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

[2024] SGHC 49

Originating Claim No 78 of 2023 (Registrar's Appeal 276 of 2023)

Between

Hall, Jonathan Stuart

… *Claimant*

And

Rapyd Pte Ltd

… *Defendant*

JUDGMENT

[Civil Procedure — Privileges — Without prejudice privilege]
[Civil Procedure — Privileges — Disapplication of without prejudice privilege — Admission of liability]
[Civil Procedure — Privileges — Threshold for finding an oral admission of liability on disputed facts]

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Hall, Jonathan Stuart
v
Rapyd Pte Ltd

[2024] SGHC 49

General Division of the High Court — Originating Claim No 78 of 2023
(Registrar's Appeal No 276 of 2023)
Kwek Mean Luck J
29 January, 21 February 2024

23 February 2024 Judgment reserved.

Kwek Mean Luck J:

Introduction

1 In Originating Claim 78 of 2023 ("OC 78") Summons 2628 of 2023 ("SUM 2628"), the Defendant, Rapyd Pte Ltd ("Rapyd"), applied to strike out paragraphs 22 and 36 of the Statement of Claim ("SOC") of the Claimant, Mr Jonathan Stuart Hall ("Mr Hall"), and Mr Hall's Further and Better Particulars served on 30 June 2023 ("Particulars"), on the basis that they relate to communications before, on and after a meeting on 29 August 2022, that were protected by without prejudice privilege ("Privilege").

2 The learned Assistant Registrar ("AR") struck out the pleaded communications which took place after a meeting on 29 August 2022 between Mr Hall and the Chief Executive Officer of Rapyd, Mr Arik Shtilman ("Mr

Shtilman"). I refer to this meeting as the "29 August Meeting". However, the learned AR declined to strike out the pleaded communications which took place before or at the 29 August Meeting, and the pleaded communications which took place after the 29 August Meeting to the extent that they relate to commissions for a deal known as the Funding Societies Deal.

3 In RA 276 of 2023 ("RA 276"), Rapyd appeals against the decision of the learned AR.

4 A key question that arises in this case is this: where a party denies that there is Privilege by relying on an alleged oral admission of liability, what is the standard of proof that applies to demonstrating that such an oral admission took place?

Background Facts

5 In OC 78, Mr Hall claims for commissions of US$1,176,740[1] that he alleges Rapyd is obliged to pay him under a 2022 Sales Incentive Compensation Plan[2] and as subsequently amended on 2 October 2022[3] (collectively referred to as the "Compensation Plan"). Under the Compensation Plan, sales representatives are eligible to earn a commission of between 0.1% to 0.15% of the Total Payment Volume ("TPV") generated by each customer secured by the sales representative.[4] Mr Hall alleges that he generated a total of around US$1,915,540,543 of TPV in 2022, entitling him to a commission of

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1 SOC at para 20.

2 1st Affidavit of Mr Shtilman dated 7 September 2023 ("Mr Shtilman's affidavit") at pp 61–66.

3 Mr Shtilman's affidavit at pp 68–69.

4 Mr Shtilman's affidavit at p 62.

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US$1,357,015, but he was paid only US$180,264.[5] Rapyd disputes Mr Hall's entitlement to the commissions on the basis of alleged "serious irregularities and/or discrepancies" with Mr Hall's claims.[6]

Parties' cases

6 Rapyd contends that the communications made at the 29 August Meeting are protected by Privilege, as are certain communications made before and after the 29 August Meeting. Rapyd therefore seeks to strike out paragraphs 22 and 36 of the SOC, and the relevant Particulars, on the basis that the communications pleaded are subject to Privilege.

7 Mr Hall makes two main submissions. First, that Privilege does not apply as there had been no dispute that the parties were trying to settle at the material time. Second, even if there had been a dispute, Privilege still does not apply as Mr Shtilman had made an admission of liability at the 29 August Meeting.

Applicable law

8 The applicable legal principles are settled. At common law, "without prejudice" privilege derives from the policy of encouraging settlements: *Mariwu Industrial Co (S) Pte Ltd v Dextra Asia Co Ltd and another* [2006] 4 SLR(R) 807 ("*Mariwu*") at [24]. In effect, communications between parties protected by without prejudice privilege which were made 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*

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5 SOC at para 20.

6 Defence (Amendment No 1) dated 19 May 2023 at para 47.

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[2009] 4 SLR(R) 181 at [22]. This stems from the principle that parties should be encouraged as 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 future proceedings: *Cutts v Head* [1984] Ch 290 at 306.

9 Section 23 of the Evidence Act 1893 (2020 Rev Ed) ("Evidence Act") is a statutory enactment of Privilege, as held by the Court of Appeal in *Mariwu* at [24]. Section 23 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.

10 It is trite law that there are two prerequisites before Privilege can be invoked. The first is that the communication must constitute or involve an "admission", namely, statements or actions that appear on their face to go against the interest of the maker. The second is that the communications (in respect of which the privilege is claimed) must have arisen in the course of negotiations to settle a dispute: *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] and [89]. Accordingly, there must in fact be a dispute which the parties are trying to settle: *Sin Lian Heng Construction Pte Ltd v Singapore Telecommunications Ltd* [2007] 2 SLR(R) 433[7] ("*Sin Lian Heng*") at [13].

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[7] Defendant's Bundle of Authorities dated 27 September 2023 at p 201.

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Communications leading up to the 29 August Meeting

11 With the applicable law in mind, I turn first to the communications made between the parties prior to the 29 August Meeting. The question here is whether there was a dispute at the material time.

12 Prior to the 29 August Meeting, Mr Hall corresponded with Mr Aitor Gomez-Maguregui ("Mr Gomez"), the Vice-President of Enterprise Sales of Rapyd, on his claims for commissions. These communications were pleaded at paragraph 22(a) of the SOC and particularised in the Particulars as including WhatsApp ("WA") messages exchanged with Mr Gomez on 21 and 26 July 2022.[8]

13 Rapyd submits that these messages were sent as, and were intended by Mr Gomez to be, part of the ongoing discussions between Mr Hall and Rapyd for a potential resolution of the differences concerning Mr Hall's claim to commissions. They form part of a larger series of correspondence which would have reasonably led to settlement of the dispute, which is protected by the Privilege under the broad approach taken for without prejudice privilege (which is discussed at [26] below).

14 As evidence of a dispute, Rapyd points to Mr Hall's messages to Mr Joel Yarbrough ("Mr Yarbrough"), Rapyd's Vice-President of APAC, on 26 August 2022, where Mr Hall stated that "when [he is] officially told [his] agreement won't be honoured [he] will be resigning" and that he "can't trust Rapyd".[9]

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8 1st affidavit of Mr Aitor Gomez-Maguregui dated 29 August 2023 ("Mr Gomez's affidavit") at pp 30, 32.

9 Appellant's Bundle of Pleadings dated 23 January 2024 ("ABP") at p 179.

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15 I note, however, that these messages between Mr Hall and Mr Yarbrough were exchanged on 26 August 2022, whereas Mr Gomez's WA messages were exchanged prior to that, on 21 and 26 July 2022. Counsel for Rapyd confirmed that there was no other evidence of a dispute in July 2022 and that on Mr Gomez's messages alone, there is no suggestion of a dispute.[10] The Particulars simply indicate that Mr Gomez informed Mr Hall that payment should be made soon and that it should be made over the next few days.

16 Therefore, in the absence of evidence of a dispute at the material time, I find that Privilege does not extend to paragraph 22(a) of the SOC and as particularised in the Particulars.

Communications at the 29 August Meeting

Whether there was a dispute at the material time

17 I turn next to the communications at the 29 August Meeting. As mentioned above at [7], Mr Hall submits first that Privilege does not apply because there had been no dispute which the parties were trying to settle at the material time of the 29 August Meeting.[11]

18 As evidence of a dispute leading up to the 29 August Meeting, Rapyd relies on a set of messages from Mr Hall to Mr Yarbrough around 26 and 28 August 2022. I referred to this earlier and elaborate on them here.[12]

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10 Notes of Evidence dated 29 January 2024 ("NE") at p 3.

11 Respondent's Written Submissions dated 23 January 2024 ("Respondent's Submissions") at para 5(c).

12 ABP at p 179.

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(a) On 26 August 2022, Mr Hall expressed his gratitude to Mr Yarbrough for giving him "the heads up that Rapyd is considering cutting [Mr Hall's] pay – again" and that he wanted Mr Yarbrough to know that when Mr Hall was "officially told [his] agreement won't be honoured [he] will be resigning". Mr Hall said that "[r]emuneration is why" Mr Hall did what he did. Taking it away from him would be "a mortal blow".

(b) On 28 August 2022, Mr Hall told Mr Yarbrough that it was "disgusting" that Rapyd wanted to steal from Mr Hall when he was so dedicated. Mr Hall also said that he had told Mr Gomez that he would be resigning.

(c) Mr Yarbrough asked Mr Hall on 28 August 2022 if he had had his "1:1 [meeting] with [Mr Shtilman] yet?"

19 At the hearing of the appeal, counsel for Mr Hall submitted that these messages do not constitute evidence of any dispute between the parties about Mr Hall's compensation or commission payments in relation to the Funding Societies deal. Rather, they only provide evidence of Mr Hall's concerns about stock grants or not receiving inflation adjustments in his pay, which he mentioned in the same set of messages to Mr Yarbrough around 6 July 2022. Counsel for Mr Hall also submitted that other messages between Mr Hall and Mr Yarbrough, such as a message where Mr Hall had expressed his disappointment that Rapyd "blocked and again destroyed the other Funding Socities [*sic*] deals [Mr Hall] salvaged", only related to Mr Hall's concerns of generating future revenue and not past payments of commissions already earned from the Funding Societies Deal. However, counsel for Mr Hall acknowledged

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that even as of 6 July 2022, Mr Hall had complained that he had not been paid his commission for the first two quarters.

20 With respect, I have several difficulties accepting these submissions. First, by referring to stock grants, not receiving inflation adjustments in his pay or not receiving his commission for the first two quarters, Mr Hall was clearly referring to past payment issues. Counsel for Mr Hall's submission that the messages were about *future* revenue issues was thus contradicted by counsel's other submission referring to stock grants and not receiving inflation adjustment in Mr Hall's pay. Counsel for Mr Hall further submitted at the hearing that Mr Yarbrough had not filed any affidavit to explain the messages, but that does not help advance Mr Hall's case here, since the relevant statements are what Mr Hall himself had said in his messages.

21 Second, Mr Hall's messages to Mr Yarbrough deal with more than just concerns of stock grants or inflation adjustments to his pay. As seen from the above extracts of the messages, Mr Hall was expressing his broader concern that Rapyd was considering cutting his pay, that it would not honour its agreement with him and that taking remuneration away from him would be a mortal blow. Mr Hall's concerns as expressed there are broad and general, and relate to his pay and remuneration, rather than being limited to what counsel for Mr Hall submitted. These messages provide evidence of Mr Hall's broader concerns over pay, which include among other things, the Funding Societies Deal.

22 At the same time, I find that Mr Hall's concerns over his payments may not have tilted over into a dispute with Rapyd at the point of his messages to Mr Yarbrough around 6 July 2022. As set out above, Mr Gomez's WA messages with Mr Hall in July 2022 also did not suggest that there was a dispute then.

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23 However, by around 26 August 2022, Mr Hall had made it clear to Mr Yarbrough in his messages that he would resign if the agreement with him was not going to be honoured. In his affidavit, Mr Hall explains that he told Mr Yarbrough that he would resign if he was not paid what he was owed in full.[13] By Mr Hall's own evidence, the disagreement was not merely limited to stock grants or inflation adjustment or to future revenue issues. In his own words, the issue was whether he would be paid in full.[14] By threatening to resign if he was not, Mr Hall himself was casting this as a dispute. Notably, Mr Yarbrough did not say that Mr Shtilman would confirm paying Mr Hall in full at the upcoming "1:1" meeting. Mr Yarbrough also did not give any assurance as to what Mr Shtilman would say at the meeting. He simply asked Mr Hall if he had had the "1:1" meeting with Mr Shtilman yet. I therefore find that there is evidence of a dispute by around 26 August 2022, and that the "1:1" meeting with Mr Shtilman was to resolve this pay dispute.

24 Mr Shtilman's evidence is also consistent with the tenor of Mr Hall's messages to Mr Yarbrough around 26 to 28 August 2022, where Mr Hall expressed his concerns that Rapyd would not pay him in full. Mr Shtilman's evidence is that by around August 2022, he had concerns about paying Mr Hall in full, in the lead up to the 29 August Meeting.[15] He also conveyed his concerns to Mr Casey Bullock ("Mr Bullock"), the Chief Revenue Officer of Rapyd, by way of an email dated 19 August 2022.[16] There, Mr Shtilman stated that Mr Hall's claim for commissions in relation to the Funding Societies Deal was a "very problematic thing", a "misuse of [Rapyd's] compensation structure" and

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13 Mr Hall's affidavit dated 15 September 2023 ("Mr Hall's affidavit") at para 45.

14 Mr Hall's affidavit at paras 45, 52.

15 Mr Shtilman's affidavit at paras 23–25.

16 Mr Shtilman's affidavit at p 170.

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"ridiculous". Mr Shtilman was clearly opposed to Mr Hall's demands as of 19 August 2022. This is relevant in showing his mindset going into the 29 August Meeting. While these views were conveyed by Mr Shtilman only to Mr Bullock and not to Mr Hall prior to the 29 August Meeting, this does not undermine the evidence of a dispute. By Mr Hall's own account, he was also upset that he might not be paid the full sums he considered were owed by Rapyd and hence Mr Hall threatened to resign.

25 I hence find that based on Mr Hall's messages with Mr Yarbrough on 26 and 28 August 2022, Mr Hall's affidavit at paragraph 45, and Mr Shtilman's email to Mr Bullock dated 19 August 2022, there is evidence of a dispute about Mr Hall's pay at the material time at which the parties attended the 29 August Meeting. Privilege would therefore apply to the communications at the 29 August Meeting provided that the communications were admissions which arose in the course of negotiations to settle the dispute, but subject to whether there was an admission of liability by Mr Shtilman (which Mr Hall submitted there was).

26 For completeness, I reiterate that the courts have firmly established that a broad approach should be taken to communications over which Privilege is asserted. In *Unilever PLC v The Procter & Gamble Co* [2000] 1 WLR 2436 ("*Unilever*"), Robert Walker LJ observed at 2448−2449 that "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". Walker LJ's dicta was cited in *Sin Lian Heng* at [51]. In *CSO v CSP and another* [2023] SGHC 24 ("*CSO*"), Andre Maniam J affirmed Walker LJ's dicta at [4], and held at [59] that the broad approach furthers the objective of encouraging settlements, as a matter of policy and

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principle and is the position at common law. The High Court in *CSO* also held at [76] that the Court of Appeal's decision in *Ernest Ferdinand* supports the broad approach.

Whether the communications at the 29 August Meeting are admissions arising in the course of negotiations to settle a dispute

27 I next consider whether the communications at the 29 August Meeting constituted admissions which arose in the course of negotiations to settle a dispute.

28 First, on either Mr Hall or Mr Shtilman's account of the contents of the communications, the 29 August Meeting involved Mr Shtilman making admissions against his own interest. Under Mr Hall's account of the events, Mr Shtilman had agreed to pay Mr Hall the sums owed under the Compensation Plan as a bonus rather than as commissions, which would be against Rapyd's interests. Under Mr Shtilman's account, Mr Shtilman had conceded to Mr Hall that Rapyd would continue to honour its commitments under the Compensation Plan.[17] Either of these admissions is probative of a fact in issue, namely, whether Rapyd was contractually bound by the Compensation Plan and what the sums owed to Mr Hall under the Compensation Plan were. Therefore, they are admissions for the purpose of claiming Privilege: *Sin Lian Heng* at [43].

29 Second, I am satisfied that there is a *prima facie* case that the communications arose in the course of genuine negotiations to settle a dispute. Mr Shtilman's evidence is that he had arranged the 29 August Meeting in an attempt to resolve the dispute between Mr Hall and Rapyd with respect to Mr

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17 Mr Shtilman's affidavit at para 28.

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Hall's claims for commission arising out of the Funding Societies Deal.[18] Mr Hall does not challenge that Mr Shtilman had arranged the meeting.

30 Mr Hall also gives evidence that the meeting was arranged for Mr Hall to "get the confirmation from Mr. Shtilman that [Mr Hall] would be paid [his] full entitlement to the commissions".[19] This suggests that Mr Hall was aware that the 29 August Meeting concerned the unpaid commissions, although Mr Hall disputes the intended purpose of the meeting.

31 I am unable to accept Mr Hall's account that the meeting was purely to obtain confirmation that Mr Hall would be paid his commissions in full. In Mr Hall's WA messages to Mr Yarbrough on 26 and 28 August 2022, Mr Hall raised his concerns about his compensation and threatened to resign. Mr Yarbrough responded that he thought that Mr Hall needed to "go in person and share your experiences and concerns directly".[20] When Mr Hall expressed further frustrations and said that he had told Mr Gomez that he would be resigning, Mr Yarbrough asked Mr Hall if he had his "1:1" meeting with Mr Shtilman yet. There is nothing on the face of these messages from Mr Yarbrough that suggests that the meeting was simply only to confirm Mr Hall's payment in full. I hence find that there is a *prima facie* case that the 29 August Meeting communications arose in the course of negotiations to settle a dispute.

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18 Mr Shtilman's affidavit at para 25.

19 Mr Hall's affidavit at para 45.

20 ABP at p 179.

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Legal approach where parties dispute whether there is an oral admission of liability

32 I turn next to Mr Hall's second main submission about the application of Privilege to the 29 August Meeting. He submits that even if there had been a dispute, Privilege does not apply as: (a) none of the communications had been marked "without prejudice" and (b) Mr Shtilman had made an admission of liability at the 29 August Meeting.

33 I do not accept Mr Hall's submission that Privilege does not apply as the communications had not been marked "without prejudice". In *Sin Lian Heng*, Sundaresh Menon JC (as he then was) held at [10] that it is trite law that the availability of the "without prejudice" privilege is not dependent upon the use of the words "without prejudice", citing *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280 at 1299 and *Sinojaya Sdn Bhd v Metal Component Engineering Pte Ltd* [2003] 1 SLR(R) 281 at [31]. The failure to stipulate expressly that a communication is made "without prejudice" also does not preclude the operation of s 23 of the Evidence Act. In the absence of express words, the Court approaches the inquiry with no predilection one way or the other and examines all the circumstances to determine if the privilege exists: *Sin Lian Heng* at [60]. This is an established position in law, and disposes of Mr Hall's submission that the communications were not privileged as none of the alleged without prejudice communications were marked "without prejudice" or prefaced verbally as being "without prejudice" discussions (or any words to that effect).

34 I turn next to Mr Hall's submission that Privilege does not apply because Mr Shtilman had made an admission of liability. It is established in case law, and it is undisputed between the parties, that Privilege does not apply where

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there is a clear and unequivocal admission of liability:[21] *The Enterprise Fund II Ltd v Jong Hee Sen* [2017] 3 SLR 487 ("*Enterprise Fund*") at [19], [20] and [30]; *Greenline-Onyx Envirotech Phils, Inc v Otto Systems Singapore Pte Ltd* [2007] 3 SLR(R) 40 ("*Greenline*") at [17]. As the High Court found in *Sin Lian Heng* at [40], [43]–[45], where a debtor clearly acknowledges his liability, such that the "flag of truce" gives way to the "white flag of surrender", there is no legitimate interest left to protect with Privilege.

35 Before I delve further, it is important to bear in mind that the dispute in this case between the parties as to whether there is an admission of liability arises primarily because there is *no written communication* from Rapyd that Mr Hall can point to as evidence of an admission of liability. Mr Hall's case is that Mr Shtilman made such an admission of liability orally during Mr Hall's meeting with Mr Shtilman on 29 August 2022. Mr Hall primarily relies on communications that he himself sent out after this meeting, to people other than Mr Shtilman, to support his claim. Parties dispute whether the alleged oral admission of liability was made.

36 This stands in stark contrast to the instances of alleged admission of liability that were examined in *Sin Lian Heng, Greenline* and *Enterprise Fund*. In these cases, there were written communications from which the court could then examine the nature of the alleged admissions of liability, including whether they met the requirement that the admission be clear and unequivocal: *Greenline* at [16]–[17] and *Enterprise Fund* at [19] and [30].

37 Rapyd submits that where it is disputed whether an oral admission of liability was made, the party asserting such an admission, in this case, Mr Hall,

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[21] NE at pp 1 and 7.

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must prove on the balance of probabilities that such an oral admission was made.[22] In the court below, the learned AR rejected this and held that the party asserting such an admission of liability must show that there are *triable issues* as to whether the communications are in fact covered by Privilege. However, to avoid a striking out, the party denying Privilege must establish a clear basis for the Court to believe that communications may not be privileged. Bare and unsubstantiated assertions will not suffice.

38 Mr Hall's position is that where there is conflicting evidence on the crucial facts forming the basis of the allegation of Privilege, the Court should not choose between such conflicting evidence at a striking out application, but should instead leave the choice to the trial judge. Mr Hall relies on the Court of Appeal's *dictum* from *The "Bunga Melati 5"* [2012] 4 SLR 546 ("*The Bunga Melati*") at [45] that "a court should not in a striking out application choose between conflicting accounts of crucial facts" [emphasis removed]. That *dictum* was however, made to explain the approach to a different legal test, namely when a claim should be considered "factually unsustainable", such that it should be struck out. The court went on to note at [47] that there were certain facts in that case, which suggested that the appellants had at least an arguable case.

39 The effect of adopting Mr Hall's approach would be to dismiss a striking out claim based on Privilege and leave it to the trial judge whenever there are conflicting accounts over the existence of an alleged oral admission of liability. There would naturally be conflicting accounts whenever the existence of an oral admission is disputed. In my view, this approach would set the threshold far too low. It would be far from what the established case authorities have required in terms of the legal test for establishing whether the contents of an admission

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22 AR's Oral Judgment dated 31 October 2023 at paras 6−7.

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against interest amounts to an admission of liability, which is that the admission of liability must be clear and unequivocal. It would also risk eroding the protection afforded to Privilege and undermine the policy rationale for it. The English Court of Appeal in *Berry Trade Ltd and another v Moussavi and others* [2003] EWCA Civ 715 ("*Berry Trade*") highlighted such risks when it observed at [56] that in a case where there was no unambiguous impropriety on the evidence, if there was a trial of the factual dispute relating to the application of Privilege:

> [A]t such trial it would be inevitable that the witnesses would have to give even more evidence to explain what occurred in the without prejudice discussions. Satellite litigation of this sort is bound to discourage settlement negotiations for fear of such consequences, and is in our opinion highly undesirable.

40 I have similar reservations about adopting the "triable issues" approach to a dispute over the existence of an oral admission. This is a legal test (rather than a standard of proof) that is applied in summary judgment applications under O 9 r 17 of the Rules of Court 2021. In an application for summary judgment, the applicant has to first show that he has a *prima facie* case for judgment, and once he has done that, the burden shifts to the defendant to raise a fair or reasonable probability that he has a real or *bona fide* defence to resist summary judgment, such that there are triable issues to be determined: *Ritzland Investment Pte Ltd v Grace Management & Consultancy Services Pte Ltd* [2014] 2 SLR 1342 ("*Ritzland*") at [8], [43]–[45]. The underpinning judicial considerations are quite different, as can be seen from the following extract from *Singapore Civil Procedure 2021* vol 1 (Cavinder Bull gen ed) (Sweet & Maxwell, 2021) at paragraph 14/4/2:

> The policy of [the summary judgment provision in the revoked Rules of Court (Cap 322, R 5, 2014 Rev Ed)] is to prevent delay in cases where there is no defence (*per* Robert Goff L.J. in *European Asian Bank A.G. v Punjab and Sind Bank (No. 2)* [1983] 1 W.L.R 642 at 654; [1983] 2 All E.R. 508 at 516, CA

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> (Eng)), and therefore … once the court concludes that there is no triable issue…it will ordinarily give judgment for the plaintiff.

41 The threshold required to satisfy the court in summary judgment applications that a matter should proceed to trial is lower. The reason for the lower threshold is that the policy behind summary judgments is to enable a plaintiff with a strong claim to secure a judgment in a period of time and at an expense which is proportionate to the dispute, and to enable the court to conserve scarce public resources where there is no reasonable or fair probability that deploying those resources in a full trial would make a difference to the just determination of the dispute: *Ritzland* at [46].

42 On the other hand, there is no policy reason to adopt a lower threshold when a party resists Privilege on the basis of a disputed oral admission of liability. I have serious concerns that adopting the legal test of "triable issue" in such situations would erode the protection that has been given to Privilege. In *Sin Lian Heng*, the court cited at [27] the Canadian decision of *Hansraj v Ao* (2002) ACWSJ 6409 where Slater LJ held that the "[t]he privilege is clearly an important one, and in cases of doubt as to whether the correspondence does relate to the negotiations, the Court should undoubtedly err on the side of protecting the privilege."

43 In *Berry Trade*, the English Court of Appeal expressed concern at [48] that applying a test of a serious and substantial risk of perjury would considerably weaken the requirement of unambiguous impropriety for there to be an exception to Privilege. It held that the judge below should have looked for nothing less than unambiguous impropriety. In my view, for similar reasons, the legal test applied to assessing whether an admission against interest amounts to an oral admission of liability should be nothing less than what has been established and is expected where there are written communications from which

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the court can assess the content and context. The legal test is that the admission of liability has to be clear and unequivocal. Counsels for both Rapyd and Mr Hall also acknowledged at the hearing that they could find no reason why a lower test should be applied simply because the existence of an oral admission of liability is disputed.[23]

44 At the same time, I do not accept Rapyd's submission that the party asserting the oral admission of liability must prove the existence of such an oral admission on a balance of probabilities. I find [129] of *The Bunga Melati* to be instructive on this point. There, the Court of Appeal held that:

> However, if the defendant is only prepared to rely on its affidavits, the court will only be able to determine the disputed issue on a preliminary basis. Consistent with the nature of the hearing, there can be no finding of fact on the balance of probabilities, but only on a *prima facie* basis that, on the facts, the court has jurisdiction… It does not matter how the standard of proof (at the interlocutory/jurisdictional stage) is labelled provided it is understood that a factual dispute cannot be *conclusively* decided on contested affidavit evidence alone.
>
> [emphasis in original]

45 It is clear from the above *dictum* that disputed issues of fact at the interlocutory stage cannot be conclusively decided on contested affidavit evidence alone. It can only be determined on a preliminary basis and hence there can be no finding of fact on the balance of probabilities in such situations. As Mr Hall has made his contention at this interlocutory stage of OC 78 that there is an oral admission of liability only on the basis of affidavits, and he has made no application that the makers of the affidavits be cross-examined pursuant to O 15 r 7(6) of the Rules of Court 2021 in the court below or on appeal, I proceed on the basis of the affidavit evidence alone. Following *The Bunga Melati* at

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[23] NE at pp 2 and 7.

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[129], the court can only determine the disputed issue of whether such an oral admission was made on a *prima facie* basis. I therefore do not accept Rapyd's submission that Mr Hall must prove on the balance of probabilities that the alleged oral admission was made.

46 In summary, in my view, where the applicability of Privilege is being considered and parties dispute whether an oral admission of liability was made, in reliance only on affidavits, the standard of proof on which the court is to determine the existence of such an oral admission is on a *prima facie* basis. The party seeking to rely on such an oral admission bears the legal burden of proving this. If the court finds that such an oral admission was made on a *prima facie* basis, the party relying on such an oral admission of liability must still satisfy the court as to the established legal test that the alleged admission against interest was a clear and unequivocal admission of liability. The above dicta from *The Bunga Melati* at [129] and the above analysis was brought to the attention of parties at a further hearing. Both parties agreed that this is the legal position.[24]

47 The *prima facie* standard has been well explained by the courts in the context of other areas of the law. In *Mak-Levrion Kah Kay Natasha v R Shiamala* [2023] SGHC 335 (*"Mak-Levrion*"), Goh Yihan JC (as he then was), in the context of a summary judgment, observed at [16] that "*prima facie*" is defined to mean "at first sight" or "on first appearance but subject to further evidence or information" and a "*prima facie* case" is defined to mean "a party's production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party's favour": Bryan Garner, *Black's Law Dictionary* (Thomson Reuters, 11th Ed, 2019) at p 1441. Goh JC further held at [18] that a *prima facie* case should be (a) supported by a claimant's own evidence; (b)

[24] Notes of Evidence dated 21 February 2024 at pp 1–2.

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internally consistent; and (c) not inherently unbelievable without good explanation.

48 In *Millsopp, Michael Joseph v Then Feng* [2022] SGHC(A) 27 ("*Millsopp*"), the Appellate Division discussed the principles of establishing a *prima facie* case in the context of a submission of "no case to answer" in a civil case. Where a defendant makes a submission of "no case to answer", the claimant's legal burden of proving its case on a balance of probabilities will be discharged if he satisfies the court that there is a *prima facie* case on each of the essential elements of the claim: *Millsopp* at [11], citing *Ma Hongjin v SCP Holdings Pte Ltd* [2021] 1 SLR 304 at [32]–[33]. Woo Bih Li JAD made the following observations at [12]–[13]:

> 12 … even though a court will assume that any evidence led by the plaintiff is true in evaluating a submission of "no case to answer", this is subject to the qualification that his evidence is not inherently incredible, out of common sense, unsatisfactory or unreliable… The court must therefore consider all the evidence before it in determining whether the plaintiff has succeeded in establishing a *prima facie* case.
>
> 13 … based on all the evidence before the Judge, the appellant has not shown that the Judge erred in finding that his evidence was unsatisfactory and unreliable so that he had failed to establish a *prima facie* case that there was any [foreign exchange services agreement] between the parties.
>
> [emphasis in original]

49 A practical application of a *prima facie* case evaluation in the context of lifting legal advice privilege and litigation privilege where there was an allegation of fraudulent behaviour can be usefully seen in Lai Siu Chiu J's

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decision in *Gelatissimo Ventures (S) Pte Ltd and others v Singapore Flyer Pte Ltd* [2010] 1 SLR 833 ("*Gelatissimo*"). *Gelatissimo* concerned an application by the plaintiffs to strike out particular passages in an affidavit filed by the defendant, which referred to communications that the plaintiff alleged were protected by legal advice privilege and litigation privilege. At [81] of *Gelatissimo,* Lai J held that:

> [W]here the party seeking to lift privilege is relying solely on circumstantial evidence and his own affidavits, it would [*sic*] difficult for him to show a *prima facie* case of fraud. On the other hand, if the party is already in possession of the privileged communication and is merely trying to have it admitted as evidence, then his possession of those communication (assuming it is indicative of fraud) is likely to greatly bolster his case.
>
> [emphasis in original]

50 Drawing on the principles of assessing a *prima facie* case as set out above, applied to the present context, Mr Hall must prove that there is enough in the affidavit evidence to allow the court to infer that the alleged oral admission was made. The court will consider all the evidence before it, assessing whether the evidence is inherently incredible, out of common sense, unsatisfactory or unreliable, in determining whether Mr Hall has succeeded in establishing a *prima facie* case that the alleged oral admission was made.

51 With this in mind, I turn to the evidence before the court.

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Whether there is evidence of a clear and unequivocal admission

52 Mr Hall's position is that Mr Shtilman had agreed at the 29 August Meeting to pay him 100% of the commission earned in the Funding Societies deal.[25]

53 Mr Shtilman's account is that during the 29 August Meeting, Mr Shtilman had shared with Mr Hall his concerns and difficulties with paying him commissions arising from the Funding Societies Deal. However, as Mr Hall was not receptive to these concerns, and insisted on being paid the full extent of his commission, the parties were unable to reach a resolution.[26]

54 Mr Hall broadly relies on 3 sets of documents to support his claim that Mr Shtilman had made an admission of liability.

55 First, Mr Hall refers to an email he sent to Mr Bullock on 29 August 2022 (the "29 August Email")[27] after his meeting with Mr Shtilman. He informed Mr Bullock that he "wanted to share" some meeting minutes from his meeting with Mr Shtilman. This included the points that "Rapyd will pay 100% of the Q1 commission as per [Mr Hall's] Comp Plan" and that payment "will be as a 'bonus' not as a 'Commission Payment'. [Mr Shtilman] mentioned this was to do with Financial Auditing reasons and 3rd party perception".

56 On the face of this email, it was sent to Mr Bullock, who was not party to the 29 August Meeting, and could not verify if the contents in the 29 August Email were true.

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25 Mr Hall's affidavit at paras 48−50.

26 Mr Shtilman's affidavit at paras 25–26.

27 Mr Hall's affidavit at para 48.

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57 Mr Bullock's lack of immediate response to Mr Hall's email cannot be taken as a verification of the truth of its contents, contrary to Mr Hall's submission, nor can such verification be inferred from the delay in response. Mr Bullock explained that he did not consider it necessary to reply to Mr Hall as he expected to be updated by Mr Shtilman if any agreement had been reached. Mr Bullock responded to Mr Hall by WA message on 1 September 2022 that he was reviewing the commission.[28] Mr Bullock subsequently emailed Mr Hall on 7 September 2022[29] and again on 19 September 2022[30] regarding payment issues. Importantly, Mr Bullock was not under any obligation to respond immediately, whether to refute or confirm what Mr Hall had stated. Counsel for Mr Hall accepted that there was no such legal obligation, but submitted that Mr Bullock should have done so immediately because Mr Hall was a subordinate. However, with respect, I do not see any reason why this should make a difference. I find no satisfactory reason given as to why the lack of a response from Mr Bullock in the interim period should be taken as confirmation of what Mr Hall said in his 29 August Email.

58 The only person who could have verified the contents of the 29 August Email was Mr Shtilman. Mr Hall did not specifically explain in his affidavit why he chose to send this email to Mr Bullock instead. Counsel for Mr Hall submitted that this was because Mr Bullock preferred Mr Hall to raise issues through him and Mr Gomez, who would be his "advocates", instead of going to Mr Shtilman directly.[31] However, as Rapyd pointed out at the appeal, these sentiments were from WA messages that were sent on 6, 14 and 16 September

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28 Mr Hall's affidavit at p 154.

29 Mr Shtilman's affidavit at p 204.

30 Mr Shtilman's affidavit at p 206–207.

31 Respondent's Submissions at para 37.

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2022, some one to two weeks after the 29 August Email.[32] Hence, they do not appear to be a contemporaneous record of the reason for Mr Hall's decision not to send the 29 August Email to Mr Shtilman directly. In any event, even after Mr Bullock's message to Mr Hall on 16 September 2022, Mr Hall still reached out directly to Mr Shtilman by WA and email in October 2022.[33]

59 Second, Mr Hall refers to subsequent e-mails and messages that he sent to Mr Shtilman, Mr Bullock and Mr Gomez where he reiterated that Mr Shtilman had agreed that Mr Hall would be paid a bonus for the Funding Societies deal, which would be 100% equivalent to the amount Mr Hall would have received under the Commission Plan. However, it is clear from the face of the emails that these were Mr Hall's own accounts and none of the parties confirmed the account he set out in the emails or messages. As the parties were not under an obligation to respond to Mr Hall or to respond to him immediately, it cannot be inferred that their lack of response affirms what Mr Hall stated in these communications.

60 Third, Mr Hall relies on WA messages that he sent to his wife and colleagues. These again are Mr Hall's own account of what transpired at the 29 August Meeting, sent to persons who could not corroborate the positions set out by him. In addition, Mr Hall's messages to his wife have no context and are not dated. She refers to Mr Hall sharing "brilliant news" but there is no explanation as to what such news was.[34] As for Mr Hall's WA messages with his friends, Mr Pedro Myer and Mr Thomas Kang, these took place on 5 and 7 September 2022 respectively. They are therefore not contemporaneous records.

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32 Mr Hall's affidavit at paras 76 and 77, pp 162, 164, 166 and 243.

33 Mr Hall's affidavit at para 103.

34 Mr Hall's affidavit at p 135.

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61 Mr Hall also sent a WA message to Mr Bullock on 1 September 2022 asking whether Mr Bullock had had the chance to "confirm the meeting minutes" that Mr Hall had shared. However, Mr Bullock's response on 1 September 2022 was that he was "reviewing [Mr Hall's] commissions as well as a handful of others with Mr Shtilman".[35] Notably, in his reply, Mr Bullock chose not to confirm Mr Hall's account, which was that the compensation for the Funding Societies Deal had already been agreed to by Mr Shtilman at the 29 August Meeting. Mr Bullock also sent Mr Hall an email on 7 September 2022 stating that Mr Shtilman needed "additional information before he's willing to give a final view on this". In an email dated 19 September 2022, Mr Bullock explained to Mr Hall that there have been several compensation committee discussions on the issue of Mr Hall's claimed commissions, and stated that, with respect to Funding Societies, "Funding Societies is ineligible for commissions". Mr Bullock's communications with Mr Hall in the weeks after the 29 August Meeting thus do not support Mr Hall's account of what Mr Shtilman had agreed to.

62 The learned AR found that Rapyd was at this point resiling from an agreement reached at the 29 August Meeting. I am unable to reach a similar conclusion. There is, as pointed out above, no evidence corroborating Mr Hall's claim of an oral admission of liability by Mr Shtilman, other than Mr Hall's own account. It would hence be too speculative to consider Rapyd's communications post 7 September 2022 as resiling from an agreement. As pointed out above, even when Mr Bullock first responded by WA to Mr Hall on 1 September 2022, he did not confirm Mr Hall's account but said instead that he was reviewing Mr Hall's commissions. Ultimately, the onus is on Mr Hall to show a *prima facie*

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[35] Mr Hall's affidavit at p 154.

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case that the alleged oral admission of liability had occurred. In the absence of any extrinsic evidence supporting Mr Hall's account of the disputed oral admission, I find that he has not shown such a *prima facie* case.

63 In any event, even if Mr Hall's case is taken at its highest, and I accept that there is a *prima facie* case that Mr Shtilman made the alleged oral admission at the 29 August Meeting, Mr Hall has not shown that there was a clear and unequivocal admission of liability, bearing in mind the context of the surrounding evidence.

64 Mr Hall's account was that "Rapyd will pay 100% of the Q1 commission as per my Comp Plan".[36] There was however, a dispute between the parties as to Mr Hall's entitlement under the Compensation Plan. It is uncertain whether Mr Shtilman meant that Rapyd would pay Mr Hall 100% of the commission as per Mr Hall's understanding of his entitlement, or that Rapyd would only pay Mr Hall what Rapyd considered him to be properly entitled to under the Compensation Plan. Mr Shtilman had earlier emailed Mr Bullock on 19 August 2022 about his reservations with paying Mr Hall under the compensation structure. He stated that while he was willing to pay Mr Hall a one-time bonus of $55,000 for his performance overall, he did not want to link such payment to the deal because it would be a misuse of Rapyd's compensation structure.[37] While there were suggestions that Mr Shtilman may have changed his mind, those are, in my view, speculative.

65 In addition, the alleged agreement reached with Mr Shtilman entailed Mr Hall being paid a "bonus" instead of "commission", but with the same

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36 Mr Hall's affidavit at para 48.

37 Mr Shtilman's affidavit at p 170.

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quantum. As set out above, I do not find there to be a clear and unequivocal agreement to pay the quantum that Mr Hall thought was due under the Compensation Plan. But even if there were such an agreement, the use of a different term to classify the payment raises further doubt as to whether there was a clear and unequivocal admission of liability to Mr Hall's entitlement under the Compensation Plan. That there was a discussion of payment of "bonus" rather than "commission" suggests the possibility that Mr Shtilman was not looking to follow the entitlement under the Compensation Plan.

66 It is useful to bear in mind *Enterprise Fund* at [30], where it was held that while the court did not "doubt that an admission of liability could sometimes be implied by what was said in a communication, such an admission would still need to be clear and unequivocal (*ie*, it had to be clear and obvious that that was the implication)." In view of the above analysis, even if there is a *prima facie* case that Mr Shtilman had made the alleged oral admission, it cannot be said that there is evidence of a clear and unequivocal admission of liability.

67 Mr Hall also submits that based on Mr Shtilman's evidence at paragraphs 26 and 28 of his affidavit, Mr Shtilman was not offering any concession to Mr Hall, but on the contrary, Mr Shtilman was seeking a concession from Mr Hall. Therefore, Mr Hall submits that adopting the approach of Lord Mance in *Bradford & Bingley plc v Rashid* [2006] 1 WLR 2066 ("*Bradford"*) at [83], there was no relevant dispute about Rapyd's indebtedness at the 29 August Meeting and Privilege does not apply here.[38] However, this citation does not assist Mr Hall. Lord Mance had found that the defendant in *Bradford* was seeking a concession in respect of an

[38] Respondent's Submissions at paras 5(e) and 25.

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undisputed debt. Paragraphs 26 and 28 of Mr Shtilman's affidavit do not contain admissions of an undisputed debt. Neither, when properly examined, do they imply that Mr Shtilman was seeking a concession from Mr Hall. These paragraphs only state that Mr Shtilman shared his concerns with Mr Hall and assured him that he would be paid what he is properly entitled to under the Compensation Plan.

68 In summary, I find that Mr Hall has not shown that there was a clear and unequivocal admission of liability from Mr Shtilman. I therefore find that the discussions at the 29 August Meeting are protected by Privilege. Where pleadings plead or disclose without prejudice communications, they are liable to be struck out: *Ng Chee Weng v Lim Jit Ming Bryan and another* [2010] SGHC 35 at [17]. In the instant case, the relevant pleadings referencing communications protected by Privilege during the 29 August Meeting are therefore struck out.

Communications after the 29 August Meeting

69 As I have found that there was no admission of liability made at the 29 August Meeting, the parties' continued discussions to explore a resolution to Mr Hall's claim after the 29 August Meeting would also be covered by Privilege. This is consistent with the broad approach taken for without prejudice communications: *CSO* at [50]−[76].

Conclusion

70 In conclusion, I allow the appeal in part, and order that paragraphs 22 and 36 of the SOC be struck out, with the exception of the communications stated at paragraph 22(a) of the SOC and as particularised in the Particulars. If

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parties are unable to agree on costs, they are to file written submissions on costs, of not more than 5 pages, within 7 days of this Judgment.

Kwek Mean Luck
Judge of the High Court

Mohamed Nawaz Kamil (August Law Corporation) for the claimant;
Tan Kai Liang, Chia Su Min Rebecca, Jonathan Kenric Trachsel and Matthew Soo Yee (Allen & Gledhill LLP) for the defendant.

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