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

[2023] SGHC 24

Originating Summons No 268 of 2022 (Registrar's Appeal No 219 of 2022)

Between

CSO

… *Plaintiff*

And

(1) CSP
(2) CSQ

… *Defendants*

GROUNDS OF DECISION

[Civil procedure — Privileges — Without prejudice privilege]
[Evidence — Admissibility of evidence]
[Evidence — Proof of evidence — Admissions]

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CSO
v
CSP and another

[2023] SGHC 24

General Division of the High Court — Originating Summons No 268 of 2022 (Registrar's Appeal No 219 of 2022)
Andre Maniam J
8 August 2022

8 February 2023

Andre Maniam J:

Introduction

1 "Generally, communications between parties which are made on a 'without prejudice' basis in the course of negotiations for a settlement are not admissible": *Quek Kheng Leong Nicky and another v Teo Beng Ngoh and others and another appeal* [2009] 4 SLR(R) 181 ("*Nicky Quek*") at [22].

2 One basis of the common law principle relating to the admissibility of "without prejudice" communications is the policy of encouraging settlements: *Mariwu Industrial Co (S) Pte Ltd v Dextra Asia Co Ltd and another* ("*Mariwu*") [2006] 4 SLR(R) 807 at [24], [28] and [30]. That policy was articulated in these terms by Oliver LJ in *Cutts v Head* [1984] Ch 290 ("*Cutts v Head*") at 306: "parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that

anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings". [emphasis added]. This policy has been affirmed by the House of Lords in *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280 ("*Rush & Tompkins*") at 1299, and by our Court of Appeal in *Mariwu* (cited above); see also *Sin Lian Heng Construction Pte Ltd v Singapore Telecommunications Ltd* [2007] 2 SLR(R) 433 ("*Sin Lian Heng*") at [9] and [49].

3 The common law "without prejudice" principle finds statutory expression in s 23 of the Evidence Act 1893 (2020 Rev Ed) (the "Evidence Act"). Section 23(1) of the Evidence Act provides as follows:

> **Admissions in civil cases when relevant**
>
> 23.—(1) In civil cases, no admission is relevant if it is made —
>
> (*a*) upon an express condition that evidence of it is not to be given; or
>
> (*b*) upon circumstances from which the court can infer that the parties agreed together that evidence of it should not be given.

4 At common law, "anything that is said" in the course of "without prejudice" negotiations is privileged (*Cutts v Head*, quoted at [2] above). The court does not "dissect out identifiable admissions and withhold protection from the rest of without prejudice communications" (per Walker LJ in *Unilever Plc v Procter & Gamble Co* [2000] 1 WLR 2436 ("*Unilever*") at 2448–2449). This may be described as the Broad Approach to "without prejudice" privilege.

5 Section 23(1) of the Evidence Act, however, only refers to "admissions" not being relevant. Does the Evidence Act thereby oust the Broad Approach,

such that only *admissions* made in the course of "without prejudice" communications are privileged?

6 I decided that neither s 23(1) of the Evidence Act nor binding local case authority limits the common law in that regard: the privilege protects the whole of "without prejudice" communications, not only admissions.

Background

Facts

7 The first defendant was engaged as the contractor for a project. In turn, the first defendant engaged the plaintiff to supply equipment for the project, pursuant to a supply contract.

8 The plaintiff provided the first defendant with a guarantee (issued by the second defendant bank) in respect of the performance of the plaintiff's obligations under the supply contract.[1] The validity of the guarantee was successively extended, the last expiry date being 24 March 2022.[2]

9 The first defendant procured a letter of credit ("LC") in favour of the plaintiff, pursuant to which certain sums would be paid to the plaintiff for the plaintiff's performance of the supply contract.[3] The first defendant was entitled to deduct and retain 7% of every approved payment as retention money.[4] The retention money was to be paid by the first defendant to the plaintiff within 30

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1 1st affidavit of plaintiff's representative dated 22 March 2022 ("plaintiff's supporting affidavit") at para 14(2).

2 1st affidavit of first defendant's representative dated 8 May 2022 ("first defendant's reply affidavit") at paras 46, 76 and 85.

3 Plaintiff's supporting affidavit at para 13(3)(b).

4 Plaintiff's supporting affidavit at para 13(4).

days of provisional acceptance occurring under the supply contract.[5] Disputes arose between the plaintiff and the first defendant, including as to whether provisional acceptance had occurred under the supply contract, and what further payments the plaintiff was entitled to.

10 On or around 18 March 2022, the first defendant called on the guarantee,[6] alleging that the plaintiff had failed to fulfil its obligations under the supply contract, and that provisional acceptance under the supply contract had not been achieved.

The court proceedings

The plaintiff's application and supporting affidavit

11 On 22 March 2022, the plaintiff filed HC/OS 268/2022 ("OS 268") for an injunction to, *inter alia*, restrain the second defendant bank from paying on the guarantee and the first defendant from receiving payment. The plaintiff also filed HC/SUM 1115/2022 ("SUM 1115") for an interim injunction to the same effect. The interim injunction was granted on 23 March 2022.

12 The plaintiff filed an affidavit in support of OS 268 and SUM 1115, which made the following points:

(a) "Although [the plaintiff] had informed [the first defendant] on or around 20 February 2020 that it would be making a claim under the Letter of Credit for the Retention Money, as far as [the plaintiff] is aware, [the first defendant] did not take any steps to extend the Letter of Credit and/or to prevent the [LC-issuing

5 Plaintiff's supporting affidavit at para 13(4).

6 First defendant's reply affidavit at para 108.

bank] from returning the Retention Money (withheld under the Letter of Credit) to [the plaintiff] in full. [The first defendant's] conduct in allowing the Retention Money to be returned to [the plaintiff] in full without objection to the [LC-issuing bank] clearly demonstrates that [the first defendant] accepts that Provisional Acceptance has occurred …".[7]

(b) After the plaintiff wrote to the first defendant on 23 January 2020 stating that provisional acceptance under the supply contract would be achieved on 23 February 2020, the first defendant replied by way of a letter dated 6 March 2020, in which it "merely stated that it disagreed with [the plaintiff], pointing to the fact that the Scheduled Date of the Performance Test has not been defined under the Supply Contract. Importantly, [the first defendant] did not take issue with the Retention Money being returned by the [LC-issuing bank]."[8]

13 The plaintiff thereby made two assertions (the "plaintiff's Assertions"), namely that:

(a) the first defendant did not take any steps to extend the LC (the "first Assertion"); and

(b) the first defendant did not take issue with the retention money being returned to the plaintiff (the "second Assertion").

---

7 Plaintiff's supporting affidavit at para 27.

8 Plaintiff's supporting affidavit at paras 25 and 28.

14 The plaintiff's Assertions were made in the context of the plaintiff seeking an injunction on the basis that the first defendant's call on the guarantee was unconscionable. The plaintiff argued as follows:[9]

(a) the first defendant sought to justify its call on the guarantee by asserting that provisional acceptance under the supply contract had not occurred, and that the plaintiff's failure to extend the guarantee when provisional acceptance had not occurred was a breach of the supply contract;[10]

(b) the plaintiff's case is that provisional acceptance under the supply contract *had* occurred;[11]

(c) the retention money was paid to the plaintiff on or around 9 March 2020, which was to happen only if provisional acceptance had occurred;[12]

(d) to the best of the plaintiff's knowledge, the first defendant did not take any steps to extend the LC, nor did it take issue with the retention money being returned to the plaintiff by the bank (the plaintiff's Assertions); and

(e) the first defendant's contemporaneous conduct was thus inconsistent with its subsequent assertion that provisional acceptance had not been achieved; the first defendant did not genuinely believe that provisional acceptance had not been

9 Plaintiff's supporting affidavit at para 57.

10 Plaintiff's supporting affidavit at para 52.

11 Plaintiff's supporting affidavit at para 25.

12 Plaintiff's supporting affidavit at para 26.

achieved and that the contract had been breached, and as such, its call on the guarantee was unconscionable.

The first defendant's reply affidavit

15 The first defendant filed an affidavit which responded to the plaintiff's Assertions.

16 Part of the response was by reference to open correspondence, in particular, the 6 March 2020 letter stating that the first defendant did not think that provisional acceptance should be deemed to have occurred (see [12(b)] above).[13]

17 The first defendant however went further, saying that it had earlier (in February 2020) sought the plaintiff's agreement to extend the LC, and taken issue with the release of the retention money. This entailed reference to five emails in the period of 17 to 21 February 2020 (the "Disputed Emails"), which the first defendant referred to and exhibited in its reply affidavit. Each of those emails had the subject header "Settlement/Gentlemen Agreement", and individually they made the following points:[14]

(a) On 17 February 2020, the first defendant stated,

> … in view that the equipment has not been commissioned and conducted [*sic*] the performance tests, so I suggest that both parties discuss the settlement as soon as possible and the remaining payments under the LC to be postponed.
>
> We can extend the LC first and when we discuss the settlement, let's see what we can do in next step.

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13 Plaintiff's supporting affidavit at Tab 17, p 1120.

14 First defendant's reply affidavit at paras 50 to 56 and Tabs 21 to 23, pp 1282 to 1289.

(b) On 20 February 2020, the plaintiff said that a postponement of the last payment would have been possible only with a contract amendment, which the parties had failed to agree on. Therefore, the plaintiff's management had instructed that the contract be followed and the final invoice be sent to the bank, *ie*, the plaintiff would be claiming the retention money under the LC.

(c) The first defendant replied the same day to "clearly state [its] position" that "[f]or the remaining payments, we think the conditions for those payments are not fulfilled according to the Contract. Now the project has not start [*sic*] the performance tests, therefore, these two payments shall not be made as per the Contract and we disagree for [*sic*] your claim on remaining payments."

(d) The plaintiff replied the same day to say that the only way to postpone the contractual due payment would have been an amendment and therefore they had pushed to finalise the "gentlemen agreement", but without success.

(e) On 21 February 2020, the first defendant replied to say:

> … [T]he remaining payments are not due as per the Contract.
>
> And also, the settlement has not agreed [*sic*] by both parties so that the Contract Price is pending and the amount of remaining payment to [the plaintiff] is not finalised.
>
> *That's why we think the LC shall be extended firstly.*
>
> [emphasis added]

> In the text of its reply affidavit, the first defendant described this 21 February 2020 reply as reiterating its position that provisional acceptance had not been achieved.[15]

The plaintiff's striking out application

18 The plaintiff applied by HC/SUM 2046/2022 ("SUM 2046") to strike out the Disputed Emails as exhibits to the first defendant's reply affidavit, as well as paragraphs 50 to 56 of the affidavit which referred to them. The plaintiff contended that the Disputed Emails were covered by "without prejudice" privilege, and so the first defendant could not put them into evidence, or refer to their contents.

The assistant registrar's decision

19 The application failed at first instance. The assistant registrar who heard the application decided as follows:

> (a) the first defendant could put portions of the Disputed Emails into evidence to rebut the plaintiff's Assertions; and
>
> (b) in the first place, the portions of the Disputed Emails which the first defendant relied upon were never covered by "without prejudice" privilege.

My decision on the registrar's appeal

20 I dismissed the plaintiff's appeal against the assistant registrar's decision:

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15 First defendant's reply affidavit at para 54.

(a) I agreed with the assistant registrar that the first defendant could put portions of the Disputed Emails into evidence to rebut the plaintiff's Assertions;

(b) however, I did not agree with the assistant registrar that those portions of the Disputed Emails were never covered by "without prejudice" privilege: I considered that they were privileged in the first place, but that the first defendant could rely on an exception to the privilege, the Delay/Acquiescence Exception, "to explain delay or apparent acquiescence" (*Unilever* at 2444–2445, exception (5); accepted by the Court of Appeal in *Nicky Quek* at [23]).

21 I also limited the portions of the Disputed Emails that the first defendant could rely on, excluding portions that did not relate to the plaintiff's Assertions. At the hearing before me, counsel for the first defendant accepted that the relevant portions, as limited by me (the "Relevant Portions"), were sufficient for the first defendant's purposes.

The appeals

22 Both parties sought and obtained permission to appeal.

23 By AD/CA 98/2022, the plaintiff appeals against my *decision* that the first defendant could rely on portions of the Disputed Emails to rebut the plaintiff's Assertions.

24 The first defendant is satisfied with my *decision*, but by AD/CA 99/2022 the first defendant appeals against part of my *reasons*, namely, that the Relevant Portions of the Disputed Emails were covered by "without prejudice" privilege. In effect, the first defendant seeks to affirm my decision on an additional ground

that did not find favour with me, an appeal of the type considered in *L Capital Jones Ltd and another v Maniach Pte Ltd* [2017] 1 SLR 312 at [65].

25 If the plaintiff's appeal fails because an exception to "without prejudice" privilege applies, that would render moot the first defendant's appeal. I will thus address the plaintiff's appeal first.

Issues

26 I address the following main issues:

(a) whether the Delay/Acquiescence Exception applies in this case; and

(b) whether the Relevant Portions of the Disputed Emails were privileged in the first place.

The Delay/Acquiescence Exception applied in this case

27 Although I found that the Disputed Emails were subject to "without prejudice" privilege to begin with (as I explain below from [46]), I decided that an exception to "without prejudice" privilege applied – namely, the Delay/Acquiescence Exception.

The Delay/Acquiescence Exception

28 The Delay/Acquiescence Exception was stated by Walker LJ in *Unilever* at 2444–2445: that a party could refer to "without prejudice" communications "to explain delay or apparent acquiescence". In this regard, I considered that the concept of "delay" included not only belated action, but also complete inaction: here, the non-extension of the LC, which the plaintiff alleged to be due to the first defendant not taking any steps to extend it.

29 Those pages of Walker LJ's judgment in *Unilever* were cited by the Court of Appeal in *Nicky Quek* at [23] as setting out "the most important instances" of the exceptions to "without prejudice" privilege.

30 Walker LJ noted that in *Walker v Wilsher* (1889) 23 QBD 335, Lindley LJ (at 338) had regarded the Delay/Acquiescence Exception as limited in its effect, as excepting the fact and dates of negotiations from being privileged. However, Walker LJ doubted the generality of this proposition, commenting that "occasionally, fuller evidence is needed in order to give the court a fair picture of the rights and wrongs of the delay". The Court of Appeal in *Nicky Quek* accepted the exceptions as formulated by Walker LJ in *Unilever*.

31 The plaintiff cited *Soon Peng Yam and another (trustees of the Chinese Swimming Club) v Maimon bte Ahmad* [1995] 1 SLR(R) 279 ("*Soon Peng Yam*") at [21] to suggest that Singapore law only recognises the Delay/Acquiescence Exception in its narrow form (based on *Walker v Wilsher*), rather than the broader formulation set out in *Unilever*. The court in *Soon Peng Yam* did not however have to decide whether the Delay/Acquiescence Exception might extend to *contents* of "without prejudice" negotiations. In that case, the appellants sought to adduce certain "without prejudice" letters for the mere fact that negotiations (on the matter in question) had taken place – and the court agreed that that could be done. As the appellants accepted that the contents of the "without prejudice" letter were not admissible, it was not in issue whether the appellants might also have referred to those contents.

32 The decision in *Soon Peng Yam* also predates the formulation of the exceptions in *Unilever* and the endorsement of that formulation in *Nicky Quek*.

The application of the Delay/Acquiescence Exception to this case

33 In the present case, the first defendant could minimally rely on the narrow form of the Delay/Acquiescence Exception to say that in the period of 17 to 21 February 2020, the plaintiff and the first defendant were engaged in "without prejudice" negotiations regarding the payments to be made by the first defendant to the plaintiff. That would go some way towards rebutting the plaintiff's second Assertion that the first defendant had not taken issue with the plaintiff being paid the retention money.

34 This was, however, a case where (as Walker LJ put it in *Unilever*) fuller evidence was needed to give the court a fair picture of the rights and wrongs of the delay (or inaction, I would add).

35 In response to the plaintiff's second Assertion that the first defendant had not taken issue with the plaintiff being paid the retention money, the first defendant could point to the *fact of negotiations about payment*; but the first defendant should also be allowed to say that *it had expressed disagreement with the plaintiff's claim* for the remaining payments, and that *it had stated that the amount of the remaining payments due to the plaintiff had not been finalised*.

36 The plaintiff had also made the first Assertion that the LC had not been extended because the first defendant had not taken any steps to extend it. Given that the plaintiff had put in issue the *reason* for the LC not being extended (*ie*, the rights and wrongs of the delay/inaction), the first defendant should be allowed to respond by showing that in the course of "without prejudice" negotiations *it had proposed to extend the LC, but the plaintiff had opposed that extension*, and that is why the LC was not extended. If the first defendant were

limited to referring to the dates and fact of negotiations about payments, the court would not have a fair picture of why the LC had not been extended.

37 *McFadden v Snow* (1952) 69 WN (NSW) 8 (followed in *Pitts v Adney* [1961] NSWR 535 at 539) is a similar case. There was an issue in *McFadden v Snow* as to whether one Ms Jobson had surrendered her tenancy to the claimant. The claimant sought to prove that she did, by adducing a letter from him to her to this effect. The letter referred to evidence given by Ms Jobson in earlier proceedings that she claimed no interest in the property. It further expressed the claimant's acceptance of Ms Jobson's abandonment of rights in the tenancy. Crucially, the claimant asserted that he had received no reply to his letter. The court said (at 10) that this would have been "highly significant for the purpose of establishing an admission (by silence) [that] Ms Jobson had surrendered her tenancy".

38 The truth, however, was that following the claimant's letter, Ms Jobson's solicitors did write to the claimant, but that letter was marked "without prejudice". The contents of the letter were inconsistent with Ms Jobson having surrendered the tenancy. The court admitted the letter into evidence, to "negative the inference that otherwise might quite erroneously have been raised in [the] claimant's favour" (at 10). It dismissed the claimant's objection that the reply could not be admitted as it was marked "without prejudice". It refused to allow "the cloak of 'without prejudice'" to be "abused for the purpose of misleading the court" (at 10). If the court had merely allowed Ms Jobson to refer to the date and fact of her solicitors' letter, Ms Jobson could have rebutted the claimant's assertion that he had received no correspondence from Ms Jobson after his letter to her, but the court would still not have a fair picture of the matter if it did not know what the letter from Ms Jobson's solicitors said.

39 Allowing the contents of the Disputed Emails to be put in evidence (to the extent they related to the plaintiff's Assertions) would not offend the public policy underlying the "without prejudice" principle. In *Muller v Linsley & Mortimer* [1996] PNLR 74 at 79–80 (cited in *Unilever* at 2443), Hoffmann LJ suggested that many of the exceptions to "without prejudice" privilege involve communications relevant for the mere *fact that they were made*, rather than the *truth of what is stated or admitted*.

40 In the present case, the first defendant wished to mention:

(a) the fact that it had proposed to extend the LC, pointing out that the parties were still in negotiations about what the plaintiff should be paid; and

(b) the fact that the first defendant had expressed disagreement with the plaintiff's claim for the remaining payments, and stated that the amount of the remaining payments due to the plaintiff had not been finalised.

41 The first defendant's statements on those points were relevant for the *mere fact that they were made*, and not because of the *truth of what was stated*.

42 On a related note, at the core of the "without prejudice" principle is the protection of admissions against a party's interest being used against that party thereafter (*Unilever* at 2448). Allowing the first defendant to refer to *its own statements* in the Disputed Emails would not go against that.

43 As for the first defendant also wishing to refer to *the plaintiff's statements* that the plaintiff would not agree to extend the LC unless the negotiations culminated in agreement on a contract amendment (see [17(b)] and

[17(d)] above), those statements would contain an *admission* by the plaintiff that it was willing to negotiate. Indeed, a genuine intimation that a party is willing to negotiate a settlement of an existing dispute is a sufficient "admission" to make communications "without prejudice" in nature: *Sin Lian Heng* at [22]–[39]; *Ernest Ferdinand Perez De La Sala v Compañia De Navegación Palomar, SA and others and other appeals* [2018] 1 SLR 894 ("*Ernest Ferdinand*") at [67]–[69], and [89]–[95].

44 It would, however, not go against the policy objective of "without prejudice" privilege to allow the first defendant to rely on the plaintiff's rejection of the first defendant's proposal to extend the LC, to rebut the plaintiff's first Assertion that the LC was not extended because the first defendant did not take any steps to extend it. That the parties were in "without prejudice" negotiations (and that the plaintiff was willing to negotiate) would already have been evident even before one turned to the fact that the plaintiff rejected the first defendant's proposal. The first of the five Disputed Emails, which came from the first defendant, already made references to settlement discussions. Moreover, as discussed above at [36], as the plaintiff had sought to blame the first defendant for the LC not being extended, the first defendant was justified in providing fuller evidence to give the court a fair picture of why the LC had not been extended.

45 Given these findings, I was satisfied that the first defendant should be allowed to rely on the fact, dates *and* **contents** of the Disputed Emails, but with reliance on the contents limited to those of the Relevant Portions (see [42]–[44] above).

The Relevant Portions of the Disputed Emails were privileged in the first place

46 Having dealt with the thrust of the plaintiff's appeal, I turn to discuss the first defendant's appeal.

47 In giving permission to appeal, the Appellate Division framed various issues to be addressed by the parties:

> The applications are allowed because of the following question of general principle to be decided for the first time:
>
> (a) Whether, in respect of without prejudice privilege, the broad approach stated in *Unilever Plc v The Procter & Gamble Co* [2000] 1 WLR 2436 that communications between negotiating parties are protected by without prejudice privilege as a whole and the court should not dissect parts of such communications as not being protected by such privilege (the "Broad Approach"), or the narrow approach in which only those parts of such communications which are admissions within the meaning of ss 17(1) read with 23 of the Evidence Act 1893 (2020 Rev Ed) ("Evidence Act") are protected by without prejudice privilege, applies in Singapore?
>
> In answering (a), both applicants are to address the following sub-questions:
>
> (i) Whether the Broad Approach engages s 23 of the Evidence Act and the two requirements for without prejudice privilege to apply set out in *Ernest Ferdinand Perez De La Sala v Compania De Navegacion Palomar, SA* [2018] 1 SLR 894 ("*Ernest Ferdinand*") (at [67] and [89]), *viz*, that (a) the communications (in respect of which privilege is claimed) must arise in the course of genuine negotiations to settle a dispute and (b) the communications must constitute or involve an admission against the maker's interest?
>
> (ii) If (i) is answered in the affirmative, does the Broad Approach sit harmoniously with s 23 of the Evidence Act and/or the second requirement set out in *Ernest Ferdinand*?
>
> (iii) Are there exceptions to the Broad Approach and what are their limits, if any?

48 I thus address:

(a) whether the Broad Approach (of protecting the whole of "without prejudice" communications, and not just admissions) is the position at common law;

(b) whether the Broad Approach is precluded by s 23(1) of the Evidence Act;

(c) whether the Broad Approach is precluded by the Court of Appeal's decision in *Ernest Ferdinand*;

(d) what are the exceptions to the Broad Approach; in particular, whether the Delay/Acquiescence Exception is an exception; and

(e) whether the Relevant Portions of the Disputed Emails would have been privileged in the first place, even if the privilege only covered admissions.

The Broad Approach to "without prejudice" privilege is the position at common law

49 The Broad Approach is the position under English law: see *Cutts v Head*, *Rush & Tompkins*, and *Unilever*, cited at [2] and [4] above.

50 The Broad Approach has also been accepted in other common law jurisdictions:

(a) Australia: *Yokogawa Australia Pty Ltd and Others v Alstom Power Ltd* [2009] SASC 377 (SA) at [98]–[100];

(b) Hong Kong: *Poon Loi Tak (the administrator of the late Poon Nuen, deceased) v Poon Loi Cheung Desmond* [2020] 1 HKLRD 511 at [19] and [22]; and

(c) Canada: *Phoa Estate v Ley* [2020] AJ No 555 (Alta) at [27]–[28].

51 In *Unilever*, Walker LJ explained (at 2448–2449) that the Broad Approach furthers the public policy objective of encouraging settlements; indeed, protecting only admissions (and not the whole of "without prejudice" communications) would go against that policy:

> … the modern cases, especially *Cutts v Head*, *Rush & Tompkins Ltd v Greater London Council* and *Muller v Linsley & Mortimer* … make clear that the without prejudice rule is founded partly in public policy and partly in the agreement of the parties. They show that the protection of admissions against interest is the most important practical effect of the rule. But to dissect out identifiable admissions and withhold protection from the rest of without prejudice communications (except for a special reason) would not only create huge practical difficulties but would be contrary to the underlying objective of giving protection to the parties, in the words of Lord Griffiths in the *Rush & Tompkins* case [1989] AC 1280, 1300: 'to speak freely about all issues in the litigation both factual and legal when seeking compromise and, for the purpose of establishing a basis of compromise, admitting certain facts.' Parties cannot speak freely at a without prejudice meeting if they must constantly monitor every sentence, with lawyers or patent agents sitting at their shoulders as minders.

52 In *Sin Lian Heng*, Sundaresh Menon JC (as he then was) cited the above portion of Walker LJ's judgment in part, to support his decision that "without prejudice" privilege would continue to apply to negotiations on quantum even if there had been an admission of liability (which would not be privileged).

53 Menon JC first agreed with the *policy* rationale stated in *Cutts v Head* (and approved of in *Rush & Tompkins*) that "parties should be encouraged so

far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations … may be used to their prejudice in the course of the proceedings" (at [49]). He decided that that rationale "applies with equal force to negotiations on quantum where there is a real dispute over this … even though one party may have admitted to liability" (at [50]).

54 At [51]–[52] he then cited Walker LJ's judgment in *Unilever* as support for his decision as a matter of *principle*:

> 51 In my judgment, the same result can also be seen to be justified *in principle*. In *Unilever* ([12] *supra*), Robert Walker LJ stated that it would be undesirable to 'dissect out identifiable admissions and withhold protection from the rest of without prejudice communications'. The rationale for this proposition is that if there is a risk that some part of the communications that take place in circumstances where the parties are trying to come to a settlement may later be found not to be privileged, it would inhibit the discussions as a practical matter. In my judgment, the same sort of practical difficulties would arise if the 'without prejudice' rule were held not to apply to negotiations directed at settling disputes on quantum.
>
> 52 One can quite easily imagine a situation where negotiations both as to liability and quantum are conducted on the same plane and at the same time. If the negotiations in respect of liability succeed, but those as to quantum break down and the matter proceeds to trial for an assessment of damages, it would be patently unfair for evidence of such negotiations to be admitted. As observed by Robert Walker LJ in *Unilever* at 796:
>
> > Parties cannot speak freely at a without prejudice meeting if they must constantly monitor every sentence, with lawyers or patent agents sitting at their shoulders as minders.
>
> [emphasis in original]

55 The outcome in *Unilever* turned on the application of the Broad Approach. Unilever had pleaded that Procter & Gamble had made a threat actionable under the UK Patents Act 1977 (c 37). However, that threat (if it had

been made) would have been made during a "without prejudice" meeting. The judge at first instance struck out the "threat" pleading as an abuse of process, and that was upheld by the English Court of Appeal.

56 Walker LJ (with whom the other lord justices agreed) applied the Broad Approach to preclude Unilever from referring to the threat as it was made during a "without prejudice" meeting. Although the threat was not an admission, by applying the Broad Approach the whole of the "without prejudice" communications would be privileged, as Walker LJ explained (at 2443–2444 and 2449):

> … I have no doubt that busy practitioners are acting prudently in making the general working assumption that the ['without prejudice'] rule, if not 'sacred' (*Hoghton v Hoghton* (1852) 15 Beav 278, 321), has a wide and compelling effect. That is particularly true where the 'without prejudice' communications in question consist not of letters or other written documents but of wide-ranging unscripted discussions during a meeting which may have lasted several hours.
>
> At a meeting of that sort the discussions between the parties' representatives may contain a mixture of admissions and half-admissions against a party's interest, more or less confident assertions of a party's case, offers, counter-offers, and statements (which might be characterised as threats or as thinking aloud) about future plans and possibilities. As Simon Brown LJ put it in the course of argument, a threat of infringement proceedings may be deeply embedded in negotiations for a compromise solution. Partial disclosure of the minutes of such a meeting may be, as Leggatt LJ put it in *Muller v Linsley & Mortimer* [1996] PNLR 74, 81, a concept as implausible as the curate's egg (which was good in parts). As it happens, the minutes of the Frankfurt meeting are exhibited in redacted form in which the redacted parts of the document appear to amount to about 90 per cent of its contents.
>
> …
>
> In my judgment the judge was right to conclude that it would be an abuse of process for Unilever to be allowed to plead anything that was said at the meeting either as a threat or as a claim of right. The circumstances were such that each side was entitled to expect to be able to speak freely, and their agreement

> to the meeting being arranged evinces that common intention. I would, if necessary, base my conclusion on the parties' agreement to extend the normal ambit of the rule based on public policy. But I do not think it is necessary to go that far. The Frankfurt meeting was undoubtedly an occasion covered by the normal rule based on public policy, and the pleading of the threat (or claim of right) has not been shown to come within any recognised exception. …

57 Walker LJ recognised (at 2448) that "the protection of admissions against interest is the most important practical effect of the rule", but admissions are not the only communications that "without prejudice" privilege would cover.

58 Admissions against interest made during "without prejudice" negotiations might be seized upon by the opposing party if they were not privileged, and it is "thus in the overall spirit of encouraging negotiations that parties be sufficiently protected when they 'lay their cards on the table'" (*Sin Lian Heng* at [43]). Admissions against interest are, however, not the only communications made during "without prejudice" negotiations that might prejudice their author if the communications were not protected by privilege. One example would be actionable threats such as that pleaded in *Unilever*. Likewise, a party might during negotiations assert a claim or defence that is not later pursued in court proceedings – it should not be prejudiced by the other party being able to make forensic use of that discrepancy. So too, if an exaggerated claim sum is put forward in negotiations, or if a party emphasises the strength of his case to an unreasonable extent, or indeed in an unreasonable manner. It would encourage settlements if the *whole* of "without prejudice" communications are protected, and not merely *admissions against interest*.

59 The Broad Approach furthers the objective of encouraging settlements, as a matter of *policy* and *principle*; and it is the position at common law. Is the

Broad Approach, however, precluded in Singapore by the Evidence Act or by binding authority (in particular, the Court of Appeal's decision in *Ernest Ferdinand*)?

The Broad Approach is not precluded by s 23(1) of the Evidence Act

60 Section 2(2) of the Evidence Act provides that "[a]ll rules of evidence not contained in any written law, so far as such rules are inconsistent with any of the provisions of this Act, are repealed".

61 However, s 23(1) (which is reproduced at [3] above) has been described as "a statutory enactment of the common law principle relating to the admissibility of 'without prejudice' communications based on the policy of encouraging settlements": *Mariwu* at [24] (the applicable section at the time was s 23 of the Evidence Act (Cap 97, 1997 Rev Ed) ("Evidence Act (1997 Rev Ed)"), but this is *in pari materia* with s 23(1) of the Evidence Act 1893 (2020 Rev Ed)). One would expect the common law "without prejudice" principle not to be inconsistent with its statutory enactment in s 23(1).

62 That was indeed the conclusion reached by the Court of Appeal in *Mariwu*, in relation to the application of the common law principle to third parties (*ie*, parties other than the parties to the negotiations). The court noted at [25] that s 23 of the Evidence Act (1997 Rev Ed) "only refers to situations where it is the *parties to the negotiations* themselves who are attempting to renege on an express or implied agreement not to use admissions made in the course of negotiations against each other. The admissions in such cases are not relevant." [emphasis added].

63 The court went on to hold at [27]–[28] that s 23 cannot refer to the situation where a third party is involved; that situation was governed by the

common law. Given the court's interpretation that the rationale of the s 23 privilege was to encourage settlements, the court saw no inconsistency between that section and the common law principle as stated in *Rush & Tompkins*.

64 *Mariwu* was followed in *Krishna Kumaran s/o K Ramakrishnan v Kuppusamy s/o Ramakrishnan* [2014] 4 SLR 232 ("*Krishna*"), where the High Court applied the common law "without prejudice" principle to cover a communication made to a messenger or informal mediator between the two disputing parties. *Krishna* was then approved by the Court of Appeal in *Ernest Ferdinand* at [98].

65 In *Mariwu* at [24] the court recognised that the "without prejudice" principle at common law has two justifications – first, the public policy of encouraging parties to negotiate and settle their disputes out of court; and second, an agreement between the parties that their negotiations should not be introduced into evidence. It then observed at [26] that section 23 of the Evidence Act (1997 Rev Ed) places emphasis on the second reason, "agreement": be it express agreement (now s 23(1)(*a*) of the Evidence Act (2020 Rev Ed)) or inferred agreement (now s 23(1)(*b*)).

66 However, this did not mean that the public policy rationale was of no relevance to s 23. Although s 23 places emphasis on agreement, the court in *Mariwu* further held at [24] and [28] that the rationale of the s 23 privilege was to encourage settlements, *ie*, s 23 has the same rationale as the common law "without prejudice" principle. That in turn entails applying the Broad Approach, as Walker LJ explained in *Unilever* at 2448–2449 (quoted above at [51]).

67 Given that s 23 and the common law "without prejudice" principle have the same rationale (*ie*, public policy and agreement of parties), the common law principle (and the Broad Approach) is not inconsistent with s 23.

68 In *Mariwu*, the court reasoned that s 23 cannot refer to the situation where a third party is involved, but that the common law principle could and would still apply to that situation. On a parity of reasoning, as between the parties to the negotiations, s 23 only refers to admissions; if the "without prejudice" communications contain more than just admissions, the common law still applies to make the whole of the "without prejudice" communications privileged.

***The Broad Approach is not precluded by* Ernest Ferdinand**

69 An issue in *Ernest Ferdinand* was whether a certain letter between lawyers was "without prejudice" in nature. The Court of Appeal agreed with the trial judge that for the letter to be "without prejudice" in nature:

> (a) "the communications (in respect of which privilege is claimed) must arise in the course of genuine negotiations to settle a dispute"; and
>
> (b) "the communication must *constitute* ***or*** *involve* an admission against the maker's interest" [emphasis added in italics and bold italics]
>
> ([67] read with [89] of the Court of Appeal's decision, quoting from [489] of the first instance decision published as [2017] SGHC 14)

70 The Court of Appeal however disagreed with the trial judge's application of those principles. The judge had held that the letter was "without prejudice" in nature as it was a genuine invitation to negotiate a settlement, but the Court of Appeal considered that taking the 11-page letter as a whole, it

conveyed little in the way of an invitation to negotiate a settlement – instead, the letter gave the impression that its author was trying to exert pressure on the recipient to acquiesce in the maker's demands (at [89]–[94]).

71 Significantly, the Court of Appeal observed that if two paragraphs (which the court quoted at [92]) were the only mention of criminal consequences, the court might not have thought them unusual in a letter concerning settlement negotiations; however, practically the entirety of the letter's 11 pages, comprising 55 paragraphs, was devoted to an analysis of wrongdoing and replete with statements regarding wrongdoing and consequences (at [93]). Like the trial judge, the Court of Appeal considered whether *the letter* was privileged, and there was no suggestion that if certain paragraphs in the letter comprised statements about criminal consequences, rather than admissions against the author's interest, then *those paragraphs* would not be privileged.

72 It follows that a communication may be "without prejudice" in nature even if some parts of it are not admissions, but instead statements about the other party's wrongdoing and the consequences thereof. That is consistent with the Broad Approach – if an objective inquiry based on the whole content and circumstances of the communication (*Ernest Ferdinand* at [90]) shows that the communication was made with the purpose of inviting negotiations for a settlement, that communication would be "without prejudice" in nature. The court would not then parse the communication to identify admissions as the only contents that are privileged, leaving the other aspects of the communication (references to wrongdoing and consequences, or portions emphasising the strength of a party's own case – at [90] – and the like) unprotected by privilege.

73 Indeed, the very formulation of the second pre-requisite (*Ernest Ferdinand* at [67]) that "the communication must *constitute* ***or*** *involve* an admission against the maker's interest" [emphasis added in italics and bold italics] itself shows that admissions are not the only aspects that are privileged. It is not only communications that "constitute" admissions that are privileged; communications that "involve" admissions (and also involve non-admissions) are privileged too.

74 The Court of Appeal (at [86]) noted the argument that "the broader purpose of without prejudice privilege is to provide parties with a general freedom to negotiate, and therefore *things which go beyond admissions against interest should be capable of being protected*" [emphasis added]. The court did not disagree with this. On the contrary, the court (at [68] and [90]) approved of the observations in *Schering Corporation v CIPLA Ltd* [2004] EWHC 2587 (Ch) ("*Schering*") , a decision that applied the Broad Approach.

75 In *Schering*, the court held that a certain letter was a "negotiating document", *ie*, a document indicating a willingness to negotiate, and as such the letter was protected by "without prejudice" privilege. The letter contained two paragraphs asserting the author's confidence, on the basis of legal advice, that the other party's patent was invalid, and a further paragraph to the effect that the author's confidence in the correctness of its position was so great that it felt it is safe to proceed without regard to the other side's position if negotiations were not entered into and resolved satisfactorily. The court however held that "the overall message continues to be one of wishing to negotiate" (at [21]). The court did not dissect out identifiable admissions (such as references to willingness to negotiate) and withhold protection from the rest of the "without prejudice" communications (such as the author's assertions of the strength of its

own position). The *whole* letter was privileged, not just the identifiable admissions in it.

76 *Ernest Ferdinand* (which endorsed *Schering*) does not preclude the Broad Approach. On the contrary, *Ernest Ferdinand* supports the Broad Approach.

The same recognised exceptions apply under the Broad Approach, in particular the Delay/Acquiescence Exception

The Delay/Acquiescence Exception is a recognised exception

77 As discussed at [27]–[42] above, the exceptions to "without prejudice" privilege set out by Walker LJ in *Unilever* at 2444–2445 were accepted as good law in Singapore by the Court of Appeal in *Nicky Quek* at [23]. It follows that whether the Broad Approach is the position in Singapore, or "without prejudice" privilege in Singapore only covers admissions, the same exceptions accepted in *Nicky Quek* would apply. Those exceptions include the Delay/Acquiescence Exception.

The Relevant Portions of the Disputed Emails are not communications of objective facts unconnected with the parties' negotiations

78 The first defendant also contended that the Relevant Portions of the Disputed Emails were never privileged because they were communications of facts unconnected to settlement negotiations. I did not accept this on the facts, but I will first review the legal principles.

79 The first defendant cited *Greenline-Onyx Envirotech Phils, Inc v Otto Systems Singapore Pte Ltd* [2007] 3 SLR(R) 40 ("*Greenline-Onyx*") where the Court of Appeal admitted into evidence letters comprising acknowledgments of

the appellant's debt. The court cited the decision of the majority in the House of Lords case of *Bradford & Bingley plc v Rashid* [2006] 1 WLR 2066 ("*Bradford & Bingley*"), that "without prejudice" privilege did not apply to "apparently open communications designed only to discuss the repayment of an admitted liability rather than to negotiate a compromise to a disputed liability" (*Greenline-Onyx* at [17]).

80 The first defendant, however, relied on *Greenline-Onyx* for a broader proposition. In *Greenline-Onyx*, the court noted (at [17]) that in *Bradford & Bingley*, Lord Hope of Craighead was of the view "that the [without prejudice] rule did not apply to clear admissions or statements of fact that did not form part of an offer to compromise". The first defendant relied on that to contend that the Relevant Portions of the Disputed Emails were statements of fact "not fairly incidental to the purpose of settling a dispute between the parties" (citing *Halsbury's Laws of Singapore*, vol 10 (LexisNexis, 2016 Reissue) at para 120.402). The first defendant also cited *Field v Commissioner for Railways for NSW* (1957) 99 CLR 285 as an example: there, the plaintiff's admission to a doctor (appointed by the defendant) that the plaintiff himself was responsible for the injuries for which he was seeking compensation, was regarded as having been "made without any proper connexion with any purpose connected with the settlement of the action" (at [8]).

81 The court should be cautious about allowing such propositions to be used to erode the protection provided by the Broad Approach. As Lord Griffiths put it in *Rush & Tompkins* at 1300:

> … There is also authority for the proposition that the admission of an 'independent fact' *in no way connected* with the merits of the cause is admissible even if made in the course of negotiations for a settlement. Thus an admission that a document was in the handwriting of one of the parties was

> received in evidence in *Waldridge v Kennison* (1794) 1 Esp 142. *I regard this as an exceptional case and it should not be allowed to whittle down the protection given to the parties to speak freely about all issues* in the litigation both factual and legal when seeking compromise and, for the purpose of establishing a basis of compromise, admitting certain facts. If the compromise fails the admission of the facts made for the purpose of the compromise should not be held against the maker of the admission and should therefore not be received in evidence. [emphasis added]

82 The present case was not an "exceptional case" where statements of fact made in the course of negotiations were nevertheless "in no way connected" with the settlement that was being negotiated.

83 In the first place, the Relevant Portions of the Disputed Emails were not "statements of fact". As I noted at [40]–[44] above, they comprised:

(a) the first defendant's *proposal* to extend the LC;

(b) the plaintiff's *rejection of that proposal* because the plaintiff would only agree to extend the LC if the negotiations concluded in agreement on a contract amendment; and

(c) the first defendant's *disagreement with the plaintiff's claim* for remaining payments, and the *statement of its position* that the amount of the remaining payments due to the plaintiff had not been finalised (as the parties had not agreed on settlement), and so the first defendant said the LC should first be extended.

84 All of these are statements of the parties' respective positions, rather than statements of objective facts.

85 Moreover, all these statements were clearly connected with the settlement negotiations – the ongoing negotiations about payment were the

premise for the first defendant's proposal to extend the LC, and its disagreement with the plaintiff's claim was expressed in the context of it nevertheless being prepared to negotiate about what the plaintiff should be paid. As for the plaintiff's refusal to extend the LC, the plaintiff said that it would only agree to extend the LC if the negotiations concluded in a contract amendment – to the plaintiff, the extension of the LC was a potential outcome of the negotiations.

86 I thus did not agree with the first defendant's contention that the Relevant Portions of the Disputed Emails were not privileged because they were communications of objective facts unconnected with the parties' negotiations.

The Relevant Portions of the Disputed Emails would also be privileged in the first place, even if the privilege only covered admissions

87 For completeness, even if the Broad Approach is not the law in Singapore, the Relevant Portions of the Disputed Emails would nevertheless be privileged in the first place, for they all constitute admissions that would be protected by "without prejudice" privilege.

88 First, the Disputed Emails were "without prejudice" in nature to begin with (*Ernest Ferdinand* at [67] and [89]):

(a) the Disputed Emails concerned disputes between the parties (including about what the plaintiff should be paid) which the parties were trying to settle; and

(b) the Disputed Emails contained admissions – intimations by both parties that they were willing to negotiate, and references to their settlement negotiations.

89 Second, the Relevant Portions of the Disputed Emails constituted admissions that, even on a narrow approach to "without prejudice" privilege, would be privileged: see [85] above.

90 However, I rested my decision on the Broad Approach to "without prejudice" privilege conferring privilege on the Disputed Emails, but an exception (the Delay/Acquiescence Exception) applying to allow the first defendant to refer to the Relevant Portions to explain delay (or inaction) or apparent acquiescence, and particularly to rebut the plaintiff's Assertions: (a) that the first defendant had taken no steps to extend the LC; and (b) that the first defendant had not taken issue with the plaintiff's claim under the LC for the retention money.

91 I considered this to be appropriate in terms of policy and principle, rather than merely protecting admissions, which would entail having to characterise each portion of the negotiations as an "admission" before it would be privileged.

Conclusion

92 As a matter of policy and principle, the Broad Approach to "without prejudice" privilege furthers the objective of encouraging settlements. The Broad Approach is the position at common law, and it is not precluded by s 23(1) of the Evidence Act, or by binding authority (in particular, the Court of Appeal's decision in *Ernest Ferdinand*).

93 Applying the Broad Approach, the whole of the five Disputed Emails were protected by "without prejudice" privilege in the first place.

94 However, an exception – the Delay/Acquiescence Exception – applied to allow the first defendant to refer to the Relevant Portions of the Disputed

Emails to rebut the plaintiff's Assertions: (a) that the first defendant had taken no steps to extend the LC; and (b) that the first defendant had not taken issue with the plaintiff's claim to retention money under the LC.

95 I thus dismissed the registrar's appeal, save that I limited the portions of the Disputed Emails that the first defendant could refer to, to the parts relevant to rebutting the plaintiff's Assertions. The rest of those emails remained protected by "without prejudice" privilege.

Andre Maniam
Judge of the High Court

Wong Soon Peng Adrian, Ang Leong Hao, Wayne Yeo and Sia Bao Huei (Rajah & Tann Singapore LLP) for the plaintiff;
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