Ten Leu Jiun Jeanne-Marie *v* National University of Singapore
[2014] SGHC 217

Case Number	: Suit No 667 of 2012 (Registrar's Appeal No 279 of 2014)
Decision Date	: 29 October 2014
Tribunal/Court	: High Court
Coram	: Woo Bih Li J
Counsel Name(s)	: Christopher Anand Daniel and Harjean Kaur (Advocatus Law LLP) for the plaintiff; Chia Voon Jiet and Kelly Lua (Drew & Napier LLC) for the defendant.
Parties	: Ten Leu Jiun Jeanne-Marie — National University of Singapore

Res Judicata – Issue Estoppel

Civil Procedure – Privileges – "Without prejudice" negotiations

29 October 2014

Woo Bih Li J:

Introduction

1 The plaintiff was a candidate for the degree of Master of Arts in Architecture in the School of Design and Environment of the defendant. The plaintiff filed the present action against the defendant for wrongful termination of her candidature.

2 The plaintiff applied to amend her statement of claim ("SOC"). Extensive amendments were proposed. The defendant objected only to three sub-paragraphs in the proposed amended SOC, *ie*, sub-paras 9.2.36 to 9.2.38, as they referred specifically to two emails from the Ministry of Education ("MOE") to the plaintiff dated 26 August 2011 and 13 September 2011 ("the MOE Emails"). The defendant objected on the basis that the MOE Emails were sent on a without prejudice basis and were therefore privileged from disclosure. The defendant also submitted that a court had previously ruled that the MOE Emails were privileged and therefore the principle of *res judicata* precluded the plaintiff from referring to the MOE Emails. Alternatively, if there was no previous ruling on the without prejudice issue, the defendant submitted that the MOE Emails do enjoy such a privilege because they were sent on a without prejudice basis and hence the disputed sub-paragraphs should not be allowed. The plaintiff disputed that there was a previous ruling on the issue. She also disputed that the MOE Emails were sent on a without prejudice basis.

3 An assistant registrar ("AR") rejected the defendant's objection. The defendant appealed. After hearing arguments, I allowed the appeal as I concluded that the MOE Emails were sent on a without prejudice basis. Therefore the disputed sub-paragraphs were not to be included in the amended SOC. I set out below my reasons.

Issues

4 The first issue was whether there was a previous ruling that the MOE Emails were sent on a without prejudice basis.

5 If not, the second issue was whether the MOE Emails were sent on a without prejudice basis.

Background

6 On 28 June 2013, the plaintiff applied for further discovery of documents in various categories. For Category 7, she requested production of all documents and/or correspondence between the officers and agents of the defendant and MOE for the period 9 May 2011- 15 August 2011, which was later changed to 13 September 2011 ("the Category 7 Documents").

7 On 12 September 2013, AR Shaun Leong dismissed the plaintiff's entire application for discovery including her application for the Category 7 Documents.

8 The plaintiff appealed against that decision in Registrar's Appeal No 320 of 2013 ("the Discovery Appeal"). The Discovery Appeal was heard and dismissed by Tan Siong Thye JC (as he then was) on 5 November 2013.

9 Thereafter, the plaintiff sought leave to appeal against Tan JC's decision. The application for leave was dismissed by Tan JC on 15 January 2014.

10 On 29 May 2014, the plaintiff applied to amend her SOC by way of Summons No 2671 of 2014. The proposed amendments included the disputed sub-paragraphs which referred specifically to the MOE Emails.

11 As mentioned above, the defendant objected only to those sub-paragraphs.

The arguments of the parties on the first issue

12 The application to amend the SOC was heard by the same AR who heard the plaintiff's previous application for further discovery of documents.

13 The defendant argued that the two earlier decisions of AR Leong and Tan JC in respect of the application for further discovery had decided that the MOE Emails were sent on a without prejudice basis. Therefore, *res judicata* applied and it was not open to the plaintiff to argue otherwise.

14 The defendant referred to AR Leong's brief grounds of decision in his earlier decision where he said at [8]:

> With regard to the documents in category 7, the supporting affidavit (at [62] and [63]) states that "the [d]efendant has glaringly not disclosed any communications between themselves and MOE for the period subsequent to their official response to MOE, i.e. after 9 May 2011… It was not explained however, how "all documents and/or correspondence" between the officers and agents of the defendant and MOE for the period 9 May 2011 to 15 August 2011 (which was subsequently amended to 13 September 2011), as sought for in the application, were relevant to the pleaded issues. There was also no such explanation in the plaintiff's written submissions. I am also unsure of the basis in which the plaintiff could make such a wide demand for "all documents and/or correspondence" between the defendant and MOE during the stated period without specifying the precise documents in which it seeks, and the reasons for doing so. *If the plaintiff is seeking the disclosure of any admissions made by the defendant in its correspondence with MOE in relation to the pleaded disputes, which I must clarify here, is not stated by the plaintiff, I am of the view that such admissions and correspondence would in fact be of a "without prejudice" nature and hence not subject to discovery, as the facts show that MOE was acting in a*

mediatory capacity in a genuine attempt to assist the plaintiff and the defendant to reconcile their differences. [emphasis added]

15 However, notwithstanding his earlier observation, AR Leong rejected the defendant's objection to the disputed sub-paragraphs when he heard the plaintiff's application to amend her SOC on 23 July 2014. This is what AR Leong said in respect of the disputed sub-paragraphs:

Court's Brief Grounds of decision

…

The defendant's basis for its objection to the disputed paragraphs is that these paragraphs contain references to documents and/or communications that have already been determined by the Court to be without prejudice and privileged. The defendant submits that the plaintiff is seeking to re-litigate issues which have already been determined by the court, and that the doctrine of res judicata forbids the plaintiff from raising this issue again.

I disagree with the defendant. First, it is very important to determine what the precise issues in question are. In the discovery application before me, the question and threshold which I had to determine was whether the documents sought to be discovered were relevant and necessary to the pleaded issues in question. I face a different question in the present amendment application before me, which is, whether the proposed amendments would enable the real questions or issues in controversy between the parties be determined (see *Review Publishing Co Ltd and another v Lee Hsien Loong and another appeal* [2010] 1 SLR 52). Seen in this view, the defendant's argument that the plaintiff is seeking to *re-litigate issues* which have been determined has no basis.

Second, I have to point out in any event that the question of whether MOE was acting in a mediatory capacity was *not an issue of dispute placed before me for decision* during the discovery application; neither was there substantive arguments made or heard on that point. This court had merely attempted to reason in *obiter dicta* that there is a good chance that the documents may be without prejudice or privileged, as an additional reason to corroborate what would be the court's *ratio* in dismissing the request for documents, which is that the request was made too wide and that the basis of the request was not clear.

16 As mentioned above, the defendant then appealed against AR Leong's decision to allow the disputed sub-paragraphs to be included in the amended SOC.

17 Before me, the defendant submitted that notwithstanding AR Leong's latest observation, Tan JC had in any event ruled on the issue whether the MOE Emails were sent on a without prejudice basis. The defendant argued that before AR Leong in the earlier application for further discovery, they did rely on the argument about lack of relevance of the Category 7 Documents in addition to the without prejudice argument. However, the defendant stressed that before Tan JC, its only argument in respect of the disclosure of the Category 7 Documents was that they were sent on a without prejudice basis. Hence, when Tan JC dismissed the plaintiff's appeal for further discovery, he must have decided that the Category 7 Documents were sent on that basis.

18 Indeed, the defendant pointed out that when the plaintiff applied for leave to appeal to the Court of Appeal against Tan JC's decision, the written skeletal submissions of her then solicitors stated, at para 6:

It is submitted that the above is particularly true in the present instance, in which several important points of law arise for consideration, which will benefit from the Court of Appeal's explication:-

…

(2) Whether or not "without prejudice" privilege can attach to a party's communications with a third party where the opposing party disagrees that the third party is mediating the dispute.

19 Therefore, the plaintiff's own solicitors had accepted that Tan JC had decided that the Category 7 Documents were sent on a without prejudice basis. The issue that her solicitors were raising to obtain leave to appeal to the Court of Appeal was whether such a privilege could attach to a party's communication with a third party, *ie*, MOE (where the plaintiff was disputing that MOE was a mediator).

20 The plaintiff's argument was that because no grounds of decision were delivered by Tan JC, the reason for his decision to dismiss the plaintiff's appeal and, in particular, her appeal on the Category 7 Documents was not clear. He could have dismissed her appeal on another ground, for example, for lack of relevance or because her application was too wide. As for the skeletal submissions for her application for leave to appeal, those submissions were made by her previous solicitors. While they did indicate that her previous solicitors themselves did believe that Tan JC had ruled that the Category 7 Documents were made on a without prejudice basis, it was still open to the plaintiff to argue that Tan JC did not in fact rule on that basis.

The court's reasons on the first issue

21 Before I elaborate on the reasons for my decision on the first issue stated above, I have a preliminary observation.

22 Tan JC would have been in the best position to say whether he had ruled that the Category 7 Documents were sent on a without prejudice basis. Indeed, the defendant's appeal was fixed for hearing before Tan JC and Tan JC had not refused to hear that appeal. However, in the light of an objection by the plaintiff, it was fixed before me instead.

23 The plaintiff had two main reasons for her objection to Tan JC which she stated in her email dated 28 August 2014 to the Supreme Court Registry.

24 Her first reason was that because Tan JC did not give reasons for his earlier decisions in respect of the Discovery Appeal and her application for leave to appeal to the Court of Appeal, her counsel would have to guess his reasons and prepare his arguments "based on quicksand". This was unfair to her and potentially unfair to the defendant. She was concerned that her counsel might be surprised if Tan JC revealed reasons which he himself only knew.

25 I did not think that the first objection was meritorious. If Tan JC had heard the defendant's appeal and had said that he had ruled that the Category 7 Documents were sent on a without prejudice basis, he would then decide whether that would give rise to an issue estoppel. If so, that would be the end of the matter. If he had said he had not ruled on that basis or that there was no issue estoppel in any event, parties would proceed to argue before him whether the MOE Emails were sent on a without prejudice basis. Solicitors for each side would prepare their submissions accordingly.

26 I did not see how the parties' solicitors would be in a better position to prepare arguments if

the defendant's appeal was heard by another judge. They would also not know what the other judge would say or decide or his reasons before the hearing of the defendant's appeal. Secondly, the other judge would be in a less advantageous position than Tan JC to decide what he did or did not decide and his reasons. Thirdly, more time would be spent to persuade the other judge as to what Tan JC did or did not decide or his reasons.

27 However, the plaintiff had a second reason. She had filed an originating summons ("OS") to seek an order for JC Tan's reasons to be given. She said that her OS was, in effect, a complaint about Tan JC's refusal to give written reasons and therefore it was "plainly inappropriate" for him to hear the defendant's appeal. She stressed that she was not accusing Tan JC of actually being biased but that in the light of her OS, there would be a reasonable suspicion of bias and an appearance of bias.

28 As mentioned above, the defendant's appeal was then fixed for hearing before me.

29 I was of the view that there was some merit in the defendant's arguments that Tan JC had ruled that the Category 7 Documents were made on a without prejudice basis. First, that was the only reason the defendant had raised before him when it objected to disclosure of that category. Thus when he dismissed the plaintiff's appeal, it was logical to conclude that he did so on that basis for the Category 7 Documents. Secondly, even the plaintiff's own solicitors thought so as evidenced by their written submissions for leave to appeal against his decision.

30 On the other hand, I was mindful that even though AR Leong had earlier said in his brief grounds of decision for the discovery application that the Category 7 Documents would in fact be on a without prejudice basis, AR Leong subsequently said, for the plaintiff's application to amend the SOC, that his earlier comments were made *obiter*, that is, he did not in fact make a ruling on the issue. Therefore, it might be that Tan JC had not ruled on the without prejudice issue too.

31 Secondly, the Discovery Appeal before Tan JC involved not just one category of documents. The Category 7 Documents were just one category in question. It was possible that Tan JC might have dismissed that appeal for this category on a different ground which was not in fact argued for this category but which applied to the other categories as well, *eg*, on the ground that the category was too widely framed.

32 More importantly, I noted that the Category 7 Documents pertained to communication between the defendant and MOE.

33 Therefore, even if Tan JC had ruled that communication between the defendant and MOE was made on a without prejudice basis, that ruling would not, strictly speaking, apply to the MOE Emails which were from MOE to the plaintiff.

34 I should mention that aside from the argument about *res judicata*, the defendant also argued that the plaintiff's attempt to include the MOE Emails in her SOC was an abuse of process even if *res judicata* did not apply as this attempt was a collateral attack on the previous decision of Tan JC. In my view, this argument about an abuse of process was based on the same premise, that is, that Tan JC had in fact already ruled that communication between the defendant and MOE was made on a without prejudice basis and that that ruling would extend to the MOE Emails. Therefore, this argument did not add anything to the *res judicata* argument on the facts before me and I need not say anything more about it.

35 I therefore considered the without prejudice issue afresh for the MOE Emails.

The arguments of the parties on the second issue

36 The plaintiff's arguments were as follows:

(a) MOE was not a mediator. She had never asked MOE to act as a mediator in her complaint to MOE.

(b) The MOE Emails were not marked "without prejudice".

(c) MOE was a third party and the defendant could not invoke the without prejudice privilege for emails emanating from a third party.

37 The defendant's arguments were as follows:

(a) MOE was acting as a mediator.

(b) Even if it was not, this did not mean that communication from it was necessarily outside the scope of the without prejudice privilege.

(c) The absence of an express marking of "without prejudice" on the MOE Emails was not determinative.

(d) The substance of the MOE Emails showed that the defendant was making an offer to settle the plaintiff's complaint against the defendant. Thus, in substance it was a genuine attempt to resolve the dispute and enjoyed the without prejudice privilege.

(e) The defendant was entitled to enjoy that privilege as MOE was communicating the defendant's offer to the plaintiff.

The court's reasons on the second issue

38 I noted that much of the plaintiff's consternation was in respect of the defendant's argument that MOE was acting as a mediator. The plaintiff stressed that she had never asked MOE to mediate in her complaint.

39 The plaintiff was right but only to a certain extent. MOE was not acting as a mediator in that the plaintiff and the defendant did not agree to appoint MOE as a mediator.

40 However, that did not mean that MOE could not act in a mediatory capacity. A third party may try to mediate in a dispute without being formally appointed as a mediator.

41 In the circumstances, it was the substance of MOE's Emails that was important. Were the emails part of a genuine attempt to resolve a dispute or not? It was not disputed that if they were, then they would be considered as having been sent on a without prejudice basis. I need not elaborate as to why without prejudice communication is privileged from disclosure.

42 Before I elaborate on the substance, I add that I agree that the absence of the words "without prejudice" is not determinative in favour of the plaintiff's position, see *Sin Lian Heng Construction Pte Ltd v Singapore Telecommunications Ltd* [2007] 2 SLR(R) 433 at [10] ("*Sin Lian Heng*"). Indeed, the plaintiff's counsel did not seriously question this principle although he did make the argument that those words were not used.

43 Conversely, the use of such words does not always mean that the communication enjoys the privilege if in fact there was no genuine attempt to resolve a dispute. However, in the present context, it seems to me that if such words had been used expressly, it might have dissuaded the plaintiff from asserting that the MOE Emails did not enjoy the without prejudice privilege.

44 I also think that there is some merit in the plaintiff's criticism (through counsel) that MOE and/or the defendant should have been more careful to ensure that such words were expressly used in the MOE Emails if the privilege was being claimed. However, again, the absence of such words is not determinative.

45 I come back to the substance of the MOE Emails. The material part of the MOE email dated 26 August 2011 to the plaintiff stated that:

> "To recap, your email of 30 June 2011 stated two issues:-
>
> (a) Confirmation of acceptance (in writing) of the University's decisions regarding [your] complaints; and
>
> (b) The RO.85/2003 form duly completed and signed.
>
> 2. To address these, NUS has **proposed** that you will not be required to accept in writing the University's decision on your complaints (a); or be required to sign Form RO.85/2003 (b), provided that you accept that:-
>
> (a) NUS will look to you to indemnify the University against all claims or losses arising from any infringement in your thesis of any third party intellectual property rights; and
>
> (b) NUS owns the copyright to your thesis (as provided for in your Offer of Admission dated 15 Nov 2001, and accepted 22 Nov 2001) and has the right to reproduce or publish your thesis.
>
> 3 . **If these conditions are acceptable to you**, you should write in to the Registrar's Office (Attn: Ms Jennifer Yee, regymsj@nus.edu.sg) requesting to re-instate your candidature. Upon reinstatement, you should then upload the electronic version of your thesis to the NUS Digital Thesis repository. This will activate the process for the conferment of the MA degree.
>
> …
>
> [original emphasis omitted; emphasis added in bold]

46 The plaintiff's email reply dated 31 August 2011 rejected these conditions with her comments.

47 Consequently, MOE sent an email to the plaintiff dated 13 September 2011. The material part of this email stated:

> …
>
> 2. On your remark that NUS has no right to impose additional requirements given that it has dropped its previous ones, we wish to clarify that NUS has re-considered your appeal through MOE thoroughly, and decided to offer a concession to help expedite the re-instatement of your candidature and the subsequent award of your degree. There are no new conditions imposed and you would only need to acknowledge the position stated in paragraph 2 of our earlier email dated

26 Aug 11 for a **full and final settlement of this matter**. If you prefer, you may indicate your wish to have your candidature re-instated through the acknowledgment in your email reply to us for conveyance to NUS, after which you will need to upload your thesis to NUS's repository as NUS does not have any record of your softcopy thesis in their file.

3. …

4. We seek your understanding that while we have assisted in highlighting your case to NUS, the Ministry does not interfere in the decisions made by the autonomous universities on its graduates. We hope that you would seriously consider accepting the latest **offer made by NUS**. Should you have further concerns, we recommend that you meet with NUS directly, whose personnel will be happy to discuss and resolve the matter with you, in order for you to graduate successfully.

[emphasis added]

48 It was clear to me that in the MOE Emails, MOE was making an offer on behalf of the defendant to the plaintiff in a genuine attempt to resolve the dispute between the parties. Therefore, the emails enjoyed the without prejudice privilege.

49 As for the last argument by the plaintiff that the defendant could not enjoy the privilege as the emails emanated from MOE and not from the defendant, this argument was a non-starter.

50 If a third party had made an offer on the plaintiff's behalf to the defendant to resolve the dispute, the plaintiff would be able to enjoy the same privilege. It would not matter whether the offer came from her directly or not. The point was that MOE was communicating the defendant's offer to the plaintiff for the defendant.

51 I add that even an unsolicited offer, which is sometimes referred to as the first shot, may enjoy the same privilege, see *Sin Lian Heng* at [30]–[32].

52 In the circumstances, I concluded that the two MOE Emails were sent on a without prejudice basis and were privileged from disclosure. Therefore, the plaintiff was to remove the disputed sub-paragraphs from her proposed amendments.

53 I add that it is a pity that some time and money have been spent on this issue. The plaintiff appeared to think that the MOE Emails could be used as an admission by the defendant that it knew that the imposition of certain conditions was unlawful and in excess of its obligations and authority. It is questionable how much probative value the MOE Emails would have had in the overall dispute, even if they were admissible in evidence. However, I say no more on this.