not

the subsequent disclosure of copies of those documents (which OS 188 pertained to), which would constitute distinct physical goods from the originals.

79 Secondly, the Appellants argued that the AGC committed an actionable breach of duty as "guardians of the Appellant's (*sic*) rights under the Constitution", noting that because "[n]egligent breaches of duty of care have been recognized in *Spandeck*", punitive damages ought to be awardable. To the extent that the appellants rely on the case of *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100, this relates to a breach of a duty of care (as informed by the relevant statutory backdrop), which was not prayed for in OS 188.

80 Thirdly, the Appellants suggested that breaching a right to a fair hearing should be an independent cause of action recognised by the Singapore courts. However, the cases relied on by the Appellants did not support this proposition. The first case of these, *Chief Constable of North Wales Police v Evans* [1982] 1 WLR 1155, involved an application for *judicial review* against a decision by the Chief Constable of the North Wales Police. As rightly pointed out by the Respondent, although the House of Lords remarked at page 209 that the applicant may have been entitled to monetary compensation, this was based on statutory provisions which expressly allowed the grant of monetary compensation in judicial review cases. The second case, *Ashby v White* (1703) 2 Ld Raym 938, has found little support in contemporary case law and was held by the House of Lords to be an unreliable authority for the proposition that the tort of misfeasance in public office could be actionable *per se* (*Watkins v Secretary of State for the Home Department and others* [2006] 2 AC 395 at [14] and [23]–[25]).

81 Fourthly, the Appellants argued that a person who suffers harm or loss as an inevitable consequence of the unlawful, intentional and positive acts of another is entitled to recover damages from that other, on the authority of the Australian High Court case of *Beaudesert Shire Council v Smith* (1966) 120 CLR 145 ("*Beaudesert*"). However, the tort in *Beaudesert* is no longer legally available in Australia following the High Court's decision in *Northern Territory of Australia v Mengel* (1995) 129 ALR 1 and has been rejected as a recognised cause of action in England (*Lonrho Ltd v Shell Petroleum Co Ltd (No. 2)* [1982] AC 173 at 188) and New Zealand (*Takaro Properties Ltd v Rowling* [1978] 2 NZLR 314 at 339 – 340). The Appellants offered no reason to suggest, beyond citing *Beaudesert*, why this tort should be recognised in Singapore.

82 Finally, the Appellants relied on the tort of misfeasance in public office. This argument encounters two difficulties. Firstly, a claim in respect of this tort was not sought in OS 188. Secondly, the Appellants suggested that the damage caused to them (which is a necessary consequence for the tort to be made out – see *Lines International Holding (S) Pte Ltd v Singapore Tourist Promotion Board and another* [1997] 1 SLR(R) 52 at [138]) would be the costs they would incur in filing criminal motions to challenge their convictions and sentences. However, this argument presupposes that the appellants' convictions and sentences were impugned by the disclosed correspondence. As it turned out, the criminal motions subsequently filed by the Appellants were dismissed, and their convictions and sentences were not disturbed.

Copyright

83 In our view, the Judge did not err in ordering that nominal damages of $10 ought to be payable to the First, Fifth and Seventh Appellants, and that no declaration of infringement of copyright be granted.

Prayer 5: Declaration of infringement of copyright

84 In the proceedings below, the Appellants clearly indicated that they were seeking a declaration of breach of copyright in relation to four sets of correspondence which were sent/copied prior to 1 September 2017 when reg 127A of the Prisons Regulations (which expressly provides that copies may be made of letters sent to or by prisoners) came into effect. These included letters from the First Appellant, Mr Suhail, to his uncle, letters from Mr Suhail to Mr Ramesh Tiwary, letters from the Fifth Appellant, Mr Iskandar, to the Law Society, and a letter from the Seventh Appellant, Mr Rosman, to the President of Singapore. It was not disputed by the Respondent at the hearing of OS 188 below that the copying of personal correspondence could amount to a breach of the Copyright Act (Cap 63, 2006 Rev Ed).

85 For the reasons outlined below, we agree with the Judge that only nominal damages ought to be payable to these three Appellants. Thus, the Judge's decision that she should not exercise her discretion in favour of granting a declaration was justified because doing so would not have secured the Appellants any real relief from any liability, disadvantage or difficulty. It would be obvious from the award of nominal damages itself that there had been a technical infringement of copyright, making any declaration superfluous. We are not convinced by the Appellants' assertion that a court hearing an originating summons that seeks a declaration *has* to grant the declaration that

leads to an award of damages. This submission was not based on any authority and, more importantly, is at odds with the discretionary character of declaratory relief, which this court has stressed should be exercised with great caution (*Wing Joo Loong Ginseng Hong (Singapore) Co Pte Ltd v Qinghai Xinyuan Foreign Trade Co Ltd and another and another appeal* [2009] 2 SLR(R) 814 at [178]). We are satisfied that the Appellants have not clearly shown the Judge to have wrongly exercised her discretion not to grant declaratory relief such as to warrant appellate intervention (Jeremy Woolf, *The Declaratory Judgment* (Sweet & Maxwell, 4th Ed, 2011) at para 4-04).

Prayer 6: Damages for infringement of copyright

86 As noted above, the Judge ordered nominal damages in the sum of $10 for each of the First, Fifth, and Seventh Appellants, effectively granting them what was sought in Prayer 6 of OS 188. On appeal, however, the Appellants contend that (a) damages should be granted to *all* the Appellants; and (b) that a higher quantum of damages should be granted.

The scope of Prayer 6

87 Prayer 5 was stated in the Originating Summons filed by the Appellants to relate to the Third, Fifth, and Seventh Appellants. The Appellants' documents confirmed that Prayer 6 was being sought by the same Appellants who had sought relief by Prayer 5. On appeal, however, the Appellants rely on "breach of copyright" as a basis for a claim applying to *all* the Appellants, and call for a "separate assessment" of damages for all 13 Appellants. In our judgment, however, the Appellants should not be permitted to expand the scope of Prayer 5 beyond what was sought in OS 188 when parties appeared before the Judge. Such an expansion of what was sought below would cause prejudice to the

Respondent, whose concessions in the hearing below that the copying of correspondence was capable of amounting to a breach of copyright were made in the context of Prayers 5 and 6 relating to the *specific* correspondence of the First, Fifth and Seventh Appellants which had been copied before reg 127A of the Prisons Regulations took effect.

88 For completeness, we confirm that the Judge was correct in ordering nominal damages to be awarded to the First, Fifth and Seventh Appellants, notwithstanding Prayer 5 in OS 188 referring to infringement of copyright in relation to the *Third*, Fifth and Seventh Appellants' correspondence. The supporting affidavit tendered by Mr Ravi in OS 188 clearly referred to the First Appellant, Mr Suhail's letter as one of the sets of correspondence in respect of which Prayers 5 and 6 were sought.

The quantum of damages

89 In their submissions, the Appellants argued that (a) the damages awarded should not be confined to nominal damages; and (b) even if only nominal damages are recoverable, a higher sum than $10 per Appellant is justified.

90 We see no basis on which the Appellants may seek additional damages, whether in the form of exemplary damages or statutory damages under the Copyright Act 2021 (2020 Rev Ed), or for an inquiry into the extent of damage suffered by each Appellant to be conducted. The express wording of Prayer 6 militates against the granting of such relief. Before the Judge, the Appellants' submissions explained that nominal damages were sought "since it is accepted that the items were not copied for financial gain and that the [Appellants] have suffered minimal financial loss". The Appellants were given the opportunity to

amend the summons post-filing but, while making various other amendments, did nothing in relation to Prayer 6 (see [7] above). During the hearing of OS 188 itself, the Appellants' solicitors confirmed to the Judge that they had "asked for nominal damages for breach of copyright". In light of the foregoing, it is too late for the Appellants now to rescind from their original position.

91 In any event, we do not see how substantial damages would be warranted on the facts of this case, or how an inquiry would add very much to the Appellants' case. There was no evidence, nor any suggestion in the Appellants' submissions or affidavits, that there was any monetary loss directly flowing from a breach of copyright. The only loss in relation to copyright suggested by the Appellants related to the possible advantage that the AGC would have gained in court proceedings by virtue of having advance notice of the Appellants' intended arguments. In light of the determination in the relevant criminal motions that the integrity of the Appellants' criminal proceedings was not affected by the disclosure of their correspondence, this contention does not bring the Appellants very far.

92 We are also unconvinced by the Appellants' submission that the figure of $10 awarded by the Judge was arbitrary or unprincipled. In our view, this figure fell within the scope of "nominal damages" sought in Prayer 6 and the quantum awarded was well within the scope of the Judge's discretion. We do not think this discretion was exercised unreasonably. There was ample reason for the Judge to have rejected the figure of $1,000 per letter suggested by the Appellants' counsel below, which the Appellants asserted was based on the case of *Anwar Patrick Adrian and another v Ng Chong & Hue LLC and another* [2014] SGHC 234 ("*Anwar Patrick Adrian*"). Not only did *Anwar Patrick Adrian* involve a fundamentally different factual matrix from the present case

(with the appellants there seeking to recover a settlement sum of US$1 million from the respondents), but the High Court's decision to order only nominal damages was also eventually overruled by this court (see *Anwar Patrick Adrian and another v Ng Chong & Hue LLC and another* [2015] 5 SLR 1071 at [38]).

93 We thus see no reason to disturb the quantum of $10 per Appellant ordered by the Judge to be payable as nominal damages.

Issues arising post-hearing

94 Following the fourth hearing on 10 May 2024, counsel for the Appellants, Mr Ong, wrote in to court on 17 May 2024 with additional arguments that the Appellants had, post the hearing, instructed him to raise. We agree with the Respondent that this submission contravened O 19 r 34 of the ROC 2021, which does not permit further arguments to be made to the appellate court without leave, the court having reserved its decision after the fourth hearing of the appeal.

95 In any event, we note for completeness that the additional arguments raised by the Appellants do not affect our conclusions above. First, the Appellants highlight that Mr Iskandar suffered pecuniary damages arising from the respondent's breach of confidentiality. According to the Appellants, the disclosure of Mr Iskandar's complaints of inadequate professional services rendered by his solicitors at trial, as well as claims made against him in the course of bankruptcy proceedings, adversely affected the claims that he could have brought in disposal proceedings and his ability to "contest the claims made by the government against him for return of bonus paid to him as a civil servant around the time of his offence". Because of what allegedly happened to *Mr Iskandar*, the appellants now claim that *he and other appellants* who did not

seek to review their criminal convictions/sentences should be able to seek assessment of damages in addition to punitive damages. However, the correspondence of Mr Iskandar, which was disclosed to the AGC, did not contain any information which would have affected his ability to bring disposal proceedings; the closest that such information came to being prejudicial was an affidavit filed in support of the originating summons against the Law Society of Singapore involving complaints against his previous counsel, and a letter from the Official Assignee stating that four proofs of debt had been filed against Mr Iskandar. It is not apparent to us how knowledge that there were proofs of debt filed against him, or that he had filed complaints about his former counsel, would have been relevant to disposal proceedings for Mr Iskandar's salary as a civil servant.

96 Secondly, the Appellants raised new allegations about the SPS's conduct. This is outside the scope of OS 188 and does not relate to the present proceedings.

97 Following Mr Ong's letter to the court, we received several rounds of correspondence from the First Appellant, Mr Suhail, dated 20 May, 29 May, 6 June, 7 June, 9 June and 17 July 2024. These letters set out various allegations against Mr Ong and stated, among other things, that Mr Suhail wished to discharge Mr Ong as his counsel. Mr Ong has since informed us that he had received notice of his discharge as Mr Suhail's counsel on 12 June 2024. On 19 July 2024, Mr Suhail confirmed that, apart from his complaints about Mr Ong, he did not have any further arguments which he intended to make in CA 30.

98 We also received letters from Mr Iskandar dated 29 May and 19 June 2024. These letters contained points which Mr Iskandar described as "further submissions" which largely overlapped with the contents of Mr Ong's letter of 17 May 2024 covered at [94] above. Despite our reiterating to Mr Iskandar that no further arguments or submissions were required by the court following judgment being reserved, we received further letters from him on 4 August, 15 August and 30 August 2024, which contained allegations against Mr Ong's conduct as his counsel and set out further arguments which he wished to make in CA 30.

99 Mr Iskandar is not permitted by O 19 r 34 to raise further arguments without leave, much less when the Respondent had no opportunity to respond to them because the hearing was over. In such circumstances, it would be improper for the court to deal substantively with new arguments. To reiterate, these letters were sent to the court without copying in the Respondent long after parties had been given the opportunity in court to bring up all the arguments they wished to and to respond to all contentions made by the respective parties. In this connection, we echo our observations in *Pausi bin Jefridin v Public Prosecutor and other matters* [2024] SGCA 37 at [32] that justice cannot be expected to unfold in the shadows; in both civil and criminal matters, litigation cannot be conducted by way of communications that exclude the presence and participation of all parties.

Conclusion

100 We, therefore, grant declarations that the AGC and the SPS had acted unlawfully by, respectively, requesting and disclosing the Appellants' correspondence pursuant to the Practice. We also find the SPS and the AGC

acted in breach of confidence by, respectively, the disclosure and retention of the Appellants' correspondence pursuant to the Practice. However, we decline to grant Prayers 4 and 5 of OS 188, or to vary the Judge's decision that nominal damages of $10 for breach of copyright are payable to each of the First, Fifth and Seventh Appellants.

101 Where an appellant partially succeeds on the issues he raised in the appeal, the court may disallow or reduce costs accorded to the appellant. The court also has the discretion to make no order as to costs (*Noor Azlin bte Abdul Rahman and another v Changi General Hospital Pte Ltd* [2022] 1 SLR 689 at [285]; *TND v TNC and another appeal* [2017] SGCA 34 at [107]). Although the Appellants have succeeded on appeal in respect of Prayers 1, 2 and 3 of OS 188, they have been unsuccessful in their appeals against the Judge's decision in respect of Prayers 4, 5 and 6. The third and fourth hearings of the present case were also in large part necessitated by the Appellants' failure to address why the damages they were seeking in respect of breach of confidence and copyright were recoverable as a matter of law. In the circumstances, we make no order as to costs.

Sundaresh Menon
Chief Justice

Steven Chong
Justice of the Court of Appeal

Judith Prakash
Senior Judge

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