IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 140

Suit No 1250 of 2014
(Registrar's Appeal No 33 of 2017)

Between

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)
(4) Goh Han Rong Clarke
(5) Goh Yu Wei Ewis
(6) Jennifer Janeth
(7) Erfan Syah Putra
(8) Theodora Budi Halimundjaja

… *Defendants*

JUDGMENT

[Civil procedure] — [Discovery of documents]
[Civil procedure] — [Privilege] — [Litigation privilege]
[Civil procedure] — [Privilege] — [Without prejudice privilege]

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This judgment is subject to final editorial corrections approved by the court and/or redaction pursuant to the publisher's duty in compliance with the law, for publication in LawNet and/or the Singapore Law Reports.

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

[2017] SGHC 140

High Court — Suit No 1250 of 2014 (Registrar's Appeal No 33 of 2017)
Aedit Abdullah JC
14 March 2017

15 June 2017

Aedit Abdullah JC:

Introduction

1 Pursuant to settlement negotiations between the plaintiff on the one part and the second and third defendants on the other, a settlement agreement was entered into between these parties ("the Settlement Agreement"). This Settlement Agreement made reference to an affidavit affirmed by the second defendant, on behalf of himself and the third defendant, relating to the nature and extent of the first defendant's involvement in the alleged wrongdoing which lies at the heart of the plaintiff's suit ("the Affidavit"). The first defendant sought specific discovery of the Affidavit from the plaintiff and/or the second and third defendants. Disclosure was resisted on grounds of (a) litigation privilege, and/or (b) without prejudice privilege.

2 Several legal issues arose as to the subsistence and waiver of the two distinct types of privilege in the context of a multi-party litigation. In the court below, the learned Assistant Registrar Bryan Fang ("the AR") disallowed discovery of the Affidavit on the ground of litigation privilege. The first defendant appealed. Having heard the parties, I find that litigation privilege in the Affidavit subsists and was not waived. The appeal is therefore dismissed.

Background

3 This matter is related to an earlier decision of this court in *United Overseas Bank Ltd v Lippo Marina Collection Pte Ltd and others* [2016] 2 SLR 597. That decision concerned the application of O 14 r 12 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC") on summary determinations of issues of law. The background to this suit was set out there; only the relevant portions are reproduced here.

The parties

4 The plaintiff is a commercial bank licensed by the Monetary Authority of Singapore ("MAS") to offer, *inter alia,* housing loans.

5 The first defendant is the developer of a 99-year leasehold condominium development known as the Marina Collection.

6 The second and third defendants were real estate agents at the material time. In these proceedings, they were initially represented by counsel, but their solicitors obtained an order to discharge themselves on 28 October 2016, immediately prior to the hearing of this discovery application before the court below on 9 November 2016. In the circumstances, the second and third defendants did not take an active role in this discovery application or on appeal

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– they filed no affidavits, made no arguments, and did not appear in any of the hearings.

7 Each of the fourth to eighth defendants is a relative of either the second or third defendant. For reasons to be explained below, the plaintiff discontinued the suit against the fourth to eighth defendants on 15 April 2016.

The context

8 From 2011 to 2013, the first defendant sold 38 units in the Marina Collection to 38 purchasers in separate transactions. The plaintiff granted housing loans to each of the 38 purchasers to finance their purchases.

9 After the loans were granted, the plaintiff discovered that the first defendant had offered significant furniture rebates to the 38 purchasers. These rebates exceeded market norms and were not reflected in the housing loan application forms. On 26 November 2014, the plaintiff commenced the present suit with claims in the tort of unlawful means conspiracy and the tort of deceit. The plaintiff contended, *inter alia*, that the rebates were part of the defendants' deliberate effort to mislead the plaintiff into granting housing loans (a) based on artificially inflated purchase prices of the units, and (b) which exceeded the maximum loan amounts permissible under MAS's regulation, *vide*, MAS Notice 632.

10 The first defendant denied involvement in any conspiracy or act of fraud. It pleaded that the financing of the purchase of the units was a matter solely between the plaintiff and the purchasers, of which it had no knowledge. The first defendant further pleaded that any loss suffered by the plaintiff was caused by the plaintiff's own decision to grant the loans based on its independent checks and risk assessments, or its failure to properly perform the same.

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11 The second and third defendants filed a joint defence denying any conspiracy between the defendants and any act of deceit. While the plaintiff's case was based in part on certain allegedly suspicious transfers of money between the bank accounts of the purchasers and those of the second, fourth and fifth defendants, the second and third defendants contended that these transfers were made pursuant to suggestions by the plaintiff's Vice-President of Home Loans, one Ann Ong. The second and third defendants argued that Ann Ong's knowledge and acts as employee and agent of the plaintiff must be attributed to the plaintiff, or, alternatively, form the basis of an estoppel against the plaintiff.

The Settlement Agreement

12 On 29 March 2016, the plaintiff entered into the Settlement Agreement with the second and third defendants pursuant to settlement negotiations between them. The recitals to this Settlement Agreement state, *inter alia*:

> (I) [The second defendant] has affirmed an Affidavit… relating to the nature and extent of the involvement of [the first defendant] in the Suit.
>
> (J) The Affidavit is made on behalf of [the second defendant]… and… [the third defendant] in the Suit.
>
> (K) [The second defendant] has affirmed the Affidavit whilst being advised by his solicitors and has not been coerced and influenced in any way in the making of the Affidavit.
>
> (L) [The plaintiff] has requested that [the second defendant] file the Affidavit in the Suit and further give truthful testimony as to 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 at the trial of the Suit.
>
> (M) In consideration, [the plaintiff] is agreeable to regulating the future conduct of its claims against [the second and third defendants] as well as [the fourth to eighth defendants] in the Suit… in accordance with the terms of this Agreement.

13 As can be seen, Recital [M] refers to the plaintiff's undertaking "to regulat[e] the future conduct of its claims" against the second to eighth

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defendants in accordance with the terms of the Settlement Agreement. This undertaking was given in consideration of the second defendant filing the Affidavit and giving truthful testimony at trial. The following terms of the Settlement Agreement are also material:

> 1.1 Upon [the second defendant] affirming the Affidavit in the Suit:
>
> (a) [The plaintiff] shall discontinue all of its claims against the [fourth to eighth 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 …;

14 In accordance with cl 1.1 of the Settlement Agreement, the plaintiff withdrew his action against the fourth to eighth defendants by way of a Notice of Discontinuance filed on 15 April 2016.

Requests for the Affidavit

15 On 13 June 2016, the plaintiff filed a Supplementary List of Documents which disclosed, *inter alia*, the existence of the Settlement Agreement. The plaintiff also provided a copy of the Settlement Agreement to the first defendant's solicitors. However, the Affidavit itself, which was referred to in the recitals of the Settlement Agreement, was not provided to the first defendant.

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16 On 5 August 2016, the first defendant's solicitors wrote to the plaintiff's solicitors requesting various documents, including the Affidavit. The plaintiff's solicitors replied on 19 August 2016 stating that the plaintiff would not be providing discovery of the Affidavit 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".

17 On 23 August 2016, the first defendant's solicitors wrote to the second and third defendants' then-solicitors making a similar request for the Affidavit. This request was also denied in a reply letter dated 30 August 2016 ("the Letter") stating the following:

> 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.

18 In light of the above, the first defendant filed Summons No 4966 of 2016 on 12 October 2016 seeking specific discovery of several documents, including the Affidavit, by the plaintiff and/or the second and third defendants. This appeal concerns only the Affidavit. In that regard, the plaintiff resisted disclosure on grounds of litigation privilege and/or without prejudice privilege. The second and third defendants were absent from the hearings, but appeared to resist disclosure on the ground of litigation privilege.

The decision below

19 The learned AR issued written Grounds of Decision on 19 January 2017 in *United Overseas Bank Ltd v Lippo Marina Collection Pte Ltd and others* [2017] SGHCR 1 ("*UOB v Lippo*"). This appeal concerns only the part of his

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decision dismissing the first defendant's application on the ground of litigation privilege. In that regard, the AR framed two issues for determination (at [19]):

> (a) Can litigation privilege attach to the Affidavit even though the second and third defendants have omitted to file any affidavits claiming the privilege as such?
>
> (b) Even if litigation privilege can and does attach to the Affidavit, have the second and third defendants waived it against the entire world by making disclosure to an opponent in litigation?

20 As regards the first issue, the learned AR held that litigation privilege can attach to the Affidavit even though the privilege had not been asserted by the second and third defendants on affidavit. This followed from the Court of Appeal's decision in *ARX v Comptroller of Income Tax* [2016] 5 SLR 590 ("*ARX*"), in which it was stated that the court may, if it is not satisfied with a bare assertion of privilege, look behind that assertion on affidavit to the documents themselves to ascertain if the privilege has been rightly asserted (*ARX* at [46]). Without a supporting affidavit, a fact sensitive inquiry would be required. On the facts, both requirements for litigation privilege were found to be satisfied: (a) there was a reasonable prospect of litigation at the time legal advice was sought by the second and third defendants in respect of the Affidavit, and (b) the Affidavit was created for the dominant purpose of litigation (*UOB v Lippo* at [26]). Accordingly, litigation privilege attached to the Affidavit.

21 As regards the issue of waiver, the learned AR particularised the issue as follows: "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

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to the litigation" (at [44]). In this regard, he held in the negative: "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" (at [61]).

22 The learned AR premised his decision in that regard on principle, policy, and precedent. First, there is no principle precluding the court from recognising a selective waiver of privilege *vis-à-vis* some but not all of the parties in a multi-party litigation (at [49]). Secondly, the policy of the law is to encourage the parties to prepare properly for litigation; it also encourages parties to enter into confidential communications with other parties in preparation for the same. This applies even between adversaries, in recognition of the shifting array of interests involved in multi-party litigations (at [50]–[52]). Thirdly, the AR referred to *Stax Claimants v Bank of Nova Scotia Channel Islands Ltd* [2007] All ER (D) 215 ("*Stax Claimants*") and *Canada Safeway Ltd v Toromont Industries Ltd* (2004) 362 AR 296 ("*Canada Safeway*") for the proposition that, in the context of multi-party litigation, litigation privilege may subsist in respect of communications between adversaries (at [54]–[60]). Various other case authorities cited by the parties were discussed.

23 On the facts, the learned AR found that the second and third defendants' conduct had been consistent with their maintaining confidentiality in the Affidavit against the first defendant (at [62]). He also found that the copy of the Affidavit in the plaintiff's hands must also be privileged for otherwise the second and third defendants' privilege over the original Affidavit would be rendered hollow (at [68]).

24 Finally, the learned AR opined that there would be no unfairness to the first defendant if the Affidavit was not disclosed to him. Given that he would

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not have had any right to view the Affidavit anyway, selective disclosure by the second and third defendants did not put him in a worse position. Even if there was some information asymmetry, this would be the case whenever privilege is upheld (at [64]–[65]). In any event, the first defendant would have sight of the Affidavit when parties exchanged their Affidavits of Evidence-in-Chief ("AEIC"); the court should not compel expedited disclosure only of the second and third defendants' Affidavit (at [66]).

25 For the above reasons, the learned AR dismissed the application for specific discovery of the Affidavit on the ground of litigation privilege. Having done so, he did not address the issue of without prejudice privilege.

Arguments on appeal

26 The first defendant filed an appeal against the AR's decision on 1 February 2017. The sole issue on appeal is whether the plaintiff and/or the second and third defendants should provide specific discovery of the Affidavit.

First defendant's case as appellant

27 The first defendant maintains that the Affidavit should be disclosed by the plaintiff and/or the second and third defendants. The Affidavit is relevant and necessary for the fair disposal of the matter, and also within the possession, custody or power of the plaintiff and the second and third defendants.[1] Further, neither litigation privilege nor without prejudice privilege applies.

28 With regard to litigation privilege, the first defendant argues that the Affidavit is not a document in which such privilege subsists, as the necessary

[1] First defendant's Skeletal Submissions at para 3.

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element of confidentiality was lost when the second defendant affirmed the Affidavit and put it forward as his AEIC. Reliance is placed on several case authorities, including *Australian Competition and Consumer Commission v Cadbury Schweppes Pty Ltd* [2009] FACFC 32 ("*Cadbury Schweppes*"), for the proposition that finalised documents intended to be used as evidence at trial are not covered by litigation privilege.[2] Further, the first defendant seeks to distinguish *Stax Claimants* and *Canada Safeway* (which were relied on by the AR) on the basis that they did not concern documents that were intended to be introduced as evidence at trial.[3] The first defendant also seeks to distinguish the decision of *Robert Hitchins Limited v International Computers Limited* [1996] Lexis Citation 1579 ("*Robert Hitchins*") (on which the plaintiff heavily relies) on grounds that it concerns common interest privilege rather than litigation privilege, and, in any case, was a decision involving draft witness statements rather than an affidavit intended to be used as an AEIC.[4]

29 Further, the first defendant submits that the Affidavit is not protected by without prejudice privilege for three reasons. First, it was not a communication made in the course of settlement negotiations, but rather affirmed pursuant to, and hence *ex post*, the conclusion of such negotiations between the parties.[5] In the circumstances, the Affidavit constitutes part of the settlement agreement itself, which would not be protected by without prejudice privilege. Secondly, the Affidavit does not contain any admission or other material which would be prejudicial to the positions of the second or third defendant, such that the policy

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2 First defendant's Skeletal Submissions at paras 27-28.

3 First defendant's Skeletal Submissions at para 34.

4 First defendant's Skeletal Submissions at paras 41-48.

5 First defendant's Skeletal Submissions at paras 7-13.

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rationale of without prejudice privilege does not apply.[6] Thirdly, and in any event, any privilege over the Affidavit was waived when the second defendant confirmed that it would be used at trial as his AEIC.[7]

Plaintiff's case as respondent

30 At the outset, the plaintiff clarifies that it does not have the original Affidavit, but merely a copy of it which was extended by the second and third defendants on a without prejudice basis. The plaintiff submits that the Affidavit, whether in its hands or in the hands of the second and third defendant, is protected from disclosure to the first defendant on grounds of (a) litigation privilege, and/or (b) without prejudice privilege.[8]

31 As regards litigation privilege, the plaintiff's starting premise is that an unserved affidavit remains protected by litigation privilege even if it has been finalised. It is only upon service of that affidavit that confidentiality is lost, and privilege no longer subsists. That has not yet been done here.[9] Further, so long as the factual circumstances make clear that the second and third defendants are resisting disclosure on the ground of litigation privilege, there is no strict need for them to file an affidavit to assert such privilege.[10] On the facts, litigation privilege clearly subsists as the Affidavit was prepared and signed by the second defendant in circumstances where litigation was ongoing, and was expressly

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6 First defendant's Skeletal Submissions at paras 14-18.

7 First defendant's Skeletal Submissions at paras 19-23.

8 Plaintiff's Written Submissions at para 21.

9 Plaintiff's Written Submissions at paras 23-26.

10 Plaintiff's Written Submissions at paras 33-35.

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contemplated in the Settlement Agreement to be for use at trial.[11] This privilege, attaching to the second and third defendants' original Affidavit, must equally attach to the plaintiff's copy for it would otherwise render the privilege hollow in substance.[12]

32 The plaintiff further denies that there was any waiver of litigation privilege, relying heavily on the reasoning of the learned AR. In particular, the plaintiff defends *Stax Claimant* and *Canada Safeway* for the proposition that, in a multi-party litigation, confidentiality in a document is not lost by mere disclosure to an adversary; rather, whether or not such a document remains confidential is a fact-sensitive inquiry. In this case, the second and third defendants' conduct has been consistent with their maintaining confidentiality in the Affidavit as against the world save for the plaintiff.[13] Further, there is no principled reason why the second defendant cannot selectively waive confidentiality as against the plaintiff only.[14] Lastly, the plaintiff submits that its position accords with the legal policy of encouraging the sharing of privileged material between adversaries in order to reach settlement at least on some issues and save costs and resources.[15]

33 As regards without prejudice privilege, the plaintiff clarifies that it is only arguing that the privilege attaches to its copy of the Affidavit; it does not purport to say the same for the original Affidavit in the possession of the second and third defendants. In this regard, the plaintiff seeks to counter the three

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11 Plaintiff's Written Submissions at paras 27-29.

12 Plaintiff's Written Submissions at paras 30-32.

13 Plaintiff's Written Submissions at paras 41-50.

14 Plaintiff's Written Submissions at paras 51-54.

15 Plaintiff's Written Submissions at paras 55-58.

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arguments raised by the first defendant. First, the plaintiff denies that the Affidavit must be disclosed because it was so inextricably tied to the Settlement Agreement as to constitute one of its terms.[16] In any event, there is no mandatory rule that the terms of a concluded settlement agreement are themselves not protected by without prejudice privilege.[17] Secondly, without prejudice privilege is a joint privilege of both parties to a settlement negotiation; no distinction can be drawn between the maker and recipient of each communication. The plaintiff is thus entitled to assert this privilege regardless of the second defendant's position, and the collective consent of the plaintiff and the second and third defendants is required before the privilege can be waived.[18] Thirdly, the plaintiff denies that it has waived its privilege over the Affidavit simply because the Settlement Agreement contemplates the second defendant using the Affidavit as his AEIC at trial – contemplation is not obligation.[19] Even if that was an implied waiver, it would only take effect at the time of the trial rather than at this stage of the proceedings, *ie*, ahead of the exchange of AEICs. In this regard, the first defendant's discovery request is unfair as it forces the second and third defendants to disclose their AEIC prior to all other parties.[20]

The decision

34 I find that litigation privilege attaches to the copy of the Affidavit in the plaintiff's hands and that it does not need to be disclosed. The appeal should therefore be dismissed on that basis.

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16 Plaintiff's Written Submissions at paras 74-79.

17 Plaintiff's Written Submissions at paras 78–80.

18 Plaintiff's Written Submissions at para 65.

19 Plaintiff's Written Submissions at para 92.

20 Plaintiff's Written Submissions at paras 93–94.

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The analysis

35 The requirements of relevance and necessity in the context of specific discovery are laid out in O 24 r 5 and O 24 r 7 of the ROC. Generally, the party seeking discovery has to establish the relevance of the documents sought, and the onus is then on the resisting party to show that discovery is not necessary for the fair disposal of the matter or for saving costs. In the present appeal, neither relevance nor necessity is in issue. It is also not disputed that the Affidavit is in the possession, custody or power of the second and third defendants, and that a copy thereof is with the plaintiff.

Issue 1: Is the Affidavit protected by litigation privilege

36 In seeking and resisting specific discovery, the parties have raised several novel arguments concerning litigation privilege in the context of a multi-party litigation. The following issues will be discussed in sequence after the interface between the common law and the Evidence Act (Cap 97, 1997 Rev Ed) ("EA") is set out:

(a) In respect of privilege in the second and third defendant's original Affidavit:

(i) whether litigation privilege may be asserted without a supporting affidavit;

(ii) whether litigation privilege subsists in unserved affidavits that has been finalised and which is intended for use in trial; and

(iii) if litigation privilege subsists and may be asserted, whether it is waived because the Affidavit was disclosed to an adverse party in a multi-party litigation.

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(b) In respect of privilege in the plaintiff's copy of the Affidavit:

(i) whether the plaintiff being only the recipient of a copy of the Affidavit has standing to assert litigation privilege; and

(ii) if litigation privilege subsists in the original Affidavit, whether it also subsists in the plaintiff's copy of the same.

General principles

37 Sections 128 and 131 of the EA provide generally for legal professional privilege in Singapore. The fundamental concern behind this privilege is the proper and effective administration of justice, as noted by the Court of Appeal in *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2007] 2 SLR 367 ("*Asia Pacific Breweries*") (at [23]):

> Legal professional privilege is to be found in two principal forms – viz, legal advice privilege and litigation privilege, respectively, and has been firmly entrenched as part of the common law system of justice for centuries. The two privileges are conceptually distinct although they overlap. However, they both "serve a common cause: The secure and effective administration of justice according to law", and "they are complementary and not competing in their operation["].

38 Litigation privilege, which is one of two forms of legal professional privilege, is a common law doctrine contemplated by s 131 of the EA. The relationship between this common law doctrine and the EA was examined by the Court of Appeal in *Asia Pacific Breweries*, where it was held that no inconsistency exists between the doctrine at common law and ss 128 and 131 of the EA read together (at [67]):

> … litigation privilege exists by virtue of the common law. Since… s 131 of the [EA]… clearly envisages the concept of litigation privilege, there is no inconsistency between the common law and the statutory provisions. Accordingly, s 2(2) of

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> the [EA] would apply to confirm the applicability of litigation privilege at common law in the local context… as there is no inconsistency between litigation privilege at common law and ss 128 and 131 read together…

39 At the heart of the doctrine of litigation privilege is the recognition that parties to a litigation should be granted "the autonomy… to strategise and prepare their cases in private in the interest of optimal presentation at the trial" (Jeffrey Pinsler SC, *Evidence and the Litigation Process* (LexisNexis, 5th Ed, 2015) ("*Pinsler on Evidence*") at para 14.002). As Fish J observed in *Minister of Justice v Sheldon Blank (Attorney General of Ontario, The Advocates' Society and Information Commissioner of Canada (Interveners))* [2006] SCC 39 (at [27]) (affirmed by the Court of Appeal in *Asia Pacific Breweries* at [23]):

> Litigation privilege… is not directed at, still less, restricted to communications between solicitor and client. It contemplates… communications between a solicitor and third parties or, in the case of an unrepresented litigant, between the litigant and third parties. Its object is to ensure the efficacy of the adversarial process and not to promote the solicitor–client relationship. And to achieve this purpose, parties to litigation, represented or not, must be left to prepare their contending positions in private, without adversarial interference and fear of premature disclosure.

40 On a preliminary note, there may be a question about the applicability of Parts I, II and III of the EA (which includes ss 128 and 131) to interlocutory proceedings such as the present and whether, if the issue is answered in the negative based on a literal reading of s 2(1) of the EA, common law principles would apply in lieu thereof (see *Pinsler on Evidence* at para 14.004). The broader issue does not need to be authoritatively resolved at present. As explained, the doctrine of litigation privilege exists in Singapore by virtue of the common law, and the common law principles would in any event apply as they are not inconsistent with the EA (*Asia Pacific Breweries* at [67]).

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Privilege in the second and third defendants' original Affidavit

(1) Assertion of privilege without a supporting affidavit

41 The second and third defendants filed no affidavits and made no appearances in this application. The first issue is, thus, whether the absence of a supporting affidavit by the second and third defendants asserting litigation privilege prevents the invocation of such privilege here.

42 In my judgment, privilege may be asserted in different ways. The best form would be an assertion in an affidavit, as that would, hopefully, be clear and unequivocal. But the privilege can also be asserted without an affidavit, as long as the circumstances manifest a clear invocation of that privilege. The essential question is whether the claim of privilege is expressed clearly in some form, so that the matter can be readily determined by the court. It may be that where privilege is not clearly asserted by way of a supporting affidavit, grounds can be made out for adverse cost consequences. The absence of an affidavit supporting the claim of privilege may also leave the claiming party exposed to having the matter determined only on undisputed facts or on the law. If that party chooses to run the risk of an adverse determination, then that is its choice. However, privilege is not excluded simply because such a supporting affidavit has not been filed.

43 I note that the learned AR cited the decision of the Court of Appeal in *ARX*, and in particular the dictum that "if the court is not satisfied with [the supporting affidavit], it is always open to the court to look behind the affidavit to the documents themselves to ascertain if privilege was rightly asserted" (*ARX* at [46]). However, the observations of the Court of Appeal in that case were concerned with the sufficiency of the supporting affidavit, and not its necessity. While the case gives some support for the proposition that an affidavit is not the

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be-all of an inquiry on privilege, I do not think, with respect, that it is clear authority for or against the proposition of law that a supporting affidavit is necessarily required in order to assert privilege. I would prefer to approach the question as one of principle.

44 On the facts, the second and third defendants filed no affidavit and made no appearance in this application. However, while they appear to have been unrepresented after their former counsels discharged themselves on 31 October 2016, they had on 19 August 2016 clearly declined the first defendant's request for disclosure of the Affidavit by means of the Letter on the basis of litigation privilege. Indeed, this Letter was acknowledged by, and annexed to, the affidavit of the first defendant's representative filed in support of its present application for discovery. Accordingly, I find that the second and third defendants have clearly invoked litigation privilege over the Affidavit. The absence of a supporting affidavit filed by them is thus not fatal to the assertion of such privilege.

(2) Subsistence of litigation privilege

45 In order to establish litigation privilege, the legal advice in question must have been sought and obtained, or the document concerned must have been prepared or created: (a) at a time when there was a reasonable prospect of litigation, and (b) for the dominant purpose of litigation (*Asia Pacific Breweries* at [69]–[77]).

46 In the present case, both elements are clearly fulfilled. The Affidavit was affirmed by the second defendant on the legal advice of his solicitors in the context, and for the purpose, of ongoing litigation. The Letter and the Settlement Agreement clearly state that the Affidavit was created for use at trial by the

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second and third defendants. The first defendant does not dispute this and has not suggested that the Affidavit was created for any other purpose. Accordingly, subject to the issues discussed below, litigation privilege attaches to the Affidavit.

(3) Privilege in finalised affidavits intended to be used at trial

47 The first defendant contended that litigation privilege no longer subsists in the Affidavit because the second and third defendants have put it forward as a finalised document intended to be used as their AEIC at trial. The first defendant maintains that this is a matter of subsistence, and not waiver, of the privilege. The plaintiff's position is that litigation privilege is only waived in respect of an affidavit when it is served. The Affidavit not having been served, litigation privilege continues to subsist until that time. The issue is therefore whether an affidavit that is finalised and intended to be used later at trial, but not yet served or filed, is disqualified from protection in litigation privilege.

48 I am of the view that it is not. Draft submissions may have been finalised and may be intended to be tendered in court, but until that point is reached, such documents remain privileged. Thus, here, the fact that the affidavit may be ultimately disclosed to the other side does not change things. Until the affidavit is actually served or filed, the contents and structure of the affidavit may be altered, as the parties and their advisors consider how to present their case and describe their evidence. It is part of the legitimate preparation of a case for parties to constantly rephrase and rework their affidavits. Such documents should be protected by litigation privilege, until such time where confidentiality is unequivocally waived or required to be waived, to enable the parties to prepare adequately for their case.

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49 Further, I would not attach undue legal significance to the labelling of an affidavit as a draft or final copy. It is not at all clear when one melds into the other, and the distinction is too fine and manipulable to sustain the critical issue of whether litigation privilege attaches. Indeed, there may be some exigencies which require that affidavits be prepared well ahead of time for service (*eg*, the anticipated death of a witness and the need to preserve his or her evidence). That does not and should not mean that the affidavit, being prepared beforehand, must then be subject to disclosure to the other party simply because it is finalised.

50 The preponderance of case and text authorities also propose that an affidavit is usually privileged until actually served. These authorities suggest that neither the distinction between drafts and finalised affidavits, nor the amorphous intention of the creator to use (or not to use) the affidavit later at trial, can stand as the litmus test of waiver or subsistence of litigation privilege.

51 In Bankim Thanki QC, *The Law of Privilege* (Oxford University Press: 2011, 2nd Ed) ("*Thanki on Privilege*") (at para 5.41):

> Prior to service, the witness statement and affidavit remain privileged. Once served, confidentiality in them is lost *vis-à-vis* the other parties to the litigation and privilege can no longer be maintained against those parties in that action.

52 Similarly, in Colin Passmore, *Privilege* (Sweet & Maxwell: 2013, 3rd Ed) (at para 7-187):

> Drafts of statements of case, witness statements, experts' reports and affidavits prepared for the dominant purpose of use in litigation will almost certainly be, and will remain, privileged whilst they remain unserved, since at that point they are still confidential to the party that prepared them.

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53 In Charles Hollander, *Documentary Evidence* (Sweet & Maxwell: 2012, 11th Ed) (at para 23-21):

> There was never any authority as to whether privilege could be claimed for an unserved affidavit once sworn, but there seems no reason why it should not be the subject of a claim for privilege…

54 I also noted the English High Court case of *General Accident Fire and Life Assurance Corp Ltd and others v Tanter and others; The Zephyr* [1984] 1 WLR 1000 cited by the plaintiff, which opined that an affidavit is privileged until actually served or used in court (at 108):

> Civil Evidence Act statements are frequently put in in evidence. They are frequently statements which have been given to a solicitor and which, in the absence of Civil Evidence Act notice being served, would be privileged… Likewise, the same point arises with regard to affidavits. Affidavits, until they are served or used in court, are obviously privileged…

55 Further, some support for the plaintiff's position that an affidavit remains privileged prior to service, even if finalised and intended to be used at trial, can be found in the English Court of Appeal decision of *Robert Hitchins*. In that case, the plaintiff-buyer sued the defendant-supplier for breach of contract and misrepresentation. The defendant in turn commenced third party proceedings against its sub-contractor ("CSB") on the basis that if it was in breach of its contract with the plaintiff, then so too was CSB in breach of the sub-contract with the defendant. Both matters were fixed to be heard together. At the interlocutory stage, the defendant and CSB settled the third party proceedings, and CSB's proposed witnesses provided the defendant with certain favourable draft witness statements. The defendant sought leave to serve these statements on the plaintiff out of time, with intent to use these statements in their defence against the plaintiff's claim. The plaintiff in turn sought discovery of the settlement agreement and the draft witness statements.

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56 The plaintiff's application was rejected both at first instance and on appeal by a majority of the English Court of Appeal. Both Simon Brown and Hobhouse LJJ found that litigation privilege persisted in respect of the draft witness statements in the hands of the defendant. Peter Gibson LJ found that there was no litigation privilege, but that nonetheless no production would be ordered as such an order would not be necessary for the fair or efficient disposal of the matter.

57 *Robert Hitchins* primarily concerned the legal significance to be attached to the act of disclosure of a document by one party to another party in a multi-party litigation, and the issue of privilege in copies – these will be discussed below. For present purposes, it suffices to note that litigation privilege was found to attach to these draft witness statements even though they were clearly intended to be used later at trial.

58 The first defendant seeks to distinguish *Robert Hitchins* on two bases, but neither is persuasive. First, it is pointed out that *Robert Hitchins* dealt with draft – and not finalised – witness statements. As explained, that distinction is untenable (see [49] above). Indeed, when probed on the precise point in the preparatory lifespan of the document at which litigation privilege is waived (or, according to the first defendant, ceases to subsist), counsel for the first defendant could not provide a satisfactory response. Second, the first defendant seeks to distinguish this case as concerning common interest privilege and not litigation privilege. It is true that Simon Brown LJ opined that the defendant and CSB shared a "community of interests", but that term as I understood it was used broadly and not in the technical sense. Peter Gibson LJ also expressly clarified, in the context of that case, that "it cannot be said that some common interest privilege came into being".

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59 The first defendant cites other authorities in support of its submission that a finalised affidavit intended to be used at trial is not protected by litigation privilege. These were not persuasive.

60 First, the first defendant referred to *Australian Competition and Consumer Commission v Cadbury Schweppes Pty Ltd* (2009) 254 ALR 198 ("*Cadbury Schweppes*"). There were two sets of proceedings in this case. In the first set, the claimant regulator, the Australian Competition and Consumer Commissioner ("ACCC"), filed and served 111 finalised witness proofs on the defendant company, Visy, pursuant to an order of court. These witness proofs were not eventually admitted into evidence as judgment was pronounced on the basis of agreed facts without trial. The second set of proceedings involved Cadbury suing Amcor which cross-claimed against Visy. ACCC sought to intervene in the second set of proceedings to prevent Visy from disclosing the witness proofs on the basis of litigation privilege. The issue was whether litigation privilege attached to the final version of witness proofs which the party claiming privilege (*ie*, ACCC) had served on an adverse party (*ie*, Visy) in a separate set of proceedings pursuant to an order of court. For purposes of the appeal, the court considered that there was no distinction between affidavits and proofs of evidence (at [64]). The Federal Court of Australia found that litigation privilege could not attach to a finalised document intended to be served on an adversary (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.

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61 On a preliminary note, the language of *Cadbury Schweppes* suggests that a document "*intended to be given to an opposing party*… is not a document in which privilege subsists" [emphasis added] (at [63]). Strictly speaking, that has a different nuance from the first defendant's submission that "a finalised document *intended to be used as evidence at trial* is not protected by litigation privilege" [emphasis added].[21] However, this distinction, if any, is not material in the present application as the Affidavit would fall within the scope of either statement. Further, the legal significance to be attached to the *act of disclosure* is a conceptually distinct issue which will be dealt with separately below (at [66]-[85]).

62 In any event, I accept the plaintiff's submission that *Cadbury Schweppes* should be distinguished from the present case. For one thing, *Cadbury Schweppes* was concerned with only two parties to litigation, and not a multi-party suit. The interests and policy considerations at play would therefore be significantly different. Secondly, unlike the present case, *Cadbury Schweppes* concerned witness proofs which had in fact been served and filed by ACCC in the first set of proceedings against Visy. This is not an insignificant distinction. Indeed, the language used in the judgment appears to be directed to documents already disclosed or served. As regards the subsistence of privilege, the court stated that "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*" [emphasis added] (at [37]); and further, "whether it be an affidavit, witness statement or finalised proof of evidence, the purpose in serving and filing is not within the rationale of litigation privilege *once disclosed to an opposing party*" [emphasis added] (at [64]). Similarly, in respect

[21] First defendant's Written Submissions at para 27.

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of the court's alternative analysis on waiver, the fact that the witness proofs had actually been served and filed clearly weighed on the court's mind: "given the *context and circumstances of the filing and serving* of the finalised proofs of evidence, there was a complete waiver" [emphasis added] (at [103]). On this reading, *Cadbury Schweppes* may, ironically, be authority in support of the plaintiff's proposition that waiver occurs at, and not before, the time of actual filing or service.

63 Even if *Cadbury Schweppes* cannot be distinguished, I would respectfully not follow it. In respect of the holding that a finalised witness proof intended to be given to an adversary is not protected by litigation privilege, the primary justification in *Cadbury Schweppes* appears to be that such a proof would have been created "for the purpose of serving them on the [adversary]" (at [37]). However, the purpose of an affidavit (and presumably a witness statement) is not merely disclosure at some point. An affidavit is created to present the deponent's evidence to the court, in order to persuade the court to reach a particular conclusion on the facts. It is a clear exemplar of a persuasive document. Its preparation, drafting, and constant redrafting are within the core conception of preparation for litigation. Inconsistent drafts may spell doom for the credibility of the deponent. Inappropriate phrasing may let in an own-goal. Affidavits should thus be prepared within the zone of privacy that is expected by parties to litigation, to enable each to prepare his or her own case without prematurely showing the hand that is to be played.

64 The first defendant further cites *Western Canadian Place Ltd v Con-Force Products Ltd* [1997] AJ No 354 ("*Western Canadian*") for the select quotation that "no privilege attaches to the affidavits or the transcriptions of cross-examination on affidavits in the normal course". However, in that case, the affidavits in question had already been filed and were even the subject of

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cross-examination. This was because, as a result of rather unique facts and parallel proceedings, the issue of privilege was raised only after the trial in which the affidavits had been admitted. In fact, the court cited as authority for its quotation the case of *Ed Miller Sales and Abernathy v Ross* (1985) 65 BCLR 142 (*Western Canadian* at [40]), which stated that there is no reason to treat affidavits as privileged because that would only protect a witness against false statements that he/she "has said on oath *in the past*" [emphasis added]. Thus, taken in context, the term "affidavit" used in the choice quote highlighted by the first defendant referred to affidavits already used in court; it did not refer also to draft affidavits that had not yet been served or filed. *Western Canadian* thus does not assist the first defendant.

65 For these reasons, I find that the Affidavit is not deprived of litigation privilege (whether as a matter of subsistence or waiver) merely by virtue of it being finalised and intended to be used by the second and third defendants at trial as their AEIC.

(4) Waiver by selective disclosure in multi-party litigation

66 Pursuant to terms of the Settlement Agreement, the second defendant shared the Affidavit with the plaintiff even though the plaintiff was on the opposite side of the litigation. The issue is whether litigation privilege, which I have found to subsist, was waived because the Affidavit was disclosed to an adverse party in a multi-party litigation.

67 Sections 128(1) and 128A(1) of the EA contemplate waiver of privilege with the client's express consent. Sections 130 and 131 of the EA, in turn, provide for the specific situations in which a client may be said to have impliedly waiver his privilege. Nonetheless, cases such as *Tentat Singapore Pte*

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Ltd v Multiple Granite Pte Ltd and others [2009] 1 SLR(R) 42 and *Gelatissimo Ventures (S) Pte Ltd and others v Singapore Flyer Pte Ltd* [2010] 1 SLR 833 appear to support a broader proposition that implied waiver may be found wherever there is a clearly evinced intention to give up confidentiality in a document. It is noted that these cases have gone beyond the literal scope of ss 131 and 130 of the EA. But this judicially crafted proposition is, as noted by Professor Pinsler, rooted in sound principle (see *Pinsler on Evidence* at para 14.088). Further, even if a general principle of implied waiver is inconsistent with the EA as regards legal advice privilege, it does not follow that the same may be said of litigation privilege. Unlike the former which is largely enshrined in the EA, the latter has its very basis stemming from the common law (*Asia Pacific Breweries* at [67]).

68 On this premise, in a situation where the privileged document is disclosed, presented, or shared with another, what matters is the context and purpose for which this was done. If the document is indeed supplied in confidence, that act of sharing would not amount to implied waiver. If the circumstances show that confidence is intended to be surrendered, or disregarded, by that act of sharing, then that act amounts to waiver even if no express words have been used to that effect. The question is whether a shield of confidentiality can reasonably be expected to exist following the sharing of the heretofore privileged document. In this regard, it should be noted that "[g]iven the importance of legal professional privilege, waiver is not to be easily implied" (*ARX* at [69]).

69 These same principles apply in the context of a multi-party litigation. In such cases, selective disclosure of a document to some but not all of the parties does not necessarily constitute waiver of the litigation privilege as against all the parties; much would depend on the context of that disclosure and its effect

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on the confidentiality of the document concerned. In this regard, it is not determinative that the party to whom disclosure was made stood in an adversarial position *vis-à-vis* the party who made the disclosure, or that the document concerned was intended to be used at trial or otherwise.

70 To my mind, this approach is in line with the common law position and the opinion of the leading texts.

71 The first authority is *Canada Safeway*. In this case, one of the defendants, Pace, sought discovery of an expert report which the claimant, Safeway, had obtained for the purpose of the litigation. Pace argued that Safeway had waived litigation privilege over that report by disclosing it to another of the defendants, Toromont, in connection with settlement negotiations between Safeway and Toromont. It was emphasized that Safeway and Toromont were adversaries who were "opposite in interest" (at [10]).

72 Burrow J in the Alberta Court of Queen's Bench found that there was no waiver: the selective disclosure by Safeway to Toromont did not indicate that it had surrendered the privacy or confidentiality of the report as against Pace. The court declined to follow *Lehman v Insurance Corp of Ireland* [1984] 1 WWR 615 (Manitoba Queen's Bench), in which the exchange of a report in similar circumstances was held to have destroyed the privilege claimed. Instead, Burrow J preferred an approach which aligned the inquiry on waiver more closely with the rationale of litigation privilege (at [15]):

> 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

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> 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.

73 To my mind, this captures the rationale of litigation privilege in Singapore just as much as in Alberta. Burrow J went on to explain how this approach would be applied in the context of litigation privilege (at [18]):

> In this case, in the context of litigation privilege, the first question is whether the communication of the privileged information to one of many adversaries signalled that a zone of privacy was no longer required for the communicated information. The second question is whether the communication of the information in the circumstances makes it unfair to continue to maintain the privilege.

74 On the facts before him, Burrows J concluded that both questions in the above quotation were to be answered in the negative. The same may be said of the present case: selective disclosure of the Affidavit by the second and third defendants to the plaintiff did not signal that a zone of privacy was no longer required in respect of the Affidavit *vis-à-vis* the first defendant. Nor would it be unfair for the privilege to be maintained as against the first defendant. These points will be elaborated on later.

75 The first defendant seeks to distinguish *Canada Safeway* on the basis that it dealt with reports which were caveated to be used solely for discussion and not at trial (*Canada Safeway* at [7]). With respect, this appears to be an immaterial distinction. An intention to use a document at trial is at best an inchoate intention to waive privilege, or surrender confidentiality, at a later time. Further, the presence (or absence) of any intention to use the document later at trial also does not add to (or detract from) the proposition that, in a multi-party litigation, selective disclosure of a document to one party does not in itself mean a waiver of privilege in respect of all the other parties.

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76 Simon Brown and Hobhouse LJJ of the majority in *Robert Hitchins* have similarly held that selective disclosure of a document did not necessarily deprive it of the claim to privilege. The facts of this case have been set out (see [55]–[56] above). As explained, this was a multi-party litigation in which the plaintiff sought discovery of draft witness statements that had been disclosed by the third party, CBS, to the defendant. Simon Brown LJ upheld the existence of litigation privilege and reasoned that the ability to make such selective disclosure fell within the rationale of litigation privilege:

> … [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 not, in short, waived their privilege *vis-à-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?

77 Similarly, Hobhouse LJ held that selective disclosure by CSB of the witness statements to the defendant (but not the plaintiff) did not constitute waiver of CSB's litigation privilege as against the plaintiff:

> 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

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> 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.

78 In my view, the reasoning of the majority vindicates the policy rationale of the privilege, *ie*, according parties with the autonomy to preparation for litigation in confidence and privacy, and with respect, should be preferred for that reason.

79 The learned AR below recognised a "factual distinction" between *Robert Hitchins* and the present case – whereas in *Robert Hitchins* the parties to the selective disclosure shared a "community of interest", in the present case the plaintiff and the second and third defendants stand adverse to one another in the litigation (*UOB v Lippo* at [34]). There is no difficulty in this regard. Even if the privileged document is shared with an adverse party, that does not necessarily destroy or undermine the ability of sharing party to claim privilege against the other parties. This goes back to the basis or rationale of litigation privilege: to protect the parties' ability to prepare their cases in confidence. This rationale applies with equal force in multi-party litigation. On this premise, it is a legitimate part of such preparation, with a view to obtaining the best possible outcome in a given case, to work out compromises or resolutions with only some of the parties, adverse or otherwise, so that a better position can be obtained against the remaining ones. Further, in a multi-party litigation, the parties' interests are kaleidoscopic, nuanced, and ever-changing. The fact that litigation privilege may be waived in respect of one such party does not mean that there is general waiver all around. For completeness, it should be noted that the sharing parties in *Robert Hitchins* (*ie*, the defendant and CSB) could also have been considered adverse parties, given the unknown terms of their

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settlement agreement and the possibility that CSB would ultimately be liable to indemnify the defendant for any judgment obtained by the plaintiff.

80 The recognition that selective disclosure is consistent with the subsistence of litigation privilege has also been demonstrated in several other authorities identified by the learned AR (see, *eg*, Jonathan Auburn, *Legal Professional Privilege: Law and Theory* (Hart Publishing, 2000) ("*Auburn*") at p 203; *Phipson on Evidence* at para 26-30; *Gotha City v Sotheby's and another* [1998] 1 WLR 114 at 119). The following passage from *Thanki on Privilege* is instructive (at paras 5.11-5.13):

> It is now well established that a document which would otherwise be privileged does not lose the quality of confidentiality necessary to attract privilege simply because it has been seen by someone other than the lawyer and client. It depends on the extent to which and the reason why the document has gone beyond the boundaries of the solicitor-client relationship...
>
> If a document has been made available to the general public then confidence and therefore privilege is lost completely.
>
> ... However, where the document or information has been communicated to a limited number of third parties in circumstances expressly or implied preserving the overall confidentiality as against the rest of the world, then it is unlikely that a party to litigation who has not seen the document will be able to claim that privilege does not attach.

81 In rebuttal, the first defendant cites *Faraday Capital Limited v SBG Roofing Limited (in liquidation), Governors of Norbridge Primary & Nursery School, Nottingham County Council* [2006] EWHC 2522 (Comm) ("*Faraday Capital*"), in which there were two sets of proceedings. In the first set, the school obtained judgment against a roofing company whose negligence led to a fire at the school's premises. The second set of proceedings were then brought by the insurer against the school and the insured roofing company in repudiation of its liability under the relevant insurance policy. The school sought discovery of

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certain statements made by two employees of the insured roofing company to the insurer in the course of investigating the cause of the fire. The insurer resisted on the ground of litigation privilege. The English High Court allowed discovery of the statements. Cooke J reasoned that there was no basis for privilege as there was no requisite confidentiality in respect of statements disclosed by one opposing party to another:

> 18 … Confidentiality is the basis upon which privilege is asserted and, in the context of information supplied by or on behalf of one party to another, there can be no question of confidentiality.

82 In my view, *Faraday Capital* can be distinguished from the present case as it again involved a two-party paradigm. While there were technically three parties mentioned in that case, the court had found – as a premise to its decision on confidentiality – that the statements were taken at a time when litigation was contemplated as between the insured and the insurer (*ie*, the provider and recipient of the statements) (at [8]). In this situation, there are only two parties to the suit and disclosure of a document to the only counterparty would for obvious reasons be more likely to constitute an absolute waiver of confidentiality than if selective disclosure had been made only to one counterparty in a multi-party litigation.

83 On a final note, the plaintiff relies on the case of *Stax Claimants*, but given its context, I do not think that would assist significantly. In that case, the claimants sued the defendants for losses as a result of certain pension-related matters. The defendants' argument was that the claimants had relied on their own independent financial advisors ("IFAs") instead. The defendants thus brought claims seeking contributions from the IFAs in what is known in the UK as a Part 20 claim. After a meeting was held between the claimants' and the IFAs' solicitors, the defendants sought disclosure of the meeting minutes and

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other related documents. The primary issue related to without prejudice privilege. Warren J in the English High Court found that it did not apply, but was willing to consider the applicability of litigation privilege. In that regard, he expressed all his statements on litigation privilege in a tentative form because he found that "[i]t is… not possible for me to reach a final conclusion on whether the documents are privileged without looking at them" (at [32]). There are dicta that may be relevant to the present case, but given the context, that case should be approached with some circumspection.

84 In the final analysis, it is evident from the authorities that where privileged documents are shared with an adversary, that is not necessarily a waiver of litigation privilege if it is done with the intent of reaching a resolution or arrangement with only that adversary, even if the litigation remains live against some other party. The mere fact that the parties sharing a document may be at different ends of the bar table does not mean that confidentiality is necessarily waived. Multi-party litigation is complex, with both overlapping and disparate interests and objectives. It is entirely legitimate for a party to pick off by lawful means some of his or her adversaries, so that attention may be focused on the others that remain. In these circumstances, where selective disclosure is made in a multi-party litigation, the rationale of litigation privilege continues to be engaged: a zone of privacy needs to be preserved in the preparation of litigation as against those others.

85 On the facts, it is clear that the second and third defendant did not intend, by their disclosure of the Affidavit to the plaintiff, to waive privilege (or surrender confidentiality) in the Affidavit as against the first defendant. The disclosure was made under the cover of a without prejudice letter and in the context of exclusive settlement negotiations between the second and third defendant on the one part, and the plaintiff on the other. Clause 2.2 of the

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Settlement Agreement also provide that, save in limited specified circumstances, the plaintiff and the second and third defendants "shall keep confidential and shall not disclose to any person whatsoever any information relating to or arising out of [the Settlement Agreement]." I agree with the learned AR that this clause would cover the Affidavit. The second and third defendants have expressly and consistently refused to disclose the Affidavit to the first defendant. The first defendant points out that the Settlement Agreement itself requires the Affidavit to be deployed as evidence at trial, but that relates to a future indeterminate contingency and does not mean that confidentiality was intended to be waived forthwith. In the circumstances, the conduct of the second and third defendants (*ie*, their selective disclosure of the Affidavit to the plaintiff) was clearly consistent with their maintaining confidentiality and privilege in the Affidavit as against the first defendant.

86 For these reasons, I find that litigation privilege subsists in the Affidavit and has not been waived as against the first defendant by the second and third defendants' selective disclosure of it to the plaintiff.

Privilege in the plaintiff's copy of the Affidavit

(1) Standing to assert privilege

87 Generally, privilege in a document belongs to the party who created that document, or on whose behalf the document was created. It should thus be asserted by that party or his successor. That being the case, the issue is whether the plaintiff being only a recipient of a copy of the Affidavit has standing to assert litigation privilege over the document.

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88 I find that he has. Support may be found in Paul Matthews & Hodge M Malek QC, *Disclosure* (Sweet & Maxwell: 2012, 4th Ed) ("*Matthews & Malek*"), in which the learned authors reasoned (at para 11.34):

> A copy made of a document already privileged in the hands of one party… for handling 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…

89 In his oral submissions, counsel for the first defendant highlighted Peter Gibson LJ's dictum in *Robert Hitchins*: "[t]he general rule is that privilege in a document can only be asserted by the person who brought the document into existence, or his successor." However, that quotation must be taken in context. In that case, the witness statements concerned were created by CSB for a third party claim which stood distinct from the main suit between the plaintiff and defendant. The defendant was thus attempting to independently assert in the main suit privilege over the witness statements created by CSB for the third party suit. That is not the case at present. In this regard, I would prefer the reasoning of Simon Brown LJ on a party's standing to assert litigation privilege as the recipient of a privileged document that was selectively disclosed:

> I recognise… that the defendants [*ie*, recipients of the privileged documents] are not in a strict sense the successors in title to the third party [*ie*, creators of the privileged documents]. But again, why should that be fatal to their right to assert the self-same privilege as the third parties, had they remained party to the proceedings[,] would unarguably been entitled to invoke?

90 In any event, even if the plaintiff here does not traditionally possess standing to assert litigation privilege over his copy of the Affidavit, I am of the view that the law should be developed to permit him to do so, given the policy reasons underlying a recognition of litigation privilege in this multi-party litigation context. The plaintiff should be entitled to assert such privilege over

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his copy at least insofar as the privilege in the original Affidavit subsists and has not been waived by the second and third defendants.

(2) Privilege in a copy

91 Based on the above findings, the original Affidavit that remains with the second and third defendants is privileged from disclosure. However, as the plaintiff clarified, what it has is only a copy of that Affidavit.

92 In my view, to the extent that litigation privilege covers the original Affidavit in the hands of the second and third defendants, it would also cover the copy of the Affidavit that is with the plaintiff. It is important to distinguish conceptually between the act of copying and the act of sharing the document concerned: different legal significance may attach to each act. As a general rule, the mere making of copies does not destroy or waive the privilege that otherwise subsists in the original document; without more, the copies themselves are also similarly privileged. This must be so in today's world of photocopiers, scanners, and e-mails. Further, as the learned AR observed, in the present case it would make a mockery of the litigation privilege that attaches to the original Affidavit if a party could be compelled to disclose copies of it merely by virtue of the fact that copies exist.

93 I appreciate that there are authorities which appear to distinguish between the privileged status of the original document and that of the copies. The learned authors of *Phipson on Evidence*, observing that "[t]he rule on copies are confusing and in consequence not well understood", stated that "[i]n determining whether copies are privileged, it is necessary to consider the purpose for which the copy document came into existence, and to consider each situation individually" (at paras 23-52 to 23-53). The line of authorities cited,

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however, does not arise for authoritative reconsideration at present. It suffices to observe that with the passage of time and changes to technology and legal practice, less legal significance would likely be accorded to the copying of a document in the present day.

94 Further, a distinction may have to be drawn between the copying of a *privileged* document, and the copying of an *unprivileged* document: there is no necessary symmetry in the applicable principles. To this end, Lord Denning MR opined in *Buttes Gas and Oil Co v Hammer (No 3)* [1980] 3 All ER 475 (at 484) (cited in *Coles v Elders Finance & Investment Co Ltd* [1993] 2 VR 356 at 360):

> If the original document is privileged… so also is any copy made by the solicitor. But if the original is not privileged, a copy of it also is not privileged, even though it was made by a solicitor for the purpose of litigation…

95 The present case concerns only the former situation in which copies were made of an otherwise privileged original document. The apparently conflicting dicta in *Robert Hitchins* must also be read in light of this distinction. Hobhouse LJ, who found that privilege attached to the original witness statements in the hands of CSB, concluded that the copies thereof in the hands of the defendant would similarly be privileged as both the original and copies shared the same character:

> In this case no problem arises about any distinction between copies and originals. The document which would have to be disclosed under a production order, if such was made, would be copies not originals. But they are copies which have the same character as the originals and fall within the policy which has been applied in recognition of legal professional privilege.

96 In contrast, Peter Gibson LJ's dictum suggesting that copies did not have privilege was premised on his finding that the original witness statements created by CSB were equally not privileged:

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> I would be reluctant to hold today that where a document for which a party could not claim privilege was photocopied, the mere making of the photocopy for the purposes of litigation was sufficient to create the privilege in the party causing the photocopy to be made.

97 There may be other issues and inconsistencies in the issue of privilege in copies, but those do not concern the present case. For present purposes, there is practical wisdom in adopting the general position stated by Professor Pinsler: "It is clear that where an original document is privileged, a copy of it is also privileged" (*Pinsler on Evidence* at para 14.034). There is no reason to depart from this presumptive position at present. Taken with my decision above on the privileged status of the original Affidavit, the plaintiff's copy of the Affidavit is similarly privileged notwithstanding that it is not the original.

98 In any event, the same result would attain even if we examine the purpose for which the copy of the Affidavit was made, as proposed in *Phipson on Evidence* (see [93] above). In this regard, it was undisputed that the copy of the Affidavit was made in the context, and for the purpose, of ongoing litigation. Accordingly, I find that the litigation privilege which attaches to the Affidavit was not destroyed or waived by the fact that it was copied, or because of the purpose for which it was copied.

Issue 2: Is the Affidavit protected by without prejudice privilege

General principles

99 Given my findings above, the issue of without prejudice privilege does not strictly arise and need only to be dealt with briefly. The applicable provision is s 23(1) of the EA, which reads:

> (1) In civil cases, no admission is relevant if it is made –

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> (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.

100 Section 23(1) must be understood in its statutory context. Section 21 of the EA provides that an admission is relevant and may be proved *against* its maker, or *by* the maker in limited specified circumstances. Section 23 of the EA provides an exception to s 21, setting out circumstances in which the admission is not relevant.

101 The leading decision on s 23(1) of the EA is the Court of Appeal's decision in *Mariwu Industrial Co (S) Pte Ltd v Dextra Asia Co Ltd and another* [2006] 4 SLR 807 ("*Mariwu*"). Strictly speaking, that case relates to a previous version of s 23, prior to the 2012 amendments to the EA. At that time, s 23 of the EA was a single provision. In 2012, s 23 was converted into s 23(1) and a new sub-section (2) was added as a reformulation of the previous explanation to s 23 (see *Pinsler on Evidence* at para 15-002). The 2012 amendment does not affect the analysis in this case, and *Mariwu* remains instructive for present purposes.

102 As explained in *Mariwu* in the context of the former s 23 of the EA, s 23(1) is "a statutory enactment of the common law principle relating to the admissibility of 'without prejudice' communications based on the policy of encouraging settlements" (at [24]). This head of privilege has two justifications, either or both of which may apply in a given case: first, the public policy of encouraging out of court settlement negotiations, and secondly, an implied agreement arising out of what is commonly understood to be the consequences of offering or agreeing to negotiate without prejudice (*Mariwu* at [24] citing

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Hoffmann LJ (as he then was) in *Muller v Linsley and Mortimer* [1996] PNLR 74).

Without prejudice privilege in multi-party litigation

103 As noted by Professor Pinsler, s 23(1) of the EA does not itself contemplate multi-party litigation (*Pinsler on Evidence* at para 15.014). However, in *Mariwu*, the Court of Appeal recognised as applicable at common law the leading House of Lords decision in *Rush & Tompkins v Greater London Council* [1988] 3 All ER 737 ("*Rush & Tompkins*"): "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*" (at [28]). In *Rush & Tompkins*, the doctrine of without prejudice privilege was applied in a multi-party litigation to address the likelihood that if the privilege did not protect settlement negotiations between a sub-group of the parties, that would "place a serious fetter on negotiations between [them] if they knew that everything that passed between them would ultimately have to be revealed to the one obdurate litigant" (at 744). Accordingly, the common law principles on without prejudice privilege apply in this case: the privilege protects from disclosure admissions made in the course of genuine negotiations to settle actual or contemplated litigation (see *Matthews & Malek* at para 14.02).

Standing to assert without prejudice privilege

104 Without prejudice privilege may be asserted by any one of the parties to the settlement negotiations. This flows from the principle that it is for all the parties involved in the negotiations to waive the privilege. As explained in *Phipson on Evidence*, this is a recognised anomaly in the law on privileges (at para 24-10):

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> Without prejudice privilege is seen as a form of privilege and usually treated as such. It does not, however, have the same attributes as the law of privilege. Privilege can be waived at the behest of the party entitled to the privilege. Without prejudice privilege can only normally be waived with the consent of both parties to the correspondence.

105 Similarly, *Thanki on Privilege* stated as follows (at para 7.39):

> The without prejudice privilege belongs to both parties. Without prejudice communications therefore cannot be shown to the court without the consent of both parties.

106 There is good reason for this position. What is protected is the discussion between the disputants; allowing any one of them to unilaterally use or disclose the documents would defeat the aim of protecting the safe haven of confidentiality under the privilege (see *Le Foe v Le Foe and Woolwich Plc* [2001] 2 FLR 970 at 996 citing Lord Esher MR in *Walker v Wilsher* (1889) 23 QBD 335).

107 Given that without prejudice privilege belongs properly to both parties to settlement negotiations, there is no issue with the plaintiff independently asserting without prejudice privilege over the Affidavit even if the second and third defendants, with whom settlement negotiations were conducted and in whose names the Affidavit was sworn, do not do the same.

Subsistence of without prejudice privilege

108 Substantively, the first defendant argues that without prejudice privilege does not protect the Affidavit from disclosure because (a) the Affidavit was made pursuant to, and not in the course of, the settlement negotiations, (b) the Affidavit does not contain admissions against the second or third defendant's interest, and (c) the privilege was waived as the Settlement Agreement

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envisaged the Affidavit being used at trial. For present purposes, I deal only with the first two contentions and make no comment as regards the third.

(1) Made in the course of settlement negotiations

109 I agree with the first defendant that while without prejudice privilege may persist after a settlement is reached, such privilege generally does not protect the product of the settlement negotiations, *ie*, the compromise or settlement itself. In this regard, *Phipson on Evidence* stated: "Although the negotiations may be without prejudice, the resulting agreement will not be, and thus the agreement will be disclosable where relevant" (in footnote 103 to para 24-16).

110 On the facts, the Affidavit is referred to in the Settlement Agreement with language which contemplates that the Affidavit is to be created after the Settlement Agreement is concluded. This suggests that the Affidavit is not an admission made in the course of settlement negotiations, but rather encapsulates the final outcome of the privileged discussions or at least a part thereof. The references to the Affidavit in this Settlement Agreement would also seem to incorporate the Affidavit as part of the Settlement Agreement. Therefore, the Affidavit is not itself protected by without prejudice privilege. There may be other factual and legal arguments not canvassed before me, which may merit argument on another occasion. As it is, I would leave the matter here in view of my conclusion on litigation privilege above.

(2) Admission

111 There are two limbs in s 23(1) of the EA, but regardless of which is invoked, the privilege applies in respect of an "admission" within the meaning of the term in the chapeau of the provision. Under the EA, the statutory

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definition of "admission" is contained in s 17(1) of the EA: "An admission is 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". At common law, without prejudice privilege also applies only to admissions against the maker's interest (see *Mariwu* at [31]; *Sin Lian Heng Construction Pte Ltd v SingTel* [2007] 2 SLR(R) 433 at [13]; *Krishna Kumaran s/o K Ramakrishnan v Kuppusamy s/o Ramakrishnan* [2014] 4 SLR 232 at [16]).

112 Based on what is stated of the Affidavit in the Settlement Agreement, the Affidavit focuses on "the nature and extent of [the first defendant's] involvement in the allegations of fraud and conspiracy" (see Recital [L] and cl 1.2 of the Settlement Agreement). Neither the plaintiff nor the second and third defendants have provided any evidence that the Affidavit contains matters going beyond that. The mere reference to the first defendant's involvement and liability does not mean that the Affidavit would necessarily be against the second and third defendants' interests: the Affidavit may well push blame onto the first defendant and absolve the second and third defendants. In the circumstances, it is difficult to see how the Affidavit would constitute or contain an admission by the second and third defendants.

113 For these reasons, I find that although the plaintiff is entitled to independently assert without prejudice privilege over the Affidavit, such privilege does not subsist because: (a) the Affidavit was made pursuant to, and not in the course of, the settlement negotiations, and (b) the Affidavit was not, and does not contain, an admission against the interests of its makers.

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Miscellaneous

Other forms of privilege

114 Traditionally, common interest privilege has two aspects (*Phipson on Evidence* at para 24-05). First, it can be used to enable party B to shield behind the privilege of party A and prevent party C from obtaining or using documents from B which were disclosed pursuant to the common interest between A and B in the subject matter of the communications (see, *eg*, *Motorola Solutions Credit Co LLC v Kemal Uzan and others* [2015] SGHC 228). Second, it can also be used to enable A to obtain from B documents which B can withhold on the ground of privilege against the rest of the world, on the basis that it is inconsistent with their common interest for B to claim privilege against A in relation to these documents (see, *eg*, *The Oriental Insurance Co Ltd v Reliance National Asia Re Pte Ltd* [2009] 2 SLR(R) 385 at [190]-[191]).

115 This doctrine was not argued or pleaded in the present case by the parties. In any case, for either aspect of common interest privilege to apply, some similar interest should be at stake, but there was no evidence of that nature here. Indeed, there is some force in the first defendant's argument that insufficient common interest exists between the plaintiff and the second and third defendants because by the terms of the Settlement Agreement, the plaintiff undertakes to "regulate future claims" and refrain from enforcing any judgment eventually obtained against the second and third defendants, but their substantive positions remain opposed during the litigation and they continue to take adversarial positions even in other applications before the court.

116 As regards joint interest privilege, which requires the relationship to be within specific categories, the parties here were not in any such type of relationship as to qualify. Nor was the doctrine argued or pleaded.

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Unfairness and the policy of candour

117 Two remaining arguments raised by the first defendant should be dealt with. First, he argues that it would be an unfair advantage if the plaintiff, but not he, has access to the Affidavit. That is not the case. As the learned AR observed, there is no unfairness in disallowing compelled disclosure of the Affidavit to the first defendant since he has, in the first place, no right to view the Affidavit in advance of the timelines for exchange of AEICs. Indeed, it may create a situation of unfairness if the court were to step in and compel expedited disclosure of only the AEIC of the second and third defendants (*ie*, the Affidavit) but not that of the other parties.

118 Secondly, the first defendant argues that justice is better served by candour than suppression. The actual position is, however, more nuanced. The various forms of privilege may each serve a different policy purpose. In recognition of the different factual situations that may arise, the courts will calibrate the relevant doctrine to best reflect their underlying rationale in novel situations. The overriding objective of this effort is to ensure the secure and effective administration of justice. In the context of a multi-party suit such as the present, it is part and parcel of legitimate trial preparation and strategy for a party to be able to show his hand to some but not all, and to explore the possibility of compromise on some if not all issues of dispute. This may differ from the traditional conception of litigation privilege in a two-party context, but the rationale for giving the parties "the autonomy… to strategise and prepare their cases in private in the interest of optimal presentation at the trial" continues to shine through (*Pinsler on Evidence* at para 14.002).

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Conclusion

119 For the foregoing reasons, while I have not found without prejudice privilege, I agree with the learned AR's conclusion that litigation privilege applies to the Affidavit, whether in relation to the original in the hands of the second and third defendants, or to the copy in the custody of the plaintiff. The appeal is therefore dismissed. Directions for arguments on costs will be given separately.

Aedit Abdullah
Judicial Commissioner

Eddee Ng, Alcina Chew, Lau Qiuyu and Sherlene Goh
(Tan Kok Quan Partnership) for the plaintiff;
See Chern Yang and Teng Po Yew (Premier Law LLC) for the first defendant.

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