Swee Wan Enterprises Pte Ltd
v
Yak Thye Peng

[2017] SGHC 313

High Court — Suit No 67 of 2017 (Registrar's Appeal No 230 of 2017)
Hoo Sheau Peng J
14, 22 September 2017

Evidence — Admissibility of evidence — "Without prejudice" communications

8 December 2017

Hoo Sheau Peng J:

Introduction

1 The defendant filed an application to strike out or expunge references to two documents in the plaintiff's Statement of Claim and in an affidavit filed on the plaintiff's behalf (which exhibited copies of those documents) on the ground that the documents were protected by "without prejudice" privilege. The Assistant Registrar ("AR") held that the documents were not privileged and therefore dismissed the defendant's application. I allowed the defendant's appeal against the AR's decision. The plaintiff has appealed against my decision.

Background

The Statement of Claim

2 The plaintiff, Swee Wan Enterprises Pte Ltd, commenced the present action against the defendant, Mr Yak Thye Peng, its shareholder and former director, to recover $1,805,156.62. It pleaded in its Statement of Claim that,[1] between 2006 and 2009, while a director of the plaintiff, the defendant caused the plaintiff to issue five cheques to himself amounting to $1,825,156.62, a sum which he then withdrew without authority from the plaintiff's bank account for his personal use. On or around May 2014, Ms Yak Chau Wei ("Ms Yak"), one of the plaintiff's present directors, discovered the issuance of the cheques. As the defendant had issued the plaintiff a cheque for $20,000 on 6 February 2007, the plaintiff claimed, as against the defendant, the repayment of a debt of $1,805,156.62, being $20,000 less than the total sum in the five cheques.

3 In paragraph 12 of the Statement of Claim, reference was made to a letter from Providence Law Asia LLC dated 27 February 2015 ("the Letter"). Immediately below, paragraph 13 referred to an undated note of acknowledgment signed by the defendant ("the Note"). These were the two documents which the defendant claimed were subject to "without prejudice" privilege. The two paragraphs read as follows:

> 12. On or around 27 February 2015, [the plaintiff's] previous solicitors, Providence Law Asia LLC, issued a letter of demand to [the defendant] (the "**27 February 2015 Letter**"). In the 27 February 2015 Letter, it was stated, among other things, that:
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> (a) Based on investigations carried out by [the plaintiff], [the plaintiff] had discovered that [the defendant] caused [the plaintiff] to issue the cheques stated at paragraph 4 above to himself;

[1] Statement of Claim (PBCP, Tab 1) at paras 4–9.

> (b) [The defendant] had acknowledged and/or agreed that he had caused [the plaintiff] to issue the cheques stated at paragraph 4 above to himself; and
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> (c) [The defendant] had acknowledged and/or agreed that he owes [the plaintiff] the sum of S$1,805,156.62.
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> 13. On or around 2 March 2015, [the defendant] signed a document acknowledging and/or agreeing to the matters stated in the 27 February 2015 Letter. Accordingly, [the defendant] has also acknowledged and/or agreed in writing that he owes [the plaintiff] the sum of S$1,805,156.62.

The Defence

4 The Defence filed by the defendant contained a number of additional facts that were relevant for present purposes:

(a) The plaintiff and another company, Swee Wan Trading Pte Ltd ("SWT"), are run as a family business.[2] The defendant and his brother, Mr Yak Tiong Liew, are both shareholders in the plaintiff and in SWT.[3] Ms Yak is Mr Yak Tiong Liew's daughter.[4]

(b) In or around 2012, it was discovered that money had been misappropriated from the plaintiff and SWT.[5] The plaintiff and SWT commenced legal proceedings against the relevant parties to recover the money. These legal proceedings were Suit Nos 235 and 236 of 2014 (which, since they were consolidated, I will refer to as "the Suit"). One of the defendants in the Suit filed a counterclaim alleging that the

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2 Defence and Counterclaim ("Defence") (PBCP, Tab 2) at para 13.

3 Defence at paras 4, 6.

4 Defence at para 6.

5 Defence at para 20.

defendant in the present case and Mr Yak Tiong Liew had both "taken out" money from both the plaintiff and SWT.[6]

(c) The Suit was later resolved pursuant to a settlement agreement dated 10 April 2015, to which Mr Yak Tiong Liew and the defendant were parties.[7]

5 As regards the plaintiff's claim for the return of $1,805,156.62, the defendant admitted to having received sums of money.[8] However, he denied any liability to repay the sum claimed. He stated that he was entitled to the money as a shareholder of the plaintiff and/or SWT, or alternatively because the money was advanced on a mutual understanding between Mr Yak Tiong Liew and him that it would not have to be repaid.[9]

The application

6 As summarised at [1], the plaintiff applied to strike out or expunge (a) paragraphs 12 to 13 of the Statement of Claim; and (b) paragraphs 10(d) and (e) of an affidavit filed by Ms Yak in response to the defendant's application for discovery of documents, in which she referred to the Letter and the Note, and exhibited copies of them. The crux of the application was whether the two documents were protected by "without prejudice" privilege. The AR found that they were not, and thus dismissed the application.

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6 Defence at para 22.

7 Defence at para 21.

8 Defence at para 41.

9 Defence at para 42.

The appeal

The law

7 The applicable legal principles are well-settled. At common law, "without prejudice" privilege attaches to communications that are made for the purpose of settling a dispute. Being privileged, such communications are inadmissible in evidence. The rationale is to encourage parties to speak frankly, without the fear that anything said in the course of negotiations might be used against them should the dispute be litigated. This furthers the law's policy of encouraging parties to settle their disputes rather than litigate them (*Greenline-Onyx Envirotech Phils, Inc v Otto Systems Singapore Pte Ltd* [2007] 3 SLR(R) 40 at [14]).

8 Section 23 of the Evidence Act (Cap 97, 1997 Rev Ed) is, as the Court of Appeal held in *Mariwu Industrial Co (S) Pte Ltd v Dextra Asia Co Ltd and another* [2006] 4 SLR(R) 807 ("*Mariwu*") at [24], a statutory expression of this common law principle. Before turning to s 23, I find it apposite first to refer to s 17 of the Evidence Act, which defines an "admission" as:

> … a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons and under the circumstances hereinafter mentioned.

9 In general, admissions are relevant and may be proved as against the person who makes them: see s 21 of the Evidence Act. Section 23(1) is an exception to this, and 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.

The effect of s 23(1), which declares admissions made in either of the two situations listed therein to be not relevant, is that evidence cannot be given of such admissions.

10 Section 23(1)(*a*) applies to all communications expressly made on a "without prejudice" basis (*Mariwu* at [24]). It should be noted that attaching a "without prejudice" label to a communication does not conclusively or automatically render it privileged (*Cytec Industries Pte Ltd v APP Chemicals International (Mau) Ltd* [2009] 4 SLR(R) 769 ("*Cytec*") at [16]). The presence of such words would, however, place the burden of persuasion on the party who contends that they should be ignored (*Quek Kheng Leong Nicky and another v Teo Beng Ngoh and others and another appeal* [2009] 4 SLR(R) 181 at [22], citing *Sin Lian Heng Construction Pte Ltd v Singapore Telecommunications Ltd* [2007] 2 SLR(R) 433 ("*Sin Lian Heng*") at [60]).

11 Section 23(1)(*b*) is the provision applicable to communications which, though not expressly made on a "without prejudice" basis, were made in the course of negotiations to settle a dispute (*Mariwu* at [24]). Whether or not the "without prejudice" privilege attaches must be determined by objectively construing the document as a whole in the context of the factual circumstances (*Cytec* at [16]). The court will seek to determine, on a reasonable basis, the intention of the author and how it would have been understood by a reasonable recipient (*The Enterprise Fund II Ltd v Jong Hee Sen* [2017] 3 SLR 487 at [17]).

12 The existence of a dispute and the attempt to compromise it are at the heart of the "without prejudice" privilege (*Cytec* at [17]). Since only a document made in the course of negotiations to settle a dispute is privileged, privilege

cannot be invoked where no dispute exists (*Mariwu* at [30]). For example, if, in a letter, a debtor admits liability to pay a debt, and merely asks for more time to pay, that letter is not privileged because the debtor has already admitted liability for the debt and there is no question of a settlement or compromise of that debt (see *Sin Lian Heng* at [44]–[45]).

13 Further, where the issue is whether or not there was a settlement agreement concluded as a result of negotiations, "without prejudice" communications are admissible to prove the existence or the terms of the settlement agreement. However, if the court finds that no settlement agreement was concluded, those communications will continue to be privileged (*Ng Chee Weng v Lim Jit Ming Bryan and another* [2012] 1 SLR 457 ("*Ng Chee Weng*") at [94]–[95]).

14 It is well established that the privilege can be waived. Waiver requires the consent of both parties (*Krishna Kumaran s/o K Ramakrishnan v Kuppusamy s/o Ramakrishnan* [2014] 4 SLR 232 at [22]). The court will normally accept that the privilege has been waived where both parties agree expressly (especially in writing) that the communications may be used in judicial proceedings. More often than not there is no express agreement, but it is open to the court to determine that parties have impliedly consented to waiving the privilege (Jeffrey Pinsler, SC, *Evidence and the Litigation Process* (LexisNexis, 5th Ed, 2015) at para 15.024).

Parties' positions

15 In his submissions on appeal, the defendant argued that in the Letter, the plaintiff was proposing to compromise its claim to the sum of $1,805,156.62 by offering to accept a lesser sum from the defendant which I shall call the Outstanding Sum. The plaintiff was willing to offset the excess amount the

defendant had paid to SWT – an entirely separate corporate entity – against the amount the defendant owed to plaintiff. The result would be that the plaintiff would not be able to claim the full $1,805,156.62, but only the Outstanding Sum. This would be a compromise as to the quantum of the disputed amount. The Note was in response to the Letter. Therefore, the Letter and the Note should be considered as communications made during a course of settlement negotiations, and protected by "without prejudice" privilege. In this connection, the defendant disagreed with the AR, whose view had been that the Letter was only a clarification of the sums owed and that there was therefore no longer a dispute between the parties.

16 Echoing the AR's view, the plaintiff argued that there was no dispute between the parties. The plaintiff characterised the Letter as merely a request for confirmation that the Outstanding Sum was "indeed due and owing to [the plaintiff]".[10] It pointed out that there was no mention in the Letter of any intent on its part to enter into negotiations for settlement with the defendant. As regards the Note, the plaintiff submitted that there was a clear admission by the defendant that "he owe[d] [the Outstanding Sum] to [the plaintiff] and SWT".[11] Again, this meant that there was no longer any "dispute" between the parties.

17 The plaintiff went further to suggest that, even if the Letter were protected by "without prejudice" privilege, the Note would be the settlement agreement arising from the settlement negotiations and would therefore, as held in *Ng Chee Weng* (see [1213] above), be admissible in evidence.[12] The Letter, being evidence of the settlement agreement, would similarly be admissible.

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10 Plaintiff's Submissions at para 16.

11 Plaintiff's Submissions at para 23.

12 Plaintiff's Submissions at paras 24–27.

18 The plaintiff also submitted that, in any event, it was entitled to waive the privilege attached to the Letter.[13] It did not, however, claim to be entitled to waive the privilege attached to the Note, assuming it was privileged.

The Letter and the Note

19 At this juncture, I turn to the Letter. I note that it was marked "without prejudice" and that there were two lines to its title. The first line referred to the Suit by stating "Consolidated Suit No. 235 and 236 of 2014" and the second line stated "Acknowledgment of sums due and owing to [the plaintiff] and [SWT]". As for the contents of the Letter, it suffices for me to note that it mentions the following:

(a) The plaintiff and SWT "looked into" allegations that the defendant had incurred non-business related expenses charged to SWT, and had withdrawn cheques from SWT's accounts for his personal expenses. Having "conducted an investigation" into the matter, they found that the defendant owed a certain sum to the plaintiff and SWT. The defendant accepted that part of that sum had been withdrawn by him for personal use.

(b) Ms Yak thus met with the defendant to confirm the amounts withdrawn and the amount which remained due and outstanding from him, and to "obtain his agreement" to return the same to the plaintiff and SWT. The defendant informed Ms Yak that he had already returned a certain sum to the companies. In the circumstances, "it was agreed" that only an outstanding sum (*ie*, the Outstanding Sum) was "due and owing to the Companies collectively".

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13 Plaintiff's Submissions at para 29.

(c) Two tables were set out, each itemising the defendant's withdrawals from and returns to the plaintiff and SWT respectively. The first table showed that the net amount withdrawn by the defendant from the plaintiff was $1,805,156.62. The second table showed that the defendant had returned to SWT a greater amount than what he had withdrawn from it. I refer to the greater amount as the "excess amount". The Outstanding Sum was the difference between $1,805,156.62 and the excess amount.

(d) Therefore, Providence Law Asia LLC sought the defendant's confirmation and acknowledgment that the "aggregate sum" (*ie*, the Outstanding Sum) was "due and owing to the Companies".

20 As for the Note, it contained a brief paragraph written in a mix of English and Chinese. No translated version of the document was furnished to the court. Before me, the parties were content to proceed on the basis that, on its face, the defendant was saying that he owed the plaintiff and SWT the Outstanding Sum.

My decision

21 Based on the contentions between the parties, the main issues to be examined were (a) whether the Letter and the Note were part of negotiations to compromise a dispute between the parties and were thus protected by "without prejudice" privilege ("the first issue"); and (b) if privilege attached to the documents, whether the privilege had been waived ("the second issue").

22 Within the first issue, there were two sub-issues pertaining to the proper characterisation of the Letter and the Note. These were: (a) whether the Letter contained a compromise or merely sought a confirmation of amounts owing, and (b) whether the effect of the defendant's acknowledgment in the Note meant

that (i) no dispute remained between the parties and/or (ii) the Note could be regarded as a settlement agreement. I will deal with them in turn.

Whether the Letter and the Note formed part of negotiations to compromise the dispute

23 In summary, I found that the Letter and the Note were communications that were part of negotiations aimed at settling a dispute between the parties. The dispute here was over the defendant's withdrawals of sums of money from the two companies for his personal use. The plaintiff and SWT regarded these sums of money as having to be returned to the companies. That was why the Letter recorded that Ms Yak met the defendant to obtain his agreement to "return" these amounts to the companies. The Letter recorded that Ms Yak and the defendant had agreed that the defendant would accept that it owed the Outstanding Sum to *both* companies. The effect of this would be that the plaintiff's claim to the full sum of $1,805,156.62 would be compromised. The Note was the defendant's acknowledgment of the Outstanding Sum owing to *both* companies which would form the basis of the compromise. However, while the compromise was clearly on the table, the details of its execution remained to be worked out. One such detail which remained to be agreed upon was to whom the Outstanding Sum should be paid. This was an important point, given that each company was a separate legal entity and the defendant could not, as a matter of law, owe a single sum of money to *both* companies. Thus, being part of the negotiations, the Letter and the Note were protected by "without prejudice" privilege. I will now analyse the Letter and the Note in greater detail, starting with the Letter.

The Letter

24 The Letter was expressly marked "without prejudice". Notwithstanding that the Letter was expressly marked in this way, the parties appeared to proceed on the basis that s 23(1)(*b*) of the Evidence Act was applicable. In my view, the use of the "without prejudice" label meant that s 23(1)(*a*) of the Evidence Act was applicable, thus placing the burden of persuasion on the plaintiff to show why those words should be ignored. I was mindful that the use of such a label would not be conclusive, and in any event the defendant did not say that its use was conclusive. Yet I could not ignore the fact that the Letter was drafted by lawyers who would not have affixed such a label to the letter unthinkingly.

25 Turning to the context of the Letter, it was written to the defendant in the midst of the Suit, which was pending at that time (it was only settled in April 2015, as I noted at [4(c)] above). In fact, the title of the Letter referred to the Suit, to which the plaintiff and SWT were parties, as was the defendant. In the Suit, it was alleged that the defendant had made unauthorised withdrawals from the plaintiff. The context already suggested that the Letter related to discussions relating to the ongoing dispute, which accorded with the use of the "without prejudice" label.

26 The contents of the Letter provided further support for this view. Although the plaintiff and SWT were separate legal entities, the Letter did not specifically seek confirmation of the amounts owed to the plaintiff and SWT respectively, but only requested an acknowledgement that the "aggregate sum" (being the Outstanding Sum) was "due and owing to the Companies collectively" (see [19(b)] above). The Letter mentioned that this "aggregate sum" had been agreed upon after negotiations between Ms Yak and the defendant though it did not explicitly say that these were settlement

negotiations. I agreed with the defendant that read as a whole, the Letter suggested that these negotiations or discussions between Ms Yak and the defendant were aimed at enabling the plaintiff to accept that it was only owed this lower sum instead of the sum of $1,805,156.62 so as to resolve the ongoing dispute. If the intention behind the Letter were merely to obtain confirmation of the sums owing to the plaintiff and SWT, the Letter could have specifically asked the defendant to confirm the amounts he had withdrawn and returned to each individual company. The reference to an "aggregate sum" suggested that what was being proposed was an arrangement to deal with the claims of the two companies holistically. This was a proposal of a compromise.

27 Ms Yak in fact admitted that the Letter was meant to propose a compromise. She somewhat candidly disclosed the intention of the plaintiff and SWT at the material time. Paragraphs 10(d) and (e) of her affidavit, which the defendant sought to strike out, stated:[14]

> 10. …
>
> (d) The present suit brought by [the plaintiff] against [the defendant] is a simple claim in debt. It was from [the plaintiff's] investigations during the course of proceedings in Suit 235 of 2014 that it was found out that [$1,805,156.62] was owed by [the defendant] to [the plaintiff]. A copy of a Letter of Demand sent from [the plaintiff's] previous solicitors, Providence Law Asia LLC, seeking acknowledgment from [the defendant] that the Claimed Sum is due and owing from him to [the plaintiff] is exhibited … It will be noted that Providence Law Asia LLC's letter is *a without prejudice letter* and *permitted [the defendant] to pay a lesser amount … [ie, the Outstanding Sum] to [the plaintiff], notwithstanding the fact that the amount due to [the plaintiff] was [$1,805,156.62].* This was on the basis that an amount of money advanced by [the defendant] to SWT could be offset from the amounts due to [the plaintiff] *as a compromise.*
>
> (e) *A note signed by [the defendant] acknowledging that the [$1,805,156.62] is due and owing from him to [the plaintiff] is exhibited …* This sum has not been paid by [the defendant].

14 PBCP, Tab 4.

> Furthermore, despite being a director of SWT, [the defendant] has still failed to properly close the accounts for SWT since 2010, and my investigations suggest that significant amounts of money remain unaccounted for in SWT. Moreover, from the last financial accounts for the year ended [*sic*] 31 October 2009, SWT appears to have solvency issues. Since then, [the defendant] has not been able to properly account for SWT's expenses and no financial statements have been filed since. Our continued investigations reveal serious solvency issues in SWT and we no longer think it makes commercial sense to *permit* [the defendant] to offset his liability to [the plaintiff] on account of what he paid SWT. A copy of SWT's financial statements for the year ended 31 October 2009 is exhibited …
>
> [emphasis added]

28 By her affidavit, Ms Yak confirmed that at the material time, the intention of the plaintiff was to propose a compromise. This accorded with the position of the defendant. In this regard, I noted that in the course of submissions, the plaintiff's counsel agreed that accepting the Outstanding Sum, being a lesser sum, would involve the plaintiff being willing to set off the amount that the defendant owed the plaintiff against the excess amount that he had paid SWT. Nonetheless, plaintiff's counsel maintained that this did not amount to a compromise. I found this position to be untenable in the light of what I had observed at [26] above.

29 At this juncture, I highlight the portion within para 10(e) of Ms Yak's affidavit (see [27]) where she stated that the Note acknowledged that the sum of $1,805,156.62 was due and owing from the defendant to the plaintiff. I note that paragraph 13 of the Statement of Claim (see [3] above) makes the same assertion. Contrary to these assertions, it was not altogether clear to me that in the Note, the defendant had acknowledged that he owed the plaintiff the sum of $1,805,156.62. Instead, it seemed to me that the defendant merely acknowledged the Outstanding Sum as owing to *both* companies. I shall return to this issue below at [38].

30 I should also observe that Ms Yak's (and the plaintiff's) description of the Letter as a letter of demand was difficult to accept. There was nothing in the Letter which suggested that a "demand" was being made of the defendant to repay any sum of money. There was certainly no deadline given for repayment and no suggestion, in the usual manner, that if the defendant were to fail to comply, the plaintiff and/or SWT would take further steps to recover the sum of money including by commencing legal proceedings.

31 Given the context, the contents of the Letter, the intention of the plaintiff and the defendant's understanding at the material time, I was of the view that the Letter was a record of discussions or negotiations on the ongoing dispute. The negotiations involved the plaintiff's not insisting on recovery of the full $1,805,156.62 from the defendant even though, as it claimed, the defendant had withdrawn that amount for his personal use. On the flip side, whatever the reason for the defendant's having returned the excess amount to SWT, the negotiations involved making the defendant treat the excess amount as part of the repayment of the amounts he had withdrawn from the plaintiff. The net effect was that there would only be the Outstanding Sum owing from the defendant to the two companies.

32 I turn to address one further point raised by the plaintiff. The plaintiff seized on the fact that there was no mention, in the Letter, of any intent to enter into negotiations for settlement, or to suggest a meeting for the matter to be discussed further. However, the fact that there is no mention in a piece of correspondence of an actual offer of settlement, or any reference to settlement at all for that matter, does not mean no privilege can arise in respect of that correspondence. Correspondence is clearly privileged if it contains an actual offer of settlement, but the privilege is wide enough to protect correspondence "that invites compromise, or outlines approaches that might be taken to

settlement, or refers in some indirect way to settlement": see the Canadian decision of *Hansraj v Ao* [2002] AJ No 594 ("*Hansraj*") at [20]. That decision was cited in *Sin Lian Heng* at [27] in support of the proposition that the "without prejudice" privilege should also protect correspondence that is issued as the "first shot" in a course of negotiations that leads to settlement. This is a pragmatic recognition of the fact that "[n]egotiations must begin somewhere" (*Sin Lian Heng* at [32]). At the beginning, parties may tread carefully and not immediately invoke the concept of "settlement". The crucial inquiry, then, is whether the correspondence is part of a larger series of correspondence which will reasonably lead to settlement of the dispute (*Hansraj* at [20]).

33 In my view, the Letter was situated near the beginning of a course of negotiations which aimed to reach a compromise on the dispute over the defendant's withdrawals of money from the plaintiff and SWT for his personal use. As Ms Yak herself admitted, the possibility of compromise was being explored at the time of the Letter. Therefore, the Letter was protected by "without prejudice" privilege. The use of the "without prejudice" label was entirely consistent with that fact. It followed that the plaintiff was unable to discharge its burden of persuading the court that the "without prejudice" label should be ignored. The Letter was inadmissible by virtue of s 23(1)(*a*) of the Evidence Act. Based on my analysis as set out above, I would have found that the Letter was, objectively construed, made in the course of negotiations to settle a dispute. Thus, I would have found it to be privileged and thus inadmissible in evidence even if, as the parties appeared to think, s 23(1)(*b*) of the Evidence Act were the applicable provision.

The Note

34 The Note was not labelled "without prejudice". It could be argued that the Note would be cloaked with the label attached to the Letter since it was a direct response to the Letter. This would again place the burden of persuasion on the plaintiff to show why the label should be ignored. However, the parties proceeded on the basis that s 23(1)(*b*) was applicable to the Note (and also to the Letter, as highlighted earlier). Thus, I proceeded to determine whether, objectively construed, the Note was part of a course of negotiations to settle the dispute.

35 In my view, the defendant's acknowledgment in the Note that he owed the Outstanding Sum to the plaintiff and SWT collectively as loans could only be read as an acknowledgment of an amount which he was willing to return to the companies, and which would thus form the basis of the compromise that the Letter had recorded. This meant that the Note was part of a course of negotiations to settle the dispute over his withdrawals of money from the plaintiff and SWT for his personal use.

36 This leads me to consider whether the defendant's acknowledgment that he owed the Outstanding Sum to the plaintiff and SWT meant that (a) there was no longer any dispute between the parties; or (b) the Note formed a settlement agreement.

37 The plaintiff argued that the acknowledgment in the Note meant that there was "no dispute", and that therefore the basis of the "without prejudice" privilege no longer existed. Expanding on this, the plaintiff characterised the Letter as merely a request for confirmation that the Outstanding Sum was "indeed due and owing to [the plaintiff]", and proceeded to argue that in the Note, the clear admission by the defendant was that "he owe[d] [the Outstanding

Sum] to the plaintiff and SWT" (see [16] above). However, if this was the admission relied on by the plaintiff, then evidently, the question as to whether the full sum of $1,805,156.62 was owing to the plaintiff remained very much in dispute.

38 At another level, the argument that no dispute remained between the parties, read together with paragraphs 12 and 13 of the Statement of Claim, suggested that the plaintiff sought to rely on the Note as an admission of liability for the sum of $1,805,156.62. However, as discussed at [29] above, I did not think that this was correct. It should be reiterated that the Letter did not specifically ask for a confirmation of the amount owed to the plaintiff, but only requested an acknowledgement that the Outstanding Sum was owing to the two companies (see [26] above). In response, the defendant acknowledged that he owed the Outstanding Sum to the two companies collectively. He did not specifically admit to owing the plaintiff the sum of $1,805,156.62, or say that he would pay the plaintiff the same. This was not a situation where a creditor demands a sum from the debtor and the latter admits to owing that sum, in which case there is no dispute to be compromised (see [12] above). In my view, there was no clear admission of liability on the defendant's part to pay the sum of $1,805,156.62.

39 Furthermore, I did not think that the Note amounted to a settlement agreement, contrary to what the plaintiff argued. From the contents of the two documents, it seemed to me that the parties were still in the midst of the negotiations and discussions on the arrangements, and that no firm agreement had been reached. The Letter did not indicate which of the two family run companies the Outstanding Sum should be paid to, and in the Note the defendant did not suggest anything to this effect either. Nor was there any mention of when

payment would be made. Thus, it was not clear how the Note could, as the plaintiff contended, have the legal effect of a settlement agreement.

40 This conclusion was fortified by the evidence of Ms Yak in paragraph 10(e) of the affidavit (see [27] above). She stated there that given the situation with SWT, the plaintiff no longer thought it made "commercial sense to *permit* [the defendant] to offset his liability to [the plaintiff] on account of what he paid SWT" [emphasis added]. That the plaintiff was at liberty to change its mind about whether to permit the compromise indicated that no firm agreement between the parties had been reached at the time of the Letter and the Note.

41 In any case, I did not see the relevance of the plaintiff's argument that the Note amounted to a settlement agreement. The plaintiff was trying to bring itself within the exception, earlier mentioned at [13], that "without prejudice" communications are admissible to prove the existence of a settlement agreement. The exception only applies where the existence of such a settlement agreement is in issue. Here, the plaintiff was not suing to recover the Outstanding Sum, and any settlement agreement relating to the Outstanding Sum was not in issue. Instead, as pleaded in paragraphs 12 and 13 of the Statement of Claim, the plaintiff's claim is for the sum of $1,805,156.62. Hence, the plaintiff's argument that the Note was a settlement agreement was irrelevant.

42 For the reasons above, the Note, objectively construed, formed part of a course of negotiations, and it should be protected by "without prejudice" privilege.

Whether the privilege had been waived

43 Lastly, I did not think there was any basis for finding that the privilege had been waived. There was no basis for finding that both parties had consented,

either expressly or impliedly, to waive the privilege. In its pleadings and affidavits, the defendant consistently took the position that the Letter and the Note were protected by "without prejudice" privilege.

44 Further, I did not agree with the plaintiff that it could unilaterally waive "without prejudice" privilege. The plaintiff relied on a passage in *Halsbury*'s *Laws of Singapore* Vol 10(2) (LexisNexis, 2016) at para 120.404:

> … A party may seek to waive the privilege attached to his own communications in those exceptional cases where the admissions they contain can be used in his favour but where the disclosure of his own communications would entail the disclosure, partial or in full, of the other party's communications, his waiver will be ineffective to the extent that it will adversely affect the other party's privilege.

I did not think this passage derogated from the well-established principle that waiver requires the consent of both parties. This explains the qualification in the latter half of the passage: a party cannot waive the privilege attached to his own communication if it would entail disclosing the other party's privileged communication. In such cases, there must still be a basis for thinking that the other party has consented, either expressly or impliedly, before waiver will be found.

45 In any case, this passage could not assist the plaintiff. The plaintiff could not waive the privilege to the Note since that was the defendant's communication. Even in respect of the Letter, waiving its own privilege would entail disclosing the summary in the Letter of the discussions between Ms Yak and the defendant. The plaintiff could not waive the privilege to its own communication without disclosing the defendant's communication. Thus, any unilateral waiver that the plaintiff purported to make would be ineffective.

Conclusion

46 For these reasons, I allowed the defendant's appeal. I ordered the plaintiff to pay the defendant a sum of $4,000 (exclusive of disbursements) representing the costs of the appeal, the hearing below, and for consequential amendments needed to the defence and counterclaim.

Hoo Sheau Peng
Judge

Vikram Nair and Lim Tiong Garn Jason (Rajah & Tann Singapore LLP) for the plaintiff;
Tan Sia Khoon Kelvin David (Vicki Heng Law Corporation) for the defendant.