IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHCR 1

Suit No 1250 of 2014
Summons No 4966 of 2016

Between

(1) UNITED OVERSEAS BANK LIMITED

… *Plaintiff*

And

(1) LIPPO MARINA COLLECTION PTE LTD
(2) GOH BUCK LIM
(3) AURELLIA ADRIANUS HO (also known as FILLY HO)

… *Defendants*

GROUNDS OF DECISION

[Civil procedure] — [Discovery of documents]
[Legal profession] — [Professional privileges]

United Overseas Bank Ltd
v
Lippo Marina Collection Pte Ltd and others

[2017] SGHCR 1

High Court—Suit No 1250 of 2014 (Originating Summons No 4966 of 2016)
Bryan Fang AR
28 October; 1 December 2016

19 January 2017

Bryan Fang AR:

1 The plaintiff commenced suit against eight defendants for alleged acts of fraud and conspiracy but subsequently entered into settlement negotiations with only the second and third defendants (collectively, "the Defendants"). These negotiations led to a settlement agreement ("the Settlement Agreement") which has been disclosed in these proceedings. It records that the second defendant has affirmed an affidavit (made also on behalf of the third defendant) relating to the nature and extent of the first defendant's involvement in the alleged wrongdoing ("the Affidavit"). It also contemplates the use of the Affidavit at trial.

2 The present application is by the first defendant for specific discovery of the Affidavit as one of six categories of documents. Disclosure of the Affidavit is sought against the Defendants as well as against the plaintiff. The Defendants were unrepresented, filed no affidavits in the application, and

absent at the two hearings before me. There was, however, evidence of prior written correspondence from their now discharged solicitors wherein disclosure of the Affidavit was explicitly refused on the basis of litigation privilege. The plaintiff was represented and did not dispute that it possessed a copy of the Affidavit. However, as the said copy had been extended to it in confidence, it argued that it too was able to assert litigation privilege to resist disclosure.

3 Oral judgment has been delivered in respect of all six categories of documents. In these written grounds of decision, I elaborate only on my reasons for disallowing disclosure of the Affidavit on the grounds of litigation privilege as the submissions made here raised interesting questions. First, as both a preliminary and a procedural point, can litigation privilege attach to the Affidavit when the Defendants have not filed an affidavit to claim privilege as such? Even if litigation privilege attaches to the Affidavit, there is the more substantive issue of waiver: have the Defendants, by furnishing a copy of the Affidavit to an *opponent* in the litigation (*viz*, the plaintiff), automatically waived privilege against the entire world? Indeed, it became clear during the course of submissions that this issue could be further refined: is the act of disclosing privileged material to an opponent alone so legally significant such that it trumps *whatever else* the Defendants might have done to limit the scope of disclosure to only the plaintiff?

4 For completeness, I mention that I also heard submissions on whether the copy of the Affidavit in the hands of the plaintiff is covered by without prejudice privilege. However, it was unnecessary for me to come to a view on that issue given my finding on litigation privilege.

The facts

5 The background to this suit was recently set out in the High Court decision of *United Overseas Bank Ltd v Lippo Marina Collection Pte Ltd and others* [2016] 2 SLR 597 and I do not propose to repeat it in detail here. That decision arose out of the plaintiff's appeal against an assistant registrar's decision refusing its application for the determination of a question of law pursuant to O 14 r 12 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) and for certain parts of the joint Defence filed by the Defendants to be struck out.

The pleadings

6 The plaintiff is a commercial bank which granted housing loans to 38 purchasers in separate transactions between 2011 and 2013 for the purchase of units in the Marina Collection, a leasehold condominium development in Sentosa. It commenced this suit on 26 November 2014 after discovering that the first defendant, which was the developer of the property, had offered significant furniture rebates to the 38 purchasers that were not reflected in the loan application forms. The plaintiff pleads that this induced it to grant loans exceeding the maximum amounts permitted under the central bank regulations as well as the actual purchase price of the units. The plaintiff further alleges that the Defendants, who were real estate agents at the material time, were responsible for the misleading loan application forms. On the plaintiff's case, this was merely one fraudulent act in a web of conspiracy that also involved the fourth to eighth defendants. However, for reasons which will become apparent below, the plaintiff has since discontinued this suit against the fourth to eighth defendants.

7 The first defendant denies involvement in any conspiracy or that it committed any acts of fraud. It pleads that the financing of the units was a matter solely between the plaintiff and the purchasers and that it has no knowledge of the same. It further pleads that, if the plaintiff has suffered loss as a result of any act by the first defendant, this is caused by the plaintiff's own decision to grant the loans based on its independent checks and risk analyses or failure to perform the same to the standard required.

8 The Defendants were represented by Straits Law Practice LLC ("SLP") at the commencement of the suit. In their joint Defence, the Defendants likewise plead that there was no conspiracy between the defendants and that they did not commit any acts of fraud. Their case is that the plaintiff's vice-president of home loans was at all material times aware of the matters arising from the loan applications and that, by contrast, the Defendants performed the limited role of liaison between the purchasers and the plaintiff.

The Settlement Agreement

9 The parties exchanged their lists of documents in February 2016. On 13 June 2016, the plaintiff filed a supplementary list disclosing the Settlement Agreement dated 29 March 2016 between the plaintiff and the Defendants.

10 The Settlement Agreement records in its preamble that the Affidavit has been affirmed by the second defendant on the advice of his solicitors, that it is made on behalf of both him and the third defendant, and that it pertains to the nature and extent of the first defendant's involvement in the allegations of fraud and conspiracy. The Settlement Agreement also states that, as consideration for the second defendant filing the Affidavit and giving truthful

testimony thereto at trial, the plaintiff is "agreeable to regulating the future conduct of its claims" against all the defendants in the following manner:

> 1.1 Upon [the second defendant] affirming the Affidavit in the Suit:
>
> (a) [The plaintiff] shall discontinue all of its claims against the 4th to 8th Defendants in the Suit …;
>
> …
>
> 1.2 Upon [the second defendant] giving truthful testimony at the trial of the Suit of the nature and extent of [the first defendant's] involvement in the allegations of fraud and conspiracy made by [the plaintiff] against the [d]efendants in the Suit (as recorded in the Affidavit):
>
> (a) [The plaintiff] its heirs and assigns shall not take any action in law or in equity to enforce any judgment rendered in [the plaintiff's] favour in the Suit against [the second and third defendants] in respect of [the plaintiff's] claims against [the second and third defendants] in the Suit …;

11 In accordance with cl 1.1 of the Settlement Agreement, and upon the second defendant affirming the Affidavit, the plaintiff duly filed a notice of discontinuance against the fourth to eighth defendants on 15 April 2016.

The plaintiff's letter requests for the Affidavit

12 On 5 August 2016, the first defendant's solicitors, Premier Law LLC ("PLL"), wrote to the plaintiff's solicitors, Tan Kok Quan Partnership ("TKQP"), to request for the Affidavit. After an exchange of correspondence, TKQP replied on 19 August 2016 to state that the plaintiff would not be providing discovery as the plaintiff "does not have a copy of the [Affidavit] which can be extended to [the first defendant] because it is covered by litigation privilege and/or without prejudice privilege". A representative of the plaintiff has since filed an affidavit in this application to clarify that what the

plaintiff has is only a copy of the Affidavit which was received under cover of a without prejudice letter during the settlement negotiations.

13 On 23 August 2016, PLL proceeded to write to the Defendants' then solicitors, SLP, to make a similar request for the Affidavit. However, on 30 August 2016, SLP also declined discovery in the following terms ("the 30 August Letter"):

> Our clients are not obliged to provide discovery of the [Affidavit] at this stage of the proceedings. Further, the [Affidavit] is subject to litigation privilege.
>
> As this is our client's Affidavit-of-Evidence-in-Chief, we will disclose and exchange the same at the appropriate juncture.

14 These responses led the first defendant to take out this application on 12 October 2016.

The arguments

15 The matter first came up for hearing before me on 9 November 2016. By this time, the Defendants were unrepresented as SLP had obtained an order to discharge themselves on 28 October 2016. The Defendants did not file any affidavits in the application and, as it turned out, also did not attend in person at the first hearing. Nor did they attend at a second hearing on 1 December 2016 when I invited parties to make further oral submissions. I therefore heard no arguments from the Defendants.

16 The plaintiff was represented before me by Ms Cheryl Nah. She argued that notwithstanding the absence of any affidavits or arguments from the Defendants, it is clear from the 30 August Letter that the Defendants are relying on litigation privilege to resist disclosure of the Affidavit. Ms Nah also

said that litigation privilege clearly attaches to the Affidavit as it was prepared and signed in circumstances where litigation was ongoing. From there, she argued that since a copy of the Affidavit was extended to the plaintiff in confidence, the plaintiff is likewise able to assert litigation privilege over the said copy against the first defendant. In this regard, Ms Nah relied on *Robert Hitchins Limited v International Computers Limited*, unreported, December 10, 1996, CA ("*Robert Hitchins*") which she said was on all fours with the present case.

17 The first defendant was represented by Mr Teng Po Yew. He argued that litigation privilege cannot attach to the Affidavit as the Defendants have not filed any affidavit claiming litigation privilege as such. Mr Teng's main argument, in any event, was that even if the Defendants have properly claimed litigation privilege over the Affidavit, they have automatically waived it against the entire world by extending a copy to the plaintiff. In his submission, all confidentiality which the Defendants might have maintained in the Affidavit was lost the moment they shared a copy of it with the plaintiff whose interests in this suit were patently adverse to theirs. This, he pointed out, was the crucial difference between the present case and *Robert Hitchins* where privilege was upheld in circumstances where privileged documents were shared between parties with common interests. Mr Teng relied on two authorities which he said were closer to the point: *Faraday Capital Limited (for and on behalf of Faraday Syndicate 435) v SBG Roofing Limited (in liquidation), Governors of Norbridge Primary & Nursery School, Nottingham County Council* [2006] EWHC 2522 (Comm) ("*Faraday*") and *Australian Competition and Consumer Commission v Cadbury Schweppes Pty Ltd* [2009] 254 ALR 198 ("*Cadbury*").

18 As mentioned earlier, parties also addressed me on without prejudice privilege but I do not set out their submissions here as I was able to determine this application solely on the basis of litigation privilege.

Analysis

19 The issues which arise from the arguments outlined above are as follows:

(a) First, can litigation privilege attach to the Affidavit even though the Defendants have omitted to file any affidavits claiming the privilege as such?

(b) Second, even if litigation privilege can (and does in fact) attach to the Affidavit, have the Defendants nevertheless automatically waived it against the entire world by making disclosure to an opponent in the litigation?

20 As alluded to at the outset, and as we shall see later, the second of these issues became further refined in the course of submissions.

Can litigation privilege attach to the Affidavit despite the Defendants not claiming it as such on affidavit?

21 Turning to the first issue, I should begin by making clear that there is no ambiguity surrounding what the Defendants' position is in respect of the Affidavit despite their failure to file any affidavits in this application and their absence from these proceedings: it is clear that they rely on litigation privilege to resist disclosure. This is explicitly stated in the 30 August Letter from SLP and, more importantly, acknowledged by the first defendant's representative in the affidavit filed in support of this application.

22 The question raised by Mr Teng's submission, however, is a more technical one of whether or not the Defendants have claimed litigation privilege *in the proper way*. According to Mr Teng, a sworn statement by the Defendants that they are claiming litigation privilege is necessary for this purpose.

23 With respect, I do not think that the Defendants' failure to file any affidavits in this application is fatal to their claim of litigation privilege. An assertion of privilege on affidavit is one way – and often the most straightforward way – of claiming privilege, but it is by no means the *only* way by which the court may be satisfied that privilege attaches to a particular document. In the absence of an assertion of privilege on affidavit, I see no reason in principle why the court cannot, if invited to do so, come to a view on all the evidence before it that a particular document was created in circumstances that attracts litigation privilege. In my view, this would be consistent with the recent decision of *ARX v Comptroller of Income Tax* [2016] 5 SLR 590 ("*ARX*") where the Court of Appeal had articulated the following principles:

> (a) The legal onus lies on the party asserting privilege to demonstrate that the preconditions for privilege to subsist are present (see *ARX* at [50]);
>
> (b) To discharge that onus, the party asserting privilege has at least to make out a *prima facie* case of privilege. This bar is not high (see *ARX* at [50]);
>
> (c) This burden is discharged, at least in the first instance, by the swearing of an affidavit in which privilege is asserted because the

assertion of privilege implies also the assertion that the requirements for privilege to subsist have been satisfied (see *ARX* at [44]);

(d) But if the court is not satisfied with the assertion on affidavit of privilege, *it is always open to the court to look behind the affidavit to the documents themselves* to ascertain if privilege has been rightly asserted and *the court will reach a decision after examining the evidence* (see *ARX* at [46]).

24 The last-mentioned principle in *ARX* is particularly important for present purposes. In my view, if the court can exercise discretion to look behind an assertion of privilege on affidavit to satisfy itself on the evidence that privilege attaches, then there is no reason why the *absence* of an affidavit should bar the court from doing precisely that where it is clear that privilege is being relied on by a party. That would be an incongruous outcome, yet it is also the effect of Mr Teng's submission that, without an assertion of privilege on affidavit, privilege cannot attach.

25 Based on the analysis above, it becomes important, then, to examine the evidence and see if it supports a finding that the Affidavit is covered by litigation privilege. In this regard, there are two requirements for litigation privilege to subsist: (a) there must have been a reasonable prospect of litigation at the time legal advice was sought in respect of the document in question and (b) the document in question must have been created for the dominant purpose of litigation (see *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and other appeals* [2007] 2 SLR(R) 367 at [70]–[77]).

26 In the present case, the first of these requirements is not in doubt. The procedural history leading up to this application makes clear that the Affidavit was affirmed by the second defendant on the legal advice of his solicitors in the context of *ongoing* litigation. Therefore no question arises over how strongly litigation was in prospect. As for the second requirement, it seems to me that there is also little doubt that the Affidavit was created for the dominant purpose of litigation. To begin with, Mr Teng did not advance in his submissions a contrary purpose. More importantly, there was positive evidence that the Affidavit was intended to be used at trial. The 30 August Letter from SLP describes the Affidavit as the second defendant's Affidavit of Evidence-in-Chief ("AEIC") and, consistent with this, cl 1.2 of the Settlement Agreement contemplates the second defendant giving truthful testimony of the first defendant's alleged wrongdoing "as recorded in the Affidavit".

27 For these reasons, I find that litigation privilege attaches to the Affidavit.

Have the Defendants automatically waived privilege against the entire world by disclosing the Affidavit to an opponent?

28 The more strongly contested issue in this application was whether or not litigation privilege has been waived by the Defendants' sole conduct of furnishing a copy of the Affidavit to the plaintiff.

29 The Defendants were not present to submit on this issue. However, it was clearly in the plaintiff's interest as a party to the Settlement Agreement to uphold privilege in the Affidavit. In this regard, Ms Nah emphasised the conduct of the Defendants in keeping the Affidavit confidential between themselves and the plaintiff. She pointed out that the Defendants had extended

a copy of the Affidavit to only the plaintiff, and that this was done under cover of a without prejudice letter during private settlement negotiations. Furthermore, she highlighted that the Defendants have also refused to disclose the Affidavit to-date. Ms Nah therefore submitted that it was clear in the circumstances that the Defendants have not waived privilege *vis-à-vis* the first defendant at any time.

Robert Hitchins

30 As mentioned, Ms Nah relied on the English Court of Appeal's decision in *Robert Hitchins*. In *Robert Hitchins*, the claimant sued the defendant for breaching a contract for the supply of an integrated computer system. The defendant, in turn, commenced third party proceedings against its main sub-contractor, CSB, who was engaged to supply software. As most of the claimant's allegations in the main action were in fact concerned with software, the defendant had effectively sought to pass on all the claimant's monetary claims to CSB in the third party action. Moments before the exchange of witness statements due, the third party action settled and notices of discontinuance were filed by the defendant and CSB. Therefore, only the claimant and the defendant proceeded to exchange witness statements. However, separately, upon settlement, CSB furnished the defendant with draft witness statements for each of its nine proposed witnesses who would have testified in the third party action had it continued on to trial. The defendant then sought to call these nine witnesses to testify in its defence in the main action.

31 The claimant applied for discovery of the nine draft witness statements. This was refused at first instance and on appeal. Peter Gibson LJ dismissed the appeal on grounds that the witness statements, in draft form,

were not necessary for disposing fairly of the matter or for saving costs. However, it is the judgments of the two other appellate judges that Ms Nah relies on to argue that there is no waiver *vis-à-vis* the first defendant in the present case because the Defendants have clearly limited disclosure of the Affidavit to only the plaintiff. The following passage in Simon Brown LJ's judgment is apposite:

> … [W]hat is the status of an undoubtedly privileged document once it is confided by the party who brought it into existence to another party in the same proceedings? That question … I would seek to answer by reference to first principles. The policy objective underlying this particular head of legal professional privilege – privilege, that is, attaching to documents brought into existence predominantly for the purpose of litigation – must surely be to enable parties or prospective parties to prepare properly for litigation in the confidence that others thereafter will not be entitled to examine and perhaps profit from their preparatory documentation. *That these draft statements were privileged in the hands of the third party is not in doubt. Nor can one doubt that the third party remain intent upon keeping them from the plaintiffs: they have consistently refused to assist or co-operate with the plaintiffs both after, as well as before, the settlement of the third party proceedings. They have not, in short, waived their privilege vis-a-vis the plaintiffs at any stage. Why should they not, in these circumstances, be free to communicate these statements to the defendants, whether originals or copies surely ought not to make the slightest difference, without surrendering their privileged character?* … [emphasis added]

32 Hobhouse LJ (as he then was) reasoned in much the same terms as follows:

> There is no dispute that the relevant documents were the subject of legal professional privilege in the hands of the third party. *There is no suggestion that the third party has chosen to waive its privilege in those documents as against the plaintiffs.* They have chosen to share them with the defendants and therefore as between those two parties no question of privilege can arise. But there is no basis for a suggestion [that] the third party elected to waive its privilege as against the plaintiffs. *As has been pointed out by Lord Justice Simon*

> *Brown, if they had wished to do that it would have been easy for them simply to send copies of the relevant documents to the plaintiff's solicitor. They have not done that.* [emphasis added]

33 At first glance, the statements made by Simon Brown and Hobhouse LJJ appear to support the general proposition that a privileged document may be shared between some parties to the same litigation without privilege being waived as against the other parties, so long as the sharing was kept confidential. However, the question raised by Mr Teng's submission is whether this proposition holds where the parties to the sharing stand *adverse* to one another in the litigation.

34 I accept that there is this factual distinction between *Robert Hitchins* and the present case and, accordingly, would not go so far as Ms Nah to say that the former was on all fours with latter. The difference between the two factual matrices is that, in *Robert Hitchins*, the defendant and CSB shared, in the words of Simon Brown LJ, a "community of interest" in defeating the claimant's allegations whereas, in the present case, the plaintiff and the Defendants have ostensibly opposing interests as they are adverse parties in the litigation. In this regard, I note that at least two leading academic commentaries in this area have rationalised *Robert Hitchins* as a case involving the sharing of privileged material between *co-defendants* (see Bankim Thanki QC, *The Law of Privilege* (Oxford University Press, 2nd Ed, 2011) ("*Thanki*") at para 3.93; see also Colin Passmore, *Privilege* (Sweet & Maxwell, 3rd Ed, 2013) at para 3-291). However, it is clear that the plaintiff and the Defendants do not stand in a similar co-ordinate position relative to one another in these proceedings. Nevertheless, it remains to be seen whether this *factual* difference of them being opponents translates into a different *legal* result insofar as the consequences of disclosure are concerned (*viz*, whether it

results in an automatic waiver against the entire world as submitted by Mr Teng).

35 For completeness, I should mention that Mr Teng went further in his submission to say that *Robert Hitchins* was in fact a case of *common interest privilege* (as distinct from litigation privilege) and therefore completely off the mark both in terms of the facts and the applicable law. However, I do not agree with that analysis because nowhere in the judgments delivered in *Robert Hitchins* was the concept of common interest privilege alluded to, and nor was it apparent that the case was argued on that basis. Indeed, in the extract reproduced above from Simon Brown LJ's judgment, it is clear that the learned judge regarded the case as one of litigation privilege since he specifically referred to the underlying policy objective of that particular head of legal professional privilege. I also note that the leading commentaries generally do not treat *Robert Hitchins* as a case of common interest privilege (see *Thanki* at para 6.16, footnote 53; see also *Passmore* at paras 3-291–3-296), although one does suggest that it can be (but not that it *was*) rationalised on that basis (see *Phipson on Evidence* (Hodge M Malek QC gen ed) (Sweet & Maxwell, 18th Ed, 2013) ("*Phipson*") at para 24-08).

36 To sum up my views on *Robert Hitchins*, I agree with Mr Teng to the extent that that authority does not entirely cover a situation such as the present where the sharing of privileged material is between parties with opposing interests. However, this does not necessarily mean that he is correct in arguing that the legal consequence of such an act is to destroy all confidentiality in the privileged material such that privilege is waived against the entire world. I shall now consider the two authorities he cited in support of this argument.

Faraday and *Cadbury*

37 The first authority which Mr Teng relied on was the English High Court decision of *Faraday*. In that case, a school obtained judgment against a roofing company whose negligence led to a fire at the school's premises. Separate proceedings were thereafter commenced by the insurer against the school and the insured roofing company. The school sought discovery of certain statements which the insurer's loss adjuster had obtained from two employees of the insured in the course of investigating the cause of the fire. The insurer claimed privilege.

38 Cooke J allowed discovery of the statements. Importantly, he observed that the statements were taken from the insured's employees in circumstances where litigation was envisaged between the insurer and the insured, and not by the school against the insured in which case both the insurer and the insured would have a common interest. In other words, what was envisaged at the time the statements were taken was the likelihood of an "adversarial situation" between the insured and the insurer (see [8]). Cooke J then went on to review a line of conflicting authorities before concluding that the applicable legal principle was simply that "No communication made by or on behalf of the opposite party can be confidential" (see [18]). Accordingly, he held that confidentiality could not be asserted by the insurer over the statements.

39 The second authority which Mr Teng relied on was the Federal Court of Australia's decision in *Cadbury*. In *Cadbury*, there were two sets of proceedings. In the first set of proceedings, the defendant company, Visy, filed and served 111 finalised witness proofs on the claimant regulator, the Australian Competition and Consumer Commission ("ACCC"), pursuant to an order of court. Subsequently, the ACCC applied as intervener in the second set

of proceedings commenced by Cadbury to prevent Visy (who was a party in those proceedings) from disclosing these witness proofs on the grounds of litigation privilege. This was rejected by the first instance judge. The ACCC appealed but this too was dismissed by the Federal Court of Australia which observed as follows at [37]:

> In our view, whatever is the extent of confidentiality arising from litigation privilege, one element of confidentiality is essential, namely non-disclosure to one's opponent. To say (as does the ACCC) that the finalised proofs of evidence were created and served for the existing litigation can be accepted. However, in our view it is impossible for litigation privilege to attach to the finalised proofs of evidence, when the finalised proofs of evidence were created for the purpose of serving them on the ACCC's opponent and when they were in fact served on that opponent.

40 In my view, one must be careful not to read the statements in *Faraday* and in *Cadbury* out of context. It is important to observe that both cases essentially concerned the disclosure of documents in what may conveniently be described as a *two-party* paradigm. By this, I mean that the documents which were the subject of a privilege claim by one party were made available to another party in circumstances where litigation was either contemplated or ongoing *exclusively* between the two of them: in *Faraday*, the two employees' statements were taken when the only relevant litigation being contemplated was between the insured and the insurer; in *Cadbury*, the 111 finalised witness proofs were served by the ACCC on the only other party to the first set of proceedings, namely, Visy.

41 In such a two-party paradigm, there are no *other* parties to the contemplated or ongoing litigation that the disclosing party might seek to ringfence the documents from. Accordingly, the courts in *Faraday* and *Cadbury* did not have to consider and weigh one party's conduct of disclosing

privileged material to an opponent *coupled with* his simultaneous conduct of limiting that disclosure to only one, and not all, of the parties to the litigation. Such a situation can only arise in the kind of *multi-party* litigation that *Robert Hitchins* and the present case are examples of. And as can be seen from the court's reasoning in *Robert Hitchins*, such efforts to maintain confidentiality against other parties to the same litigation (apart from the recipient) can be potentially significant in determining the *extent* of waiver.

42 Therefore, I do not agree with Mr Teng that *Faraday* and *Cadbury* stand for such a far-reaching proposition that so long as privileged material is disclosed to an opponent in the litigation, it is rendered disclosable to all the world. That may well have been the result in *Faraday* and *Cadbury*, but the courts there were clearly faced with a different situation.

The issue crystallised

43 Based on the analysis thus far, neither side has put forward authorities which provide a complete answer to the present case. *Robert Hitchins* involved multi-party litigation but not the sharing of privileged material between opposing parties. As for *Faraday* and *Cadbury*, these were situations in which privileged material did pass between opposing parties but within a less complicated two-party paradigm.

44 Nevertheless, these authorities and counsel's submissions were ultimately helpful in crystallising what, in my respectful view, is the real issue in the present application. The issue is this: in the context of a *multi-party litigation*, does the disclosure of privileged material to an *opponent* result, without more, in a waiver of privilege for all intents and purposes,

notwithstanding that the disclosing party may have sought to keep the privileged material confidential as against the other parties to the litigation?

45 When the issue was put to Mr Teng in this way in further oral submissions, he answered in the affirmative: the act of disclosing privileged material to an opponent rendered irrelevant whatever else the Defendants here may have done to limit the scope of disclosure to only the plaintiff. Mr Teng was content to fall back on *Faraday* and *Cadbury* but, as I have sought to explain, those cases were decided in a different context.

46 Ultimately, having considered the issue from the perspectives of principle, policy and precedent, I find that Mr Teng's position is not well supported on any of these bases and reject it.

The issue considered as a matter of principle, policy and precedent

47 First, as a matter of *principle*, it is useful to consider as a starting point that legal professional privilege (of which litigation privilege is a subset) exists to protect the client from the compulsory disclosure of confidential communications he has exchanged with his solicitors; hence it is "only the client who can give up that entitlement" (see *ARX* at [66]; see also *HT SRL v Wee Shuo Woon* [2016] 2 SLR 442 at [19]). Therefore, when determining whether such privilege has been waived, it is necessarily the conduct of the client, as the holder of the privilege, that comes to the fore. The client may choose to waive privilege expressly, but the Defendants have not done that here. Alternatively, and more relevantly, waiver may be implied from the client's conduct. In this regard, the Court of Appeal has noted in *ARX* at [66] that to constitute waiver of privilege, the client's conduct must have been

"inconsistent with the maintenance of the confidentiality that the privilege is intended to protect".

48 In my view, there is no reason in principle why the court cannot imply from the client's conduct that while it is inconsistent with maintaining confidentiality *vis-à-vis* the recipient of the privileged material, it is at the same time consistent with preserving confidentiality as against all other parties to the same litigation. As Hobhouse J (as he then was) observed in *Prudential Assurance Co Ltd v Fountain Page Ltd and another* [1991] 1 WLR 756 at 770, there is "no conceptual difficulty about the reservation of rights of confidentiality or privilege notwithstanding that a document or piece of information has been communicated to another". Indeed, the law specifically recognises instances of "selective waiver" which, in essence, is "disclosure to a limited group of people that does not necessarily destroy the privilege in relation to the rest of the world" (see Jonathan Auburn, *Legal Professional Privilege: Law and Theory* (Hart Publishing, 2000) ("*Auburn*") at p 203; see also *Phipson* at para 26-30). This may be illustrated in simple terms by the following passage which was cited with approval in *Gotha City v Sotheby's and another* [1998] 1 WLR 114 at 119, an English Court of Appeal decision that Ms Nah relied on:

> If A shows a privileged document to his six best friends, he will not be able to assert privilege if one of those friends sues him because the document is not confidential as between him and the friend. But the fact six other people have seen it does not prevent him claiming privilege as against the rest of the world.

49 Insofar as the present case is concerned, Mr Teng advocates that disclosure to an *opponent* makes all the difference. He says that, in such an instance, waiver can only ever be absolute and never selective. However, I

find that this overstates matters. In my view, there is nothing which sets an adversarial litigant apart from an ordinary third party who, if not for the disclosure, would not be entitled or privy to the confidential communication between the client and his solicitor; relative to the confidential communication, the adversary stands, as with any third party, as an outsider. Seen in this way, there is no reason why the Defendants in the present case cannot be found to have selectively waived privilege only in respect of the plaintiff, so long as their conduct is consistent with maintaining privilege as against others. Indeed, I should also stress here that no convincing reason was put forward as to why the court should isolate only one part of the Defendants' conduct instead of examining it in its entirety as part of all the circumstances of the case (see, in this regard, *ARX* at [69]). In my view, it is not satisfactory – and indeed without principled basis – to attribute *determinative* weight to the Defendants' sole conduct alone of disclosing the Affidavit to an opponent, such that their other conduct in limiting the scope of disclosure is rendered meaningless.

50 Second, considering this from the perspective of *policy*, I think it worthwhile to reproduce the following statement from Simon Brown LJ's judgment in *Robert Hitchins* which I had earlier quoted at [31]:

> … The *policy objective* underlying this particular head of legal professional privilege – privilege, that is, attaching to documents brought into existence predominantly for the purpose of litigation – must surely be *to enable parties or prospective parties to prepare properly for litigation in the confidence that others thereafter will not be entitled to examine and perhaps profit from their preparatory documentation*. … [emphasis added]

51 Ordinarily, parties prepare for litigation by communicating with their solicitors or by obtaining documents from third parties such as experts. It is

uncontroversial that such communication and documents, exchanged and created for the dominant purpose of litigation, are protected by litigation privilege. Not uncommonly, a party's preparations for litigation may also cause him to enter into confidential discussions with a co-party in the suit, such as a co-defendant, so that they can put up a common position. Such discussions are also protected by litigation privilege. Indeed, the law encourages the sharing of privileged material between co-parties as a matter of policy as this can lead to costs savings (see *Passmore* at para 3-295 and at para 7-038, footnote 76, citing *Robert Hitchins*).

52 In my view, if the policy of litigation privilege is simply to allow parties to prepare properly for litigation, then the position should be no different where he enters into confidential communications to prepare for litigation with his *opponent*. Litigation, particularly multi-party litigation, can in a sense be kaleidoscopic in nature – it can arise out of a myriad of circumstances and involve an array of different interests which may sometimes even shift as the proceedings go on. It will therefore not always be correct to assume that parties who stand adverse to one another in the suit will necessarily take up adverse positions in the proceedings. A claimant may legitimately wish to form a strategic alliance with only some defendants for their mutual benefit and, to that end, share privileged materials to develop and fine-tune their cases during the interlocutory stages in preparation for the trial. If they keep their preparatory communications confidential against other parties, then having regard to the policy underlying litigation privilege, I do not see why these communications should not receive the same protection against compulsory disclosure. This view is echoed below at [60].

53 Finally, I am fortified in my views by reference to *precedent*. In this regard, it suffices for me to discuss just two authorities which upheld litigation privilege in respect of communications between parties with *adverse interests* in the context of multi-party litigation. I should state at the outset that the first of these cases did not involve the sharing of material between adversaries *per se* (though their interests were opposed), whereas the second case did. Nevertheless, I consider both cases significant as they each demonstrate that the courts in such situations tend to place greater emphasis on the confidential nature of the communications that pass between the parties rather than on the adversarial positions in which they stand.

54 The first case is the English High Court decision of *Stax Claimants v Bank of Nova Scotia Channel Islands Ltd and others* [2007] All ER (D) 215 ("*Stax Claimants*"). In that case, a large number of claimants brought separate claims against the defendants, BNS, for breaches of duties which led to the transfer of the claimants' pension benefits to an offshore scheme called the Stax Scheme. The claimants said that they would not have entered into the Stax Scheme and thereby incurred loss if not for BNS's breaches of duties. BNS denied liability, asserting among other things that the claimants had relied on their own independent financial advisors ("IFAs") in deciding to enter into the Stax Scheme. In case it was wrong, BNS sought contribution from the IFAs (known in the UK as a Part 20 claim).

55 The question in *Stax Claimants* was whether or not certain documents exchanged between the claimants and the IFAs were protected by privilege. As alluded to earlier, none of the claimants had brought direct claims against the IFAs and thus they were not adversaries *per se*. However, as observed in *Passmore* at para 3-297, the interests of the claimants and the IFAs "might be

perceived as in complete conflict: since it was in the interest of the claimants to succeed against BNS but in the interests of the IFAs that the claimants fail".

56 Warren J noted first, as a matter of general principle, that litigation privilege attaches to documents which come into existence for the sole or dominant purpose of either giving or getting legal advice with regard to the litigation or for collecting evidence for use in litigation (see [11]). He then went on to reason that this principle applied equally to communications between a claimant and a Part 20 defendant whose interests, as observed in *Passmore*, may be in complete conflict. As Warren J said at [12]:

> … *If a document comes into existence for a purpose which would otherwise permit a claimant to assert privilege as against a defendant, I do not see why it should not be possible for the claimant to assert that privilege as against that defendant simply because the document is a communication with or otherwise involves a third party who is a Part 20 defendant.* Whether the Part 20 defendant is himself entitled to assert privilege might be a different question. In the present case, however, disclosure is sought only against the claimants and not against the IFAs although my reasoning in relation to the disclosure application against the claimants would apply equally to a disclosure application against the IFAs. [emphasis added]

57 On the facts, Warren J could not be certain if the documents in question were protected by litigation privilege without looking at them. Nevertheless, based on counsel's skeletal description of the purpose of these documents, he held that insofar as they were intended to deal with the formulation of a "battle plan", express views on the strengths and weaknesses of the claims and defences, or discuss tactics, it was "highly likely" that these documents were privileged (see [33] and [36]). Indeed, it is apparent from the following passage at [33] of *Stax Claimants* that the court there did not see anything objectionable in principle or in policy with litigation privilege being

claimed over communications between parties with ostensibly adverse interests who seek to come together in the litigation against a "common enemy":

> … The discussions under these heads can only have taken place to enable the claimants' advisers to conduct the litigation most effectively for the benefit of their clients and to advise them how best to achieve that end. These discussions can only have been held for the dominant, if not the sole, purpose of giving or getting advice for the claimants. This is so even if the Documents contain statements adverse to the claimants' cases. A full and frank exchange of views between the advisers to the claimants and the IFAs would have been important to enable all of them to recognise the strengths and weaknesses of their own cases and so to fight what [counsel for the claimants] has described as the common enemy, BNS. The discussion of these issues, to repeat, was surely to enable the claimants' advisers to give them fully informed advice; any document which came into being as a record of those discussions is privileged; and any further discussion, with a view to putting themselves is the best position to advise, is likewise privileged.

58 The second authority which I find particularly instructive is the Canadian decision of *Canada Safeway Ltd v Toromont Industries Ltd (c.o.b. Cimco Refrigeration)* (2004) 362 AR 296 ("*Canada Safeway*") (discussed in Robert W Hubbard, Susan Magotiaux and Suzanne M Duncan, *The Law of Privilege in Canada* (Canada Law Book, Looseleaf Ed, November 2008 release) at para 12.250.20). As will become apparent, the facts and the arguments raised there were very similar to the present case.

59 The question in *Canada Safeway* was whether the claimant, Safeway, had waived litigation privilege in respect of an expert's report obtained for the purposes of the litigation by providing it to one of the defendants, Toromont, in connection with settlement discussions between Safeway and Toromont. This question arose on an application by Pace, who was another defendant in

the litigation, for discovery of the expert's report. Not unlike the submissions advanced by Mr Teng in this application, Pace also sought to emphasise the fact that Safeway and Toromont were direct adversaries in the litigation (see [10]):

> … [Pace] submits that when Safeway and Toromont, *parties opposite in interest*, agreed for purposes of promoting settlement discussions, to exchange otherwise privileged expert reports, they *waived the privilege* and that the general policy requiring disclosure of relevant information must now be applied. [emphasis added]

60 Burrows J, sitting in the Alberta Court of Queen's Bench, rejected this submission. In the same vein as Simon Brown LJ's observation in *Robert Hitchins* reproduced at [50] above, Burrows J noted that the rationale of litigation privilege is to ensure to each litigant a "zone of privacy" in which to prepare his case and that this is given "priority" over the ordinary rules of discovery which require the disclosure of relevant material. Although the privilege may be waived, Burrows J did not regard this as having been done merely on account of Safeway's disclosure to an adverse party (*ie*, Toromont). Burrows J recognised that parties should have the freedom of choosing who they wished to enter into negotiations with in preparing their cases, *including an adversary*. And if the negotiations between them were clearly kept confidential, as was the case between Safeway and Toromont, privilege would not be treated as being waived beyond the circle of negotiating parties. The following passages of *Canada Safeway* bear out this reasoning (see [15] and [19]–[21]):

> In my view the determination of whether or not the acknowledged privilege has been waived should start from the rationale for the privilege. As noted, *litigation privilege exists to ensure to parties who submit their dispute to resolution through the adversarial process a* ***zone of privacy*** *in the preparation of their case. The privilege gives priority to a litigant's interest in a*

> *zone of privacy over the general policy of disclosure of relevant information.* When it is suggested that the privilege has been waived, the question becomes whether the event said to be a waiver has made the rationale for the privilege inapplicable, or whether the event otherwise justifies a reversal of the priority.
>
> …
>
> *In my view the exchange of the expert reports between Safeway and Toromont* ***in furtherance of settlement discussions and with express limitations as to the use to which the reports can be put****, does not indicate that either party no longer sought to maintain the reports they had obtained within their respective zones of privacy. …*
>
> Two statements made by McMahon J. in *Western Canadian Place Ltd.* are directly on point, correct and have lead me to the conclusions stated in the previous paragraph.
>
> ***As to the effect of a litigant communicating privileged information to one of many adversaries he said:*** (para. 33)
>
> > ***Complex litigation requires that counsel retain the ability to show his or her hand to some but not all - to compromise or to settle; and to define and reduce issues.*** Parties must now be free of the old strict rules of waiver. The reasoning in *Ed Millar Sales* is to be preferred over those cases, such as *Lehman v. Insurance Corp. of Ireland* which held strictly that waiver to one was waiver to all.
>
> The reference to *Ed Millar Sales* is to the Alberta Court of Appeal decision in *Ed Millar Sales* and *Rentals Ltd. v. Caterpillar Tractor Company* (1988), 61 Alta. L. R. (2d) 319 where Laycraft, C.J.A. said: (page 327)
>
> > … to hand a privileged document ***to one party*** to the litigation for the purpose of settlement or any other purpose, does not, in my opinion show any intention that the privilege is thereby to terminate as ***to other parties*** or in related litigation.
>
> [emphasis added in italics and bold italics]

61 In the final analysis, I think that it accords with principle, policy and precedent to conclude that privilege is not automatically waived in respect of the entire world by one party's disclosure of privileged material to an

opponent in a multi-party litigation. If there is clear evidence that the disclosure is made in confidence, there is no reason why the court should not have proper regard to that to arrive at a finding that the privilege is not waived beyond the recipient.

Application to the facts

62 With the law being clear, the analysis of the facts becomes straightforward: rather than discounting the Defendants' conduct of keeping the Affidavit confidential between themselves and the plaintiff, that is central to the present inquiry. In this regard, I agree with Ms Nah's submission (see [2929] above) that no part of the Defendants' conduct can be interpreted as being inconsistent with maintaining confidentiality in the Affidavit against the first defendant. The Defendants were in settlement negotiations with only the plaintiff and it was in that context that they extended a copy of the Affidavit under cover of a without prejudice letter. The negotiations then culminated in the Settlement Agreement. Notably, cl 2.2 of the Settlement Agreement provides that, save in limited specified circumstances (*eg*, where both the plaintiff and the Defendants approve of disclosure in writing), the plaintiff and the Defendants "shall keep confidential and shall not disclose to any person whatsoever any information relating to or arising out of" the Settlement Agreement. I think that the Affidavit is caught by this clause on any reasonable interpretation. I also pause here to note that the facts highlighted so far are similar to those considered significant in *Canada Safeway*, *viz*, that the expert's report there had been shared as part of settlement negotiations and with express limitations on its use. Finally, I note that the Defendants have also expressly refused to disclose the Affidavit to the first defendant in the lead up to this application. Similar conduct was also regarded as significant in

Robert Hitchins. Having considered all the circumstances, I find that the Defendants' conduct throughout has been consistent with maintaining confidentiality in the Affidavit against the first defendant. To borrow from Burrows J, the first defendant is clearly not within the Defendants' "zone of privacy".

63 I mention for completeness that Mr Teng also submitted on the facts that the plaintiff would be placed at an "unfair advantage" over the first defendant if disclosure of the Affidavit is not ordered. There are, however, several difficulties with this.

64 First, any unfairness is, with respect, illusory. As perceptively observed in *Auburn* at pp 203–204:

> … [S]elective disclosure does not raise issues of fairness at all. If party A cannot gain access to materials no unfairness is caused by the fact that those material have been disclosed to third party B, where party A never had any right to those materials anyway. The act of selective disclosure does not of itself cause a party any greater detriment than that otherwise resulting from their initial inability to gain access to the evidence. Put simply, selective disclosure does not put a party in any worse position. …

65 Second, even if there is *some* unfairness in the sense that non-disclosure perpetuates a knowledge deficit on the part of the first defendant relative to the plaintiff, that is not the *kind* of unfairness that finds resonance in the law of waiver. The Court of Appeal made this point plain in *ARX*, acknowledging that while there is "always some unfairness in allowing information to be withheld on the ground of privilege", the balance between disclosure and privilege "has long been struck in favour of the preservation of privilege" (see [64]). Only unfairness of "a very particular sort" matters in the law of waiver, and this is the unfairness that arises from "the inconsistency of

the posited act with the subsequent maintenance of privilege that impels a remedy" (see [67]). As explained earlier, however, I have found no inconsistency in this sense.

66 Third, I cannot, in any event, see what unfairness there is on the facts. The time will come when the parties' AEICs have to be exchanged. When that arrives, the first defendant will have sight of the Affidavit. In fact, it seems to me that, if disclosure of the Affidavit is ordered at this point in the proceedings, then unfairness may possibly be said to be worked on *the Defendants* because the court would effectively be accelerating the process of serving AEICs, *but only for them*.

Conclusion

67 For these reasons, I find that the litigation privilege which attaches to the Affidavit has not been waived by the Defendants *vis-à-vis* the first defendant. The present application therefore fails insofar as it seeks discovery of the Affidavit against the Defendants.

68 Insofar as the plaintiff is concerned, I am also satisfied that the copy in its hands is privileged. This must be so, otherwise the privilege is rendered hollow. However, if there should be any doubt about this, the following passage relied on by Ms Nah, citing the case of *Robert Hitchins*, is instructive (see Paul Matthews and Hodge M Malek QC, *Disclosure* (Sweet & Maxwell, 4th Ed, 2012) at para 11.34):

> … A copy made of a document already privileged in the hands of one party (e.g. a draft witness statement) for handing over to another party with no intention of waiving privilege as against other parties is *privileged in that second party's hands* and *that second party may himself assert the privilege.* [emphasis added]

69 In the premises, I disallow specific discovery of the Affidavit.

Bryan Fang
Assistant Registrar

Cheryl Nah, Lau Qiuyu and Sherlene Goh (Tan Kok Quan Partnership) for the plaintiff;
Teng Po Yew (Premier Law LLC) for the first defendant.
