Krishna Kumaran s/o K Ramakrishnan *v* Kuppusamy s/o Ramakrishnan [2014] SGHC 158

Case Number	: Suit No 678 of 2012 (Registrar's Appeal No 179 of 2014)
Decision Date	: 11 August 2014
Tribunal/Court	: High Court
Coram	: Edmund Leow JC
Counsel Name(s)	: Mohamed Niroze Idroos and Narayanan Vijya Kumar (Vijay & Co) for the plaintiff; Michael Moey Chin Woon and V Gyana Sambandan (Moey & Yuen) for the defendant.
Parties	: Krishna Kumaran s/o K Ramakrishnan — Kuppusamy s/o Ramakrishnan

Civil Procedure – Privileges – Without prejudice privilege

11 August 2014 Judgment reserved.

Edmund Leow JC:

Introduction

1 This case concerns a dispute between two brothers ("the Parties") over their family home ("the Property"). The Plaintiff, having transferred his interest in the Property to the Defendant, now claims that the Defendant's cheques for the purchase price of $255,997.62 were dishonoured. He is suing the Defendant for that sum. In his defence, the Defendant avers that although the Plaintiff had a 32% legal interest in the Property, his beneficial interest was only 8.61% and he had already separately received a payment of $95,194.83 for the transfer of his beneficial interest. The Defendant says that the cheques for the sum of $255,997.62 were issued solely to facilitate the transfer of legal title. The Parties had never meant for them to be presented for payment.

2 This appeal arises out of an application filed by the Plaintiff in Summons No 6252 of 2013 to strike out an email ("the Email") included in the Defendant's list of documents dated 15 February 2013 and expunge the Email from court records. The issues are whether the Email is covered by "without prejudice" ("WP") privilege, and, if so, whether that privilege had been waived by the Plaintiff.

The facts

3 It is not disputed that the legal interest in the Property was held by the following persons as tenants-in-common in the following shares:

(a) The Defendant and his wife – 33%

(b) The Parties' father – 33%

(c) The Plaintiff – 32%

(d) The Plaintiff's wife – 1%

(e) The Parties' sister – 1%

4 Sometime in September or October 2011, the Plaintiff, his wife and the Parties' sister agreed to transfer their respective shares in the Property to the Defendant. The Defendant says that he and the Plaintiff had agreed that the latter would be paid $95,194.83 for his share of the Property as this was the value of his beneficial interest in proportion to his contribution towards the purchase price of the Property. However, the Plaintiff denies that there was such an agreement and maintains that both his legal and beneficial interest in the Property was 32%.

5 On 16 February 2012, the Plaintiff sent the Email to Thanaraj s/o Ramakrishnan ("Raj"), who is a brother of the Parties. The Email stated as follows:

> Hi,
>
> Please refer to the New "Lentor Updated" spreadsheet file.
>
> I need the $186,000 to purchase a new flat.
>
> Tks.
>
> Kumar

Attached to the Email were two tables setting out what was said to be the Plaintiff's and the Defendant's share entitlements in the Property. The Plaintiff explained that the tables were prepared by a family friend using data given by the Defendant and then amended by the Plaintiff. The first table stated that $144,000 was payable to the Plaintiff while the second table, which was based on a higher valuation of the Property, stated that $186,000 was payable to the Plaintiff after setting off a debt of $22,000 owed by the Plaintiff to the Defendant. Raj did not reply to the Email and forwarded it to the Defendant on 12 October 2012.

6 On 26 March 2012, the Defendant issued two cheques for $33,320 and $222,677.92 respectively to the Plaintiff. On 28 March 2012, the transfer of legal interests to the Defendant was completed. The cheques were returned dishonoured on 6 and 21 June 2012 respectively.

7 On 15 August 2012, the Plaintiff commenced these proceedings against the Defendant. The Defendant filed his Defence and Counterclaim on 11 September 2012 wherein he referred at para 15(a) to three emails exchanged between a family friend and the Defendant's wife on 23 and 27 February 2012, purportedly showing the Plaintiff's knowledge that the cheques drawn by the Defendant were not to be presented for payment. In the Plaintiff's Reply, he pleaded that the emails were sent on a WP basis. The Defendant and the Plaintiff filed their lists of documents on 15 February 2013 and 25 March 2013 respectively.

8 On 15 May 2013, the Plaintiff filed Summons No 2532 of 2013 ("SUM 2532/2013") applying to strike out the paragraphs in the Parties' pleadings that referred to the three emails as well as all references to the three emails in the Parties' lists of documents. The Plaintiff argued that those emails were covered by WP privilege because they were sent in an attempt to resolve the Parties' dispute. The Defendant replied that the three emails were not privileged and exhibited the Email (among other documents) in his reply affidavit to support his contentions. The Plaintiff's application was allowed by an assistant registrar and the Defendant's appeal was dismissed by a High Court Judge.

9 On 3 December 2013, the Plaintiff filed this application in respect of the Email. The assistant registrar ("the AR") found that the Email was covered by WP privilege because it was sent in an attempt to settle a genuine dispute and contained an admission against the Plaintiff's interests.

However, the AR took the view that privilege had been waived by the Plaintiff because the Email was exhibited in the Defendant's affidavit for SUM 2532/2013 as well as the Plaintiff's own affidavit for this application. He therefore dismissed the Plaintiff's application. The Plaintiff appealed.

My decision

Was the Email covered by WP privilege?

Whether the privilege applies against third parties

10 The starting point for considering claims of WP privilege is s 23(1) of the Evidence Act (Cap 97, 1997 Rev Ed) ("EA"), which 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.

11 Since the Email was sent by the Plaintiff to Raj and not the Defendant, and there is no evidence that Raj was acting as the Defendant's agent, a preliminary issue is whether s 23(1) prevents a litigant who was *not* a party to the WP communication from adducing evidence of it. The Defendant submits that it does not. He referred me to *Lim Tjoen Kong v A-B Chew Investments Pte Ltd* [1991] 2 SLR(R) 168 ("*Lim Tjoen Kong (CA)*") at [21], where the Court of Appeal observed that "[a] literal reading of s 23 suggests that the privilege from disclosure of without prejudice negotiations is confined to the parties to the action (and their solicitors or agents)". He also cited *Mariwu Industrial Co (S) Pte Ltd v Dextra Asia Co Ltd and another* [2006] 4 SLR(R) 807 ("*Mariwu*"), where Chan CJ, writing on behalf of the Court of Appeal, stated (at [25]):

> In [*Lim Tjoen Kong (CA)*], I said that a literal reading of s 23 suggested that the section appeared to be confined to the parties to the action (and their solicitors and agents). … I continue to hold this view. Section 23, properly construed, only refers to situations where it is the parties to the negotiations themselves who are attempting to renege on an express or implied agreement not to use admissions made in the course of negotiations against each other. The admissions in such cases are not relevant.

12 I accept that s 23(1) does not apply in the present case where a third party to the communication is seeking to adduce evidence of it. But that is not the end of the matter – I still have to consider the common law on WP privilege. In *Rush & Tompkins Ltd v Greater London Council and another* [1989] AC 1280 ("*Rush & Tompkins*"), the issue was whether the second defendant could obtain specific discovery of WP communications between the plaintiff and the first defendant which resulted in a settlement between the latter two parties. The House of Lords held that WP privilege operated to shield those communications from disclosure even though the second defendant was not a party to them. Lord Griffiths stated the court's reasoning as follows (at 1301):

> … Suppose the main contractor in an attempt to settle a dispute with one subcontractor made certain admissions it is clear law that those admissions cannot be used against him if there is no settlement. The reason they are not to be used is because it would discourage settlement if he

> believed that the admissions might be held against him. But it would surely be equally discouraging if the main contractor knew that if he achieved a settlement those admissions could then be used against him by any other subcontractor with whom he might also be in dispute. The main contractor might well be prepared to make certain concessions to settle some modest claim which he would never make in the face of another far larger claim. It seems to me that if those admissions made to achieve settlement of a piece of minor litigation could be held against him in a subsequent major litigation it would actively discourage settlement of the minor litigation and run counter to the whole underlying purpose of the "without prejudice" rule. *I would therefore hold that as a general rule the "without prejudice" rule renders inadmissible in any subsequent litigation connected with the same subject matter proof of any admissions made in a genuine attempt to reach a settlement.* It of course goes without saying that admissions made to reach settlement with a different party within the same litigation are also inadmissible whether or not settlement was reached with that party. [emphasis added]

13 In *Mariwu*, the Court of Appeal held that the rule of evidence set out in *Rush & Tompkins* was applicable in Singapore as it was consistent with s 23(1) of the EA (at [28]):

> Section 23's silence on the situation where a third party is involved does not mean that he is free to adduce "without prejudice" evidence. The situation remains governed by common law. In [*Lim Tjoen Kong (CA)*], I left the question open whether *Rush & Tompkins* was or was not inconsistent with s 23 because of the lack of adequate argument on this point by counsel. Given our interpretation that the rationale of the s 23 privilege is to encourage settlements, I can see no inconsistency between that section and *Rush & Tompkins*.

14 The question then is whether the rule in *Rush & Tompkins* applies in the present case. I note that unlike in *Rush & Tompkins*, where a party was seeking disclosure of a WP communication between two other disputing parties, here there is no dispute between the Plaintiff and Raj *per se*. The Plaintiff deposed that he sent the Email to Raj because he and the Defendant were no longer on speaking terms, and he had hoped that Raj, as the Plaintiff's elder brother, could help persuade the Defendant to settle the dispute. The present case is therefore slightly different from the situation in *Rush & Tompkins* in that Raj was not a disputing party himself but was acting as a messenger or an informal mediator between the two disputing parties.

15 In my view, however, the WP privilege should still arise because the rule in *Rush & Tompkins* is based on "the public policy of encouraging litigants to settle their differences rather than to litigate them to the finish": *Greenline-Onyx Envirotech Phils, Inc v Otto Systems Singapore Pte Ltd* [2007] 3 SLR(R) 40 at [14]. The relevant consideration should be whether the communication in question was made in an attempt to settle a dispute, and not whether there was a dispute between the two parties to the communication. In my judgment, the doctrine of WP privilege is flexible enough to cater to situations where the relationship between two disputing parties has broken down to such an extent that they have to communicate through a third party to negotiate a settlement. This is necessary to cover, for instance, communications made to a mediator in the course of mediation, which has been accepted by the English courts as a form of "assisted without privilege negotiation" that is privileged: *Aird v Prime Meridian Ltd* [2006] EWCA Civ 1866 at [5]. I hasten to add that I make no finding that Raj was acting as a mediator in the present case; in my view it is sufficient for the purposes of WP privilege that he was a conduit through which a communication made for the purpose of settlement was passed from the Plaintiff to the Defendant. Thus, assuming that the Email was sent by the Plaintiff in an attempt to settle a dispute with the Defendant, the fact that it was originally sent to Raj (who then forwarded it to the Defendant) does not prevent the Plaintiff from asserting WP privilege over it as against the Defendant.

16 I now turn to consider whether the usual requirements for WP privilege are satisfied, namely, whether the Email was (a) written in the course of negotiations to settle a dispute; and (b) contained an admission: *Mariwu* at [29].

Whether the Email was written in the course of negotiations to settle a dispute

17 The Defendant argues that there was no dispute on 16 February 2012 when the Email was sent. This is because two weeks later, on 29 February 2012, the Plaintiff had confirmed with the conveyancing solicitors that they were to proceed with the completion of the transfer on 28 March 2012. The Defendant says that the Plaintiff would not have given the go-ahead for completion if there had been a dispute as to his beneficial interest in the Property.

18 This argument is unconvincing. The fact that the Plaintiff had proceeded with completion is equivocal given that the issue is whether the Plaintiff is entitled to the stated purchase price of $255,997.62. He might have proceeded with completion with the intention of presenting the Defendant's cheques for payment. In any event, the question of whether there was a dispute between the Plaintiff and the Defendant as at 16 February 2012 is *res judicata*, because the AR in SUM 2532/2013 had expressly found that the dispute between the Parties concerning the Property had crystallised by January 2012 and that they were still in the course of negotiations as at 27 February 2012 (when one of the emails in issue in SUM 2532/2013 was sent). [note: 1] This decision was upheld by the High Court Judge and there has been no further appeal. The Defendant is therefore estopped from relitigating the issue of whether there was a dispute between the Parties over the Property at the time the Email was sent.

Whether the Email contained an admission

19 An "admission" is defined in s 17(1) of the EA 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". I will adopt this definition for the purposes of determining whether there is WP privilege in the Email.

20 Although the Email was rather brief, when read together with the attached tables it appears to me that the Plaintiff was offering to transfer his share in the Property to the Defendant for $186,000. This sum is lower than the stated contract price of $255,997.62 and the Plaintiff's offer suggests an inference as to the proper share and/or value of his beneficial interest in the Property. It also suggests an inference as to whether the Parties had in fact agreed that the Plaintiff would be paid $255,997.62 for his share in the Property. In my judgment, the Email clearly contained an admission by the Plaintiff. I therefore find that the Email was covered by WP privilege and move on to the next issue of whether that privilege had been waived.

Was WP privilege waived by the Plaintiff?

21 The Defendant contends that even if WP privilege had subsisted in the Email, it was waived by the Plaintiff because:

(a) the Email was exhibited in the Defendant's affidavit dated 14 June 2013 and the Plaintiff did not seek to expunge it; and

(b) the Email has been exhibited by the Plaintiff in its affidavit in support of the present application.

The AR agreed with the Defendant and held that privilege had "inadvertently" been waived by the Plaintiff. [note: 2]

22 In my view, the AR had erred insofar as he held that WP privilege could be waived by a party inadvertently. The AR appeared to be influenced by the decision in *Tentat Singapore Pte Ltd v Multiple Granite Pte Ltd* [2009] 1 SLR(R) 42 ("*Tentat*") at [40], where Kan Ting Chiu J said that "[w]hen a document has become a part of the record in any court proceedings, the information in the document enters into the public domain, and it will be too late to preserve the privilege in the document". However *Tentat* was a case dealing with legal professional privilege; the principles governing the waiver of legal professional privilege are different from those governing the waiver of WP privilege. As noted in *Phipson on Evidence* (Hodge M Malek gen ed) (Sweet & Maxwell, 18th Ed, 2013) at paras 24-25:

> Waiver [of WP privilege] is different to waiver in the case of other forms of privilege, because it takes the consent of both parties to waive the privilege. So it is not really comparable in this regard to ordinary privilege. In *Galliford Try Construction v Mott Macdonald Ltd* [2008] EWHC 203] it was argued that where a party disclosed without prejudice material relating to discussions between the parties in his list of documents, that amounted to a waiver and the court was obliged to apply the inadvertent disclosure principles to determine whether the disclosing party could go back on it. As the judge correctly held, the principles on inadvertent disclosure are not applicable to without prejudice privilege … *Inadvertent disclosure involves trying to get back a document that is privileged and confidential as against the other party. Where the document relates to without prejudice discussions between the parties, the contents of the conversation can hardly be confidential as against the other party who was present at the meeting, so that analysis cannot apply. Waiver involves a decision by both parties to utilise the material in court.* Mere disclosure of without prejudice documents in a list cannot be a waiver of without prejudice privilege, in circumstances where the documents are not confidential as against the other party. [emphasis added]

23 Here, the Email was not confidential as against the Defendant. Thus, the fact that the Email had been adduced as evidence in SUM 2532/2013 and in this application cannot in itself amount to a waiver of WP privilege. It must be shown on the circumstances of the case that the Plaintiff had expressly or impliedly agreed to the waiver of WP privilege over the Email: Jeffrey Pinsler, *Evidence and the Litigation Process* (LexisNexis, 4th Ed, 2013) at para 15.024.

24 *A-B Chew Investments Pte Ltd v Lim Tjoen Kong* [1989] 2 SLR(R) 149 ("*Lim Tjoen Kong (HC)*") provides a good example of the circumstances in which a court would find that a party had waived WP privilege by adducing evidence of WP communications. In that case, the defendant had filed two affidavits which referred to certain negotiations between himself and the plaintiff. The plaintiff filed a reply affidavit disputing the defendant's version of the negotiations and putting forward its own version. The defendant then filed a further affidavit challenging the plaintiff's version and giving more details of the negotiations, to which the plaintiff responded in yet another affidavit. Finally, the defendant filed an application to strike out all references to the negotiations in the plaintiff's affidavits on the basis that they were WP. The High Court judge dismissed the defendant's application, reasoning as follows (at [24]–[25]):

> 24 In our case, it is the defendant who opened the door of privilege by allowing reference to be made to the privileged discussions in Khoo's affidavit filed on 12 March 1986 and Gozali's affidavit filed on 14 March 1986. The plaintiffs in Chew's affidavit filed on 3 May 1986 had merely sought to challenge the version given in the affidavits filed by the defendant. The defendant could have taken out an application to strike out then but did not do so. Instead, it replied with a further

affidavit of Khoo's filed on 15 May 1986 which descended into the details of what had actually transpired. Rather than close the door of privilege, the defendant and his solicitors opened it even wider. By their conduct, they had waived the privilege.

2 5 *In my view, public policy cannot allow a party who refers to "without prejudice" negotiations in an affidavit (or who files such an affidavit by some other deponent) thinking such reference is in his favour, later, upon his adversary filing an affidavit with references to the initiator's disadvantage, to claim privilege.* If he were permitted to do so, much time would be wasted and unnecessary steps in pre-trial procedure have to be taken.

[emphasis added]

The Court of Appeal agreed with the judge and dismissed the defendant's appeal (see *Lim Tjoen Kong (CA)* at [34]).

25 A case where the court reached an opposite conclusion was *Sobell v Boston and others* [1975] 1 WLR 1587 ("*Sobell v Boston*"). In that case, the plaintiff swore an affidavit referring to certain discussions. The defendant replied with an affidavit giving his own version of the discussion but adding that the whole discussion was conducted on a WP basis. Goff J held that the defendant's conduct did not amount to a waiver of WP privilege (at 1592–1593):

With regard to the second ground, Mr. Boston's affidavit could not, in my judgment, of itself be a waiver. Where the evidence is given by affidavit the opposing party is faced with a dilemma. If he says, merely, "I am advised that this is inadmissible and I need not answer it," then if the objection is overruled he must seek an adjournment which may not be allowed or which may be allowed only on adverse terms as to costs, and if he does not, or if his application be not granted, he will be left with no evidence on his side. I cannot think that the privilege can be waived by an affidavit which says, "I object that my opponent's affidavit is inadmissible because the matter it contains is privileged, but in any case should the evidence be received, I say that it is wrong, and this is my version." Of course, when the affidavits are being read counsel should at once object, and if he allows the offending affidavit to be read without objection, he may well waive the privilege despite the form of his own affidavit, but here Mr. Libbert for the defendants made it clear from the outset that he did object, and I only received the affidavits on this point de bene esse pending argument. Accordingly in my judgment there was no waiver on this head.

26 In the present case, it was the Defendant who first adduced evidence of the Email and sought to rely on it. He stated in his affidavit dated 14 June 2013 (at para 15):

On 3 February 2013, the Plaintiff wrote to our brother, Raj, to inform him that he needed $186,000 to purchase a new flat and enclosed 2 spreadsheets. The first was his calculation that he deserved $144,000 based on the value of the property at $2 million and the second amount of $208,000 was based on the value of the property at $2.4 million. Both spreadsheets showed that he deserved 16% of the Property. In the 2nd spreadsheet, the Plaintiff admitted owing me a sum of $22,000.00 and deducted the same from the sum of $208,000 and showing the balance sum of $186,000 as being payable to him. A copy of each of the email and spreadsheets are produced before me and marked "**KR-3**".

27 The Plaintiff then replied in his affidavit dated 28 June 2013 explaining his reasons for sending the Email and saying that the Email was sent on a WP basis (at para 13):

My brother Raj, who is residing in Australia, also tried to mediate and resolve the dispute between

the Defendant and myself. I sent him the email of 3 February 2012, purely to co-operate and try to preserve family unity. Purely for the purpose of settlement, I was then willing to accept a sum of S$186,000.00 which was based on the Defendant's calculations and his alleged claim that I owed him S$22,000. The Defendant failed to agree even to this amount. *All these were done on a without prejudice basis.* [emphasis added]

28 Clearly, the present case is very different from *Lim Tjoen Kong (HC)* and much closer to the factual matrix in *Sobell v Boston*. Here, the Plaintiff was not the one who sought to rely on the Email; the *Defendant* was the one who included it in his list of documents and adduced evidence of it in SUM 2532/2013. Moreover, the Plaintiff had expressly claimed WP privilege over the Email in his reply affidavit in SUM 2532/2013. It therefore cannot be said that the Plaintiff had impliedly consented to the waiver of privilege by his conduct in SUM 2532/2013.

29 The Plaintiff's introduction of the Email into evidence for the purposes of the present application similarly cannot amount to a waiver. The whole purpose of this application is to strike out all references to the Email and expunge it from court records on the basis that it was privileged, and it was necessary to exhibit a copy of the Email so that the court could make an informed decision on whether the requirements of WP privilege have been met. It would be perverse to say that by doing so, the Plaintiff had "consented" to the waiver. It bears reiterating that when it comes to WP privilege, the issue is whether a communication that both parties are already privy to (barring cases where a third party is seeking disclosure of a WP communication, as in *Rush & Tompkins*) may be used as evidence in the proceedings between them. In other words, the issue is admissibility and not confidentiality. It is therefore senseless to argue that WP privilege is lost or waived simply because there is disclosure of the privileged document to the Defendant or to the court. The court has to consider all the circumstances of the case to determine whether such disclosure amounts to consent by the disclosing party to waive WP privilege. In the present case it is clear that the Plaintiff has not waived and does not intend to waive WP privilege.

Conclusion

30 For the foregoing reasons, I allow the Plaintiff's appeal and grant an order in terms of Prayers One and Two of his application. The Plaintiff is entitled to costs here and below to be taxed if not agreed.

[note: 1] NE dated 16 August 2013 by AR Edwin San, p 5.

[note: 2] NE dated 8 May 2014, p 14.