IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 259

Suit No 72 of 2016
(Registrar's Appeal Nos 183 and 184 of 2016)

Between

The Enterprise Fund II Ltd

… *Plaintiff*

And

Jong Hee Sen

… *Defendant*

GROUNDS OF DECISION

[Evidence] — [Admissibility of evidence] — ["Without prejudice" communications]

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The Enterprise Fund II Ltd
v
Jong Hee Sen

[2016] SGHC 259

High Court — Suit No 72 of 2016 (Registrar's Appeal Nos 183 and 184 of 2016)
Hoo Sheau Peng JC
8, 15 August 2016

24 November 2016

Hoo Sheau Peng JC:

Introduction

1 In these two closely-related Registrar's Appeals, the dispute centred on whether certain communications between the parties were protected by "without prejudice" privilege. The assistant registrar ("the AR") decided that no privilege attached to the communications. Consequently, she dismissed two applications by the defendant to stop the plaintiff's use of the communications – the first being an application to strike out a portion of the statement of claim ("the SOC") ("the striking out application"), and the second being an application to expunge certain portions of two affidavits filed on behalf of the plaintiff ("the application to expunge"). This led the defendant to file the Registrar's Appeals. Having considered the parties' arguments, I took the view that "without prejudice" privilege applied to the communications, save for the correspondence from the plaintiff's lawyers that initiated the exchange (which

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the defendant agreed could be relied on by the plaintiff). Accordingly, I allowed both appeals. As the plaintiff has appealed against my decisions, I set out my detailed reasons below.

Brief facts

2 I begin with some brief facts, in so far as they are relevant for present purposes. The plaintiff, The Enterprise Fund II Ltd, is a public company in the business of fund management. The defendant, Jong Hee Sen, is a director of International Healthway Corporation Limited ("IHCL"), a healthcare services and facilities provider.

3 On 6 July 2013, as part of a deal involving the plaintiff's 20,833,000 shares in IHCL ("the IHCL Shares"), the defendant along with four others (collectively, "the Warrantors") signed a deed of undertaking ("the Deed") in favour of the plaintiff.

4 Clause 2.1(a) of the Deed provided that within nine months of purchase of the IHCL Shares by the plaintiff ("the Sale Period"), the Warrantors would be jointly and severally liable to use reasonable endeavours to procure, on the plaintiff's behalf, the sale of the IHCL Shares to other parties. The sale price was to be no less than $0.576 per share or the last traded price on the Singapore Exchange Securities Trading Limited, whichever was higher.

5 Clause 2.1(b) provided that if the consideration received from the sale of the IHCL Shares fell short of the target sale proceeds of $11,999,808 ("the Sale Proceeds Target", which was arrived at by multiplying $0.576 by the total number of the IHCL Shares), the Warrantors were obligated to purchase or

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procure the purchase of the remainder of the IHCL Shares at a price which would make up the shortfall from the Sale Proceeds Target.

6 It was undisputed that none of the IHCL Shares were sold to other parties or purchased by the Warrantors during the Sale Period.

7 On 1 December 2015, the plaintiff's lawyers sent the defendant an email headed "Letter of Demand", stating:

> …
>
> Please find attached the letter of demand, issued on behalf of our client, The Enterprise Fund II Ltd. The letter is in relation to the deed of undertaking dated 6 July 2013, entered into between, *inter alia*, yourself and our client.
>
> Please acknowledge receipt of this letter and we hope to receive your response as soon as possible.
>
> …

8 The attached letter dated 1 December 2015 was titled "Re: DEED OF UNDERTAKING DATED 6 JULY 2013 LETTER OF DEMAND". For convenience, I shall refer to this letter simply as "the LOD". The LOD summarised the matters described at [3]–[6] above, stated that "contrary to the terms of [the Deed]" the defendant had not purchased or procured the purchase of any of the IHCL Shares, and further stated:

> …
>
> 4. Without prejudice to our client's rights, we are now instructed to and do hereby write, on behalf of our client, to *request your written proposal to resolve the aforesaid claim, for our client's due consideration*, within no later than **five (5) days** from the date of this letter.
>
> 5. **TAKE NOTE** that if you fail to comply with the aforesaid request, our client reserves the right to proceed as it may deem fit to enforce its claim, without further reference to you, including commencing legal

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> proceedings, in which event our client will further look to you for the costs of such proceedings.
>
> 6. We trust however that legal proceedings will not be necessary and that you will comply with this request promptly upon receipt thereof.
>
> …
>
> [bold and underlined bold in original; emphasis added in italics]

9 The defendant sent a short reply to the plaintiff's lawyers by email on 3 December 2015 ("the Reply Email"), stating that he was overseas on business and requesting an extension of time of five days to respond so as to meet with the plaintiff's representatives to discuss a "firm payment plan".

10 The contemplated meeting took place on 8 December 2015. Following this meeting, on the same day, the defendant sent the plaintiff's lawyers an email alluding to the meeting and enclosing a written proposal contained in a letter (collectively "the Proposal"). Broadly speaking, the Proposal was for the defendant to pay a lower sum, calculated as a certain percentage of what he considered to be the shortfall, so as to *resolve* the plaintiff's claim.

11 As it transpired, no final agreement was reached and the defendant made no payments to the plaintiff. The plaintiff subsequently commenced these proceedings to enforce cl 2.1 of the Deed, which it alleged had been breached by the defendant.

The applications

12 In the course of the proceedings, the defendant lodged the striking out application, so as to strike out para 5 of the SOC which stated:

> The Plaintiff, through their solicitors' letter dated 1 December 2015, requested for the Defendant to *provide a written proposal to resolve* the Defendant's failure to perform his

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> obligations under the Deed of Undertaking. By an email dated 8 December 2015 at 10.03 PM, the Defendant sent *his written proposal for payment, which does not properly address the Plaintiff's claim*. [emphasis added]

13 Subsequently, the defendant took out the application to expunge, so as to remove certain portions of two affidavits filed on behalf of the plaintiff, as well as the copies of the LOD and the Reply Email which were exhibited thereto. The first affidavit was by one Lim Chu Pei dated 13 April 2016, which was filed to resist the striking out application. The second affidavit was by one Tan Yang Hwee dated 26 April 2016, and was filed in support of the plaintiff's summary judgment application.

The decisions below

14 As stated at the outset, the basis for the defendant's applications was that the communications – being the LOD, the Reply Email and the Proposal – were protected by "without prejudice" privilege. In the interest of avoiding repetition, I shall not set out the specific arguments mounted by the parties, and shall simply deal with their substance in the course of my analysis. The AR noted that at the heart of "without prejudice" privilege was the existence of a dispute and an attempt to compromise it, regardless of whether the label "without prejudice" was used. She considered the communications as a whole, with the Deed as the backdrop. She found that there was no dispute between the parties, and that there had been an implied admission of liability or, at least, no firm denial of it. This was consistent with the defendant's proposal to make payment to the plaintiff. She also relied on certain phrases used by the defendant which she considered to point towards the admission of liability. She then applied the principle that open communications designed to discuss the repayment of an admitted liability, rather than to negotiate a compromise

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to a disputed liability, were not protected by "without prejudice" privilege. Thus, she dismissed both applications.

My decisions

The law on "without prejudice" privilege

15 It is trite that a communication protected by "without prejudice" privilege may not be disclosed or relied on in court. The rule is rooted in "the public policy of encouraging litigants to settle their differences rather than to litigate them to the finish", without being discouraged by the concern that "anything said in the course of negotiations may be used to their prejudice in the course of the proceedings": see *Greenline-Onyx Envirotech Phils, Inc v Otto Systems Singapore Pte Ltd* [2007] 3 SLR(R) 40 ("*Greenline-Onyx*") at [14]. This common law rule has been given a statutory basis in s 23(1) of the Evidence Act (Cap 97, 1997 Rev Ed), which states:

> **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.

16 Where apparently open communications such as those in the present case are concerned, s 23(1)(*b*) is the relevant limb of the provision. In that regard, the Court of Appeal stated, in *Mariwu Industrial Co (S) Pte Ltd v Dextra Asia Co Ltd and another* [2006] 4 SLR(R) 807 ("*Mariwu*") (at [24]):

> … This situation will cover cases where even though a statement is not expressly made "without prejudice" the law holds that it is made without prejudice because it was made *in the course of negotiations to settle a dispute* … [emphasis added]

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17 Whether a communication is made in the course of negotiations to settle a dispute must be determined by objectively construing it as a whole in the context of the factual circumstances (*Cytec Industries Pte Ltd v APP Chemicals International (Mau) Ltd* [2009] 4 SLR(R) 769 ("*Cytec*") at [16]; *Sang Kook Suh and another v Mace (UK) Limited* [2016] EWCA Civ 4 at [24]). To put it differently, the court will seek to determine "what, on a reasonable basis, the intention of the author was and how it would be understood by a reasonable recipient" (*Schering Corporation v CIPLA Ltd and another* [2004] EWHC 2587 Ch at [14]). A significant part of the context of a communication is whether it was made "in response to an invitation to negotiate as to what, if anything, was due" or only "in response to an invitation to say how the amount due was to be repaid" (*Bradford & Bingley plc v Rashid* [2006] 1 WLR 2066 ("*Bradford & Bingley*") at [23], *per* Lord Hope of Craighead). Where a communication was made in direct response to an invitation to negotiate a settlement, it would form a basis for the court to find that the communication forms part of settlement negotiations unless the contrary appears.

18 Even where a communication seems to form part of settlement negotiations, it remains open to the party seeking to rely on the communication to show that it contains an admission of liability such that there was no longer a dispute between the parties (*Mariwu* at [30]). If that is shown, "without prejudice" privilege will not apply as "[t]here is no legitimate policy interest to protect appeals for leniency or mercy" (*Sin Lian Heng Construction Pte Ltd v Singapore Telecommunications Ltd* [2007] 2 SLR(R) 433 ("*Sin Lian Heng*") at [40]. This is sometimes referred to as an exception to "without prejudice" privilege; more accurately, it is simply a situation where one of the pre-conditions of the privilege – a dispute between the parties – is not present.

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19 To constitute an admission of liability, the debtor must clearly acknowledge his liability. A mere admission against a party's interest (*ie*, a statement which suggests an inference detrimental to his case) is not necessarily also an admission of liability. The latter refers to a situation where a debtor had effectively "[thrown] his hands up and [pleaded] for mercy", such that it could be said that "the "flag of truce" [had given] way to the "white flag of surrender"" (*Sin Lian Heng* at [44] and [45]). As with any admission, an admission of liability must be unequivocal (see *Qingdao Bohai Construction Group Co, Ltd and others v Goh Teck Beng and another* [2016] 4 SLR 977 at [87] regarding admissions generally). Furthermore, even where there is an admission as to the *existence* of a liability, "without prejudice" privilege will subsist so long as there is a dispute as to the *quantum* of liability (*Sin Lian Heng* at [58]).

20 To sum up, I considered the relevant principles in the present case to be as follows:

(a) "Without prejudice" privilege would apply to the communications if they were part of a course of settlement negotiations. Whether they should be considered part of a course of settlement negotiations depended on both their context and their content.

(b) If the communications contained a clear admission of liability such that no dispute remained, they could not be considered to be part of a course of settlement negotiations.

(c) However, if the communications contained a clear admission that some liability existed, but a dispute remained as to the quantum of the liability, they could still be considered to be part of a course of

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settlement negotiations and thus protected by "without prejudice" privilege.

21 I should also add that "it is well established that the principle of waiver is applicable in the context of communications for the purpose of settlement" (Jeffrey Pinsler SC, *Evidence and the Litigation Process* (LexisNexis, 5th Ed, 2015) at para 15.024). In other words, parties may agree to waive the protection accorded by "without prejudice" privilege.

22 With that, I turn to apply the principles to the communications. In this regard, while the LOD and the Reply Email were exhibited to the affidavits of Lim Chu Pei and Tan Yang Hwee, the Proposal was not part of the court papers. The Proposal was placed before me purely for the purpose of determining whether "without prejudice" privilege applied. I shall not set out the contents of the Proposal in their entirety, but will quote relevant phrases where it is necessary for the analysis.

Waiver of possible privilege in respect of the LOD

23 As a preliminary point, I noted that although the defendant initially sought to strike out the whole of para 5 of the SOC – including the first sentence, which referred to the LOD – the defendant's counsel later clarified that the defendant had no objection to the plaintiff's reference to and use of the LOD. This was a welcome clarification. Since the plaintiff obviously wished to adduce and rely on the LOD, and the defendant had no objection to that, privilege with regard to the document, if any, had been waived. It was therefore strictly unnecessary for me to consider whether the LOD – as the correspondence that initiated the exchange between the parties – was itself protected by "without prejudice" privilege. However, the LOD remained

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relevant to my analysis as part of the surrounding context, and in fact, formed the starting point of my inquiry.

Were the communications part of a course of settlement negotiations?

24 Dealing first with the plaintiff's argument that no part of the LOD could have been protected by "without prejudice" privilege as it was clearly marked as a letter of demand, I was prepared to accept the plaintiff's contention that the LOD itself was an open communication (and at any rate, as stated above, the defendant's counsel had clarified that the defendant was no longer attempting to exclude the LOD). However, there was nothing stopping a party from requesting, in an open communication, that the other party reply with a settlement proposal. If the other party were to take up that invitation, the reply could be protected by "without prejudice" privilege even though the invitation itself would not. Thus, the question at hand was whether the LOD was a pure demand or whether it included an invitation to enter into settlement negotiations as well.

25 In that regard, I noted that the LOD had some curious features. Although it stated that the defendant had acted "contrary to the terms of [the Deed]" (*ie*, in breach of contract), it did not go on to state the relief which the plaintiff believed it was entitled to. There was no express demand for compensation for the breach, or for performance (albeit late performance) of cl 2.1. Instead, the purpose of the LOD was apparently "to request [the defendant's] written proposal to resolve the aforesaid claim, for [the plaintiff's] due consideration". Indeed, unlike a typical letter of demand, the LOD did not even state any method of satisfying the claim outright; the only thing it demanded (or, rather, requested) was the submission of a proposal to

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"resolve" the claim. It was thus clear to me that the LOD was primarily, or at least contained, an invitation to the defendant to make a proposal.

26 A further question was whether the type of proposal which the LOD invited was limited to proposals as to the modalities for satisfying the claim, or whether it included proposals to settle or compromise the claim. On a plain reading of the LOD, the phrase "written proposal to resolve the aforesaid claim" was broad enough to include a settlement proposal. I saw no reason to depart from that plain reading. If, as the plaintiff argued, it had intended to invite only a proposal as to *who* would purchase the IHCL Shares and *how* the payment would be made, it could easily have said so. At the very least, if the plaintiff had been interested in considering only proposals which would fully satisfy the claim, it could have used the word "satisfy" instead of "resolve". The former denoted full payment of a debt or full performance of an obligation, whereas the latter denoted merely the resolution of a dispute, whatever form that resolution may be.

27 In this respect, the language used in a subsequent letter sent to the defendant by the plaintiff's lawyers on 12 February 2016, as a precursor to these proceedings, was telling. It stated that "[the plaintiff's] claim remains *unresolved* to date" and that the plaintiff would take certain steps "if [its] claim continues to remain *unsatisfied*" [emphasis added to both quotations]. The shift from "unresolved" (in reference to the failure of the earlier discussions) to "unsatisfied" (in reference to the hard deadline imposed) illustrates the difference in nuance between the two terms. The use of the broader term in the LOD appeared to be a conscious decision. In fact, even at para 5 of the SOC, which has been reproduced in its entirety at [12], the plaintiff characterised the LOD as a "request" for the defendant to "*provide a*

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written proposal to resolve [his] failure to perform his obligations under the [Deed]", and did not characterise it as a mere demand to satisfy the claim.

28 Given all these factors, I was of the view that the LOD invited proposals including settlement proposals. That was how a reasonable recipient with knowledge of the circumstances would have understood the LOD, whatever the plaintiff's intentions might have been. More importantly, a reasonable recipient of the Reply Email and the Proposal, knowing that they were sent by the defendant in the context of an invitation to propose a settlement, would have understood those responses as being likely to form part of a course of settlement negotiations. It was this objective impression, and not the plaintiff's private intentions to conduct the discussions "without prejudice" or not, which was relevant.

29 In the light of the above, I considered that the context of the communications pointed toward the Reply Email and the Proposal being part of a course of settlement negotiations. It was next necessary to ask whether their contents showed that they were not in fact part of a course of settlement negotiations – for instance, because they contained clear admissions of liability coupled with proposals for satisfying that liability.

Was there a clear acknowledgment of liability such that no dispute remained?

30 Considering the contents of the Reply Email and the Proposal in their context, with respect, I could not agree with the AR's finding that there was an "implied admission of liability". While I 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).

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31 On its face, the Reply Email could not be said to be unequivocal. While there was no denial of liability, there was no admission of liability. While it mentioned a "firm payment plan", the absence of more details meant that this could as easily have referred to a plan for paying based on a *settlement* as opposed to paying an acknowledged debt. However, the plaintiff argued that when the Reply Email and the Proposal were taken as a whole, there was an implied admission of liability.

32 The AR agreed with the plaintiff and relied on a series of phrases from the Proposal for her finding that there had been an implied admission of liability. As stated at [10], essentially, the Proposal conveyed an offer by the defendant to resolve the plaintiff's claim, by paying a lower sum, being a percentage of what he considered to be the shortfall. Turning to the specific phrases used, I would divide these into two categories. The first category contained references to the plaintiff's claim, the shortfall and a proportion thereof, and included phrases such as "the following payment plan to resolve the claim", "[the proposed amount] is for my 15% portion of the … shortfall" and "[t]he 15% is calculated by my proportion of shares versus [the other Warrantors]". The second category contained references in general terms to the defendant's desire to be released from his obligations under the Deed, and included phrases such as "final settlement for me and absolve me from any further liabilities" and "clear this obligation".

33 It appeared to me that the most that could fairly be said of these phrases was that they were equivocal: they could be viewed as hinting at an admission of liability, but they were equally consistent with a proposal to compromise a disputed liability. The extent of the ambiguity can be more easily appreciated by comparison with the facts in *Cytec*, which the plaintiff relied on. In that case, Andrew Ang J concluded that the disputed

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communication contained an admission of liability based on the following features (at [23]):

> … From the use of the descriptors "overdues" and "overdue payment" (akin to "outstanding balance" and "outstanding amount" in *Bradford & Bingley* …) it may be inferred that the defendant was not disputing the existence of the Debt. Further, the e-mail evinced no dispute whatsoever as to the quantum of the Debt. All that was discussed was *how* the payments were to be made. The principle in *Sin Lian Heng* … cited by the defendant (that the privilege may apply to disputes on the extent of liability) was therefore inapplicable.

34 It was no doubt true that the phrases "overdues" and "overdue payment" supported an inference that there was no dispute as to the existence of the debt. By definition, a payment would be "overdue" if the obligation to pay had accrued and the time for payment had passed; no other interpretation was possible. Further, part of the context of the defendant's letter in *Cytec* was a series of invoices which, taken together, stated the exact debt owing (at [30]). This provided a clear referent for the defendant's use of the phrases "overdues" and "overdue payment".

35 In my view, unlike the phrases used in *Cytec* (or in *Bradford & Bingley*), the phrases used by the defendant could bear multiple meanings. The first category of statements said nothing about whether the claim was good. In particular, although references to payment or payment plans might suggest an admission of liability, I did not think such references could be said to be unequivocal, especially when read in the light of the LOD, which did not contain a demand for payment of a fixed sum. Instead, those references showed only that the defendant was willing to pay *something*, which could simply reflect a desire to settle. In other words, there was ambiguity as to whether the defendant was suggesting payment to satisfy a claim or payment to settle a dispute. Similarly, the reference to a proportion of the shortfall

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could be a reference to what the defendant thought was fair or feasible, as opposed to what he was legally obliged to pay.

36 In this regard, I noted that the above interpretation was consistent with the plaintiff's own account of what was discussed at the 8 December 2015 meeting, which the Proposal purported to embody. The plaintiff stated that at this meeting, the defendant asked the plaintiff to "consider his repayment plan" and said that he was "sincere about his repayment plan" (at para 8 of the affidavit of Lim Chu Pei). Other than the use of the term "repayment" as opposed to "payment" – which I took to be a characterisation by Lim Chu Pei rather than the defendant himself, since the Proposal itself, as well as the Reply Email, used the latter term – there was no allegation that the defendant had recognised that the sums to be paid under the proposed payment plan were in respect of an admitted debt as opposed to a settlement. If the defendant had made such a clear admission, I would have expected the plaintiff to say so.

37 The second category of phrases was also equivocal. They did, no doubt, allude to the defendant having some obligations under the Deed, of which he wished to be discharged after payment of the proposed sum. That the defendant had obligations under the Deed could not be doubted given that he had signed it. However, an admission that he was bound by the Deed was not equivalent to an admission that the plaintiff's claim against him was good. The question was whether it could be said that he had thrown up the "white flag of surrender" with regard to the plaintiff's claim. Given that there would be no inconsistency in his admitting that he was bound by the Deed while contesting (for instance) the interpretation of its terms and whether they had been breached, I did not think the mere recognition of obligations under the Deed could constitute an admission of liability such as was present in *Cytec*. Otherwise, "without prejudice" privilege could never apply in a situation

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where the defendant to a contractual claim had recognised that he was bound by a contract. That would be a harsh conclusion and would prevent the "without prejudice" privilege from fulfilling its intended purpose.

38 In any event, even if the communications could be said to contain an admission of liability, they at least contained a dispute as to the quantum of the liability. The preamble of para 2 of the LOD stated that the liability was "joint and several", and para 2(b) of the LOD stated that the aggregate sum for the purchase of the IHCL Shares was S$11,999,808. In response, the Proposal did not contain an admission of the full liability of S$11,999,808. It gave a lower figure for the shortfall and stated that the defendant was willing to pay a certain percentage of that lower figure as his portion or share. At best, this could constitute an admission of part liability only, and also contained a dispute as to the quantum of the total liability. This was an entirely different situation from that in *Cytec*, where there had been no objection to the sum stated as constituting the debt. It was equally distinguishable from the three cases considered in *Sin Lian Heng* (at [44]), all of which concerned requests to extend the time for payment without any attempt to dispute the quantum of the debt owed. Finally, it was distinguishable from *Greenline-Onyx* on at least two grounds: first, the purported dispute on quantum in that case was only a dispute as to the correct exchange rate to be applied (see *Greenline-Onyx* at [15]) and thus not a dispute as to the substantive basis for the debt, and secondly – and more importantly – that case concerned the use of an admission of a debt for limitation purposes only, a situation to which different considerations applied (see *Greenline-Onyx* at [17] and [18]).

39 In light of the foregoing, I concluded that considered objectively, the Reply Email and the Proposal did not contain any admission of liability and, in any event, contained at least a dispute as to the quantum of the liability.

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Conclusion

40 All things considered, I found that the Reply Email and the Proposal were protected by "without prejudice" privilege. I therefore allowed the defendant's appeal against the decision in the striking out application, except that the first sentence of para 5 of the SOC, which referred only to the plaintiff's LOD, was allowed to stand pursuant to the parties' agreement (see [23] above). I also allowed the defendant's appeal against the decision in the application to expunge, with the following modifications: I ordered to be expunged those parts of the affidavits of Lim Chu Pei and Tan Yang Hwee which reproduced or referred to the Reply Email and the Proposal, but allowed those parts which reproduced or referred to the LOD to remain. After hearing the parties on costs, I ordered the plaintiff to pay the defendant costs of $3,000 (inclusive of disbursements) for the applications before the AR and $5,500 (inclusive of disbursements) for the appeals.

Hoo Sheau Peng
Judicial Commissioner

Tan Wei Ser Venetia (Colin Ng & Partners LLP) for the plaintiff;
Nandwani Manoj Prakash and Lester Lin (Gabriel Law Corporation)
for the defendant.

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