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

[2023] SGHC 234

Originating Claim No 158 of 2022 (Summons No 3376 of 2022)

Between

Leong Quee Ching Karen

… *Claimant*

And

(1) Lim Soon Huat
(2) Lim Soon Heng
(3) Lim Kim Chong Investments Pte Ltd
(4) Sin Soon Lee Realty Company (Private) Limited
(5) Lim Yong Yeow, Thomas
(6) Seng Lee Holdings Pte Ltd

… *Defendants*

JUDGMENT

[Civil Procedure — Privileges — Without prejudice privilege]
[Civil Procedure — Privileges — Waiver]
[Civil Procedure — Privileges — *Muller* exception]
[Abuse of Process — Inconsistent positions — Non approbation and reprobation]

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v
Lim Soon Huat and others

[2023] SGHC 234

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Goh Yihan JC
20 June 2023

23 August 2023 Judgment reserved.

Goh Yihan JC:

1 The claimant, Ms Leong Quee Ching Karen, is a minority shareholder of the sixth defendant, Seng Lee Holdings Pte Ltd ("SLH"). The claimant commenced HC/OC 158/2022 ("OC 158") against the majority shareholders of SLH for alleged minority oppression. As part of OC 158, the claimant applied in HC/SUM 2781/2022 ("SUM 2781") for an interlocutory injunction to restrain the majority shareholders from transferring certain properties out of the ownership of SLH. The majority shareholders filed affidavits to oppose SUM 2781 and introduced email correspondence therein, which the claimant alleges is protected by "without prejudice" privilege (the "Emails"). Therefore, again as part of OC 158, the claimant has taken out the present application to strike out: (a) these Emails which were exhibited in the affidavits; and (b) the relevant paragraphs in the affidavits.

2 Having taken some time to carefully consider the parties' submissions, I allow the claimant's application to strike out all the Emails, save for the last email from Mr Robert Wee ("Mr Wee") sent on 9 November 2020 at 4.42pm. I provide the reasons for my decision in this judgment.

Background facts

The background to the parties' dispute

3 The dispute in OC 158 arose out of the conduct of the majority shareholders in SLH. The late Dato Lim Kim Chong ("Dato Lim") set up SLH to hold assets that he wished to distribute for the benefit of certain members of his family. The claimant is one of Dato Lim's eight children. The first to third defendants are the majority shareholders of SLH. The first defendant is Mr Lim Soon Huat ("Soon Huat") and the second defendant is Mr Lim Soon Heng ("Soon Heng"). The third defendant is Lim Kim Chong Investments Pte Ltd ("LKCI").

4 On 25 July 2013, Dato Lim and his children entered into a Deed of Family Arrangement (the "Original Deed") to, among others, distribute a portion of his assets to his eight children in Singapore. To effect this, Dato Lim divided his eight children into two groups ("Group A" and "Group B"). Dato Lim then caused his various companies (and the properties they owned) to be divided between the fourth defendant, Sin Soon Lee Realty Company (Private) Limited ("SSLRC"), and SLH. The Group A beneficiaries, which include Soon Huat, became shareholders of SSLRC and the beneficial owners of the assets held by SSLRC and its subsidiaries. The Group B beneficiaries, which include Dato Lim, the claimant, and Soon Heng, became shareholders of SLH and the beneficial owners of the assets held by SLH and its subsidiaries. On 15 September 2016, Dato Lim supposedly gave his personal and beneficial

stake in LKCI to Soon Huat. On 23 August 2017, Dato Lim also supposedly gave his personal and beneficial stake in SLH to Soon Huat. As a result, in addition to being a member of the Group A beneficiaries, Soon Huat also became a member of the Group B beneficiaries.

5 The Original Deed has been amended twice. On 28 February 2015, the members of the Lim family entered into an Amending and Restating Deed of Family Arrangement to amend certain terms of the Original Deed (the "Amended Deed"). Subsequently, on 11 January 2019, the parties to the Original Deed and the Amended Deed entered into a third deed, to provide, among others, for the disposal and handling of certain shares in an asset in Australia.

6 The obligations relevant to the present application are as follows. Under cl 9.1 of the Amended Deed, the Group A beneficiaries were obliged to procure SSLRC to make a gift or transfer two properties to SLH and/or its nominees. These two properties are known as the "Geylang Property" and the "Tamarind Road Property". For convenience, I will refer to the two properties as the "Properties". In addition, under cl 12.5 of the Amended Deed, the Group A beneficiaries were obliged to procure SSLRC to pay a sum of $9m, being part of the "Group B Assignment Amount" as defined in the Amended Deed, to SLH and/or its nominees. Again, for convenience, I will refer to this sum of $9m as the "Assignment Amount".

The events leading to the Emails between the parties

7 Sometime in July 2020, Dato Lim proposed a meeting between the Group A and Group B beneficiaries to resolve the transfers mentioned above. On Soon Heng's initiative, the meeting was eventually scheduled to take place

on 7 August 2020. Soon Heng set out the agenda for the meeting in an email dated 15 July 2020:[1]

> Since the ABSD is unlikely to be reduced or abolished by the Singapore government, we would like to proceed with the transfer of [the Geylang Property] and [the Tamarind Road Property] and also the net income earned from these properties to us immediately.
>
> Group B would like the properties to be transferred in the following manner:
>
> A) [the Geylang Property] to Lim Soon Huat and/or his nominee
>
> B) [the Tamarind Road Property] to be transferred to Lim Soon Huat's son, Thomas Lim Yong Yeow.
>
> Group B would also like Group A to transfer the balance assignment sum of S$9m to Dato Lim Kim Chong immediately.
>
> For the meeting agenda we would like to focus only on the following matters as Group B is not involved in Soon Huat's exit negotiation from SSLR:
>
> A) Transfer of [the Geylang Property] and [the Tamarind Road Property]
>
> B) To consolidate [the Geylang Property] under a single title before transfer
>
> C) Transfer of net income earned from the properties
>
> D) Transfer of balance assignment sum to Dato Lim Kim Chong

As the claimant points out, what Soon Huat proposed in his email in relation to the Properties and the Assignment Amount departed from that provided for in the Amended Deed.[2]

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1 1st Affidavit of Lim Soon Heng dated 22 August 2022 at pp 163–164 ("Soon Heng's 1st Affidavit").

2 Claimant's Written Submissions dated 9 June 2023 ("CWS") at para 18.

8 The above-mentioned meeting between the Group A and Group B beneficiaries took place as scheduled on 7 August 2020. It was attended by, among others: (a) certain members of Group A; (b) Mr Wee of Ho & Wee LLP, as the solicitor representing the Group A beneficiaries; (c) Soon Heng and the claimant, as members of Group B; (d) Mr Tan Teng Muan ("Mr Tan") of Mallal & Namazie, as the solicitor representing the Group B beneficiaries at the time; (e) Dato Lim; (f) Mr Yang Shi Yong of Drew & Napier LLC, as Dato Lim's solicitor; (g) Soon Huat; and (h) Mr Sarbjit Singh ("Mr Singh") and Mr Thomas Ang of Selvam LLC, as the solicitors representing Soon Huat.

9 However, the meeting was cut short after thirty minutes when Dato Lim left the meeting room. In the days following 7 August 2020, the lawyers who attended the meeting exchanged email correspondence – that is, the Emails – about the issues discussed at the meeting. It is not disputed that several of the Emails were marked by the lawyers as being "without prejudice" or "without prejudice save as to costs".

The events leading to the present application

10 On 27 July 2022, the claimant commenced OC 158 against, among others, the majority shareholders of SLH, including Soon Huat and Soon Heng, for minority oppression. For present purposes, it suffices to state that one of the alleged oppressive acts was that Soon Huat and Soon Heng intended for Soon Huat and his son, Mr Lim Yong Yeow Thomas ("Thomas"), to receive the Properties instead of SLH. Thus, the claimant filed SUM 2781, where she sought, among others, an injunction to restrain the transfer of the Properties to Soon Huat and Thomas pending the final determination of OC 158 and any appeals therefrom.

11 Against this background, on 22 August 2022, Soon Heng and Soon Huat filed affidavits to oppose SUM 2781. Soon Huat exhibited the Emails in his affidavit.[3] In that affidavit, Soon Huat explained that he did so because three of the Group A beneficiaries sent a letter dated 15 June 2022 (the "15 June 2022 Letter") that made reference to one of the said Emails, which Soon Huat took to be the Group A beneficiaries waiving the "without prejudice" privilege which attached to the Emails. Soon Heng also exhibited the Emails in his affidavit.[4] He also relied on the 15 June 2022 Letter for exhibiting the Emails.

12 After the claimant discovered that Soon Heng and Soon Huat had exhibited the Emails, she sought, through her solicitors, for Soon Heng and Soon Huat to voluntarily strike out the Emails from their respective affidavits. When Soon Heng and Soon Huat refused to do so, the claimant filed the present application to strike out the Emails exhibited in Soon Heng's and Soon Huat's affidavits filed to oppose SUM 2781, as well as the relevant paragraphs in the said affidavits.

The parties' positions

The claimant's position

13 The claimant asserts that the Emails are protected by "without prejudice" privilege for the following reasons. First, they concerned disputed issues that had not been resolved during the meeting on 7 August 2020.[5] As such, the Emails were sent as a continuation of the discussions at the meeting. Second, several of the Emails were marked "without privilege" and were sent

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3 1st Affidavit of Lim Soon Huat dated 22 August 2022 at pp 213–235.

4 Soon Heng's 1st Affidavit at pp 178–205.

5 CWS at paras 45(a) and 46–50.

by lawyers, including lawyers who represented the claimant at the time.[6] Third, the emails were sent as part of a continuing discussion to resolve certain disputes, and via these emails some of the parties attempted, through their lawyers, to compromise on certain issues.[7] Fourth, Soon Heng and Soon Huat implicitly recognised that the Emails are protected by "without prejudice" privilege.[8] Finally, the claimant has not waived the "without prejudice" privilege over the Emails.[9]

The defendants' positions

14 The defendants maintained largely similar positions even though they were represented by two sets of lawyers. Mr Singh appeared for the first, third, and fifth defendants. Mr Tan appeared for the second defendant. As Mr Singh and Mr Tan indicated that they adopt each other's submissions, I will refer to them collectively as the "defendants".

15 The first (being Soon Huat), third, and fifth defendants make three points. First, the claimant does not have standing to assert "without prejudice" privilege over the Emails.[10] Second, contrary to the claimant's assertions, the Emails do not constitute admissions as part of a course of negotiations to settle a dispute.[11] As such, the Emails are not protected by "without prejudice" privilege. Third, even if the Emails are protected by "without prejudice"

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6 CWS at paras 45(b) and 51–55.

7 CWS at paras 45(c) and 56–59.

8 CWS at paras 45(d) and 60–65.

9 CWS at paras 68–75.

10 1st, 3rd, and 5th Defendants' Written Submissions dated 9 June 2023 ("D1WS") at paras 21–25.

11 D1WS at paras 47–58.

privilege, the exception in the English Court of Appeal decision of *Muller v Linsley and Mortimer (a firm)* [1994] EWCA Civ 39 ("*Muller*") applies to prevent the claimant from relying on such privilege.[12] For convenience, I shall term this as the "*Muller* exception". In addition, Mr Singh submitted before me that the claimant cannot be allowed to hide behind the "without prejudice" privilege to avoid making material disclosures in SUM 2781.

16 The second defendant (being Soon Heng) makes two points. First, the Emails are not protected by "without prejudice" privilege because they were not written in the nature of a compromise or a genuine attempt to settle the parties' dispute.[13] On the contrary, the Emails were, in substance, communications wherein the respective parties simply asserted their rights.[14] Second, the claimant acquiesced to the disclosure of the Emails because she accepts that the 15 June 2022 Letter can be relied upon in these proceedings.[15] The claimant cannot therefore be allowed to approbate and reprobate, in accordance with the English High Court decision of *Express Newspapers plc v News (UK) Ltd and others* [1990] 1 WLR 1320 ("*Express Newspapers*").[16] When I asked Mr Tan about the legal basis of this principle, Mr Tan alluded to broad public policy reasons but could not point me to an authority that regarded this principle as a specific exception to "without prejudice" privilege.

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12 D1WS at paras 69–73.

13 2nd Defendant's Written Submissions dated 9 June 2023 ("D2WS") at para 24.

14 D2WS at para 25.

15 D2WS at paras 34(c) and 35.

16 D2WS at para 35.

The relevant issues

17 With the parties' positions in mind, there are, in my view, four relevant issues that I will need to address.

(a) First, whether the claimant has standing to assert "without prejudice" privilege.

(b) Second, whether the Emails are protected by "without prejudice" privilege.

(c) Third, assuming that the claimant has standing to assert "without prejudice" privilege, and the Emails are protected by "without prejudice" privilege, whether the claimant has waived such privilege.

(d) Fourth, even if the claimant has not waived "without prejudice" privilege, whether any exception to the privilege applies in the present case.

18 I turn now to deal with each of these issues.

Whether the claimant has standing to assert "without prejudice" privilege over the Emails

The applicable law

19 It is trite law that "communications in the course of negotiations genuinely aimed at settlement of a dispute are protected by 'without prejudice' privilege" (see the High Court decision of *Cytec Industries Pte Ltd v APP Chemicals International (Mau) Ltd* [2009] 4 SLR(R) 769 ("*Cytec*") at [14], citing *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280 ("*Rush & Tompkins*") at 1299). However, as a threshold issue, a third party

cannot claim "without prejudice" privilege if it took "no part in the 'without prejudice' negotiations, either personally or through an agent" (see the High Court decision of *A-B Chew Investments Pte Ltd v Lim Tjoen Kong* [1989] 2 SLR(R) 149 ("*A-B Chew (HC)*") at [16]).

20 The High Court decision of *Yeo Hiap Seng v Australia Food Corp Pte Ltd and another* [1991] 1 SLR(R) 336 provides guidance. There, a contractual dispute arose between the plaintiff and the two defendants in relation to the supply of fruit juice by the plaintiff to the first defendant. The second defendant, being the director of the first defendant, applied to expunge parts of the plaintiff's affidavit which exhibited negotiations between the plaintiff and the first defendant protected by "without prejudice" privilege. The High Court upheld the Assistant Registrar's decision to dismiss the second defendant's application. In doing so, the court reiterated the principle in *A-B Chew (HC)* as follows (at [14]–[15]):

> 14 … The issue in the instant case is whether the second defendant who was never at or represented in the negotiations can now claim that certain exhibits in the affidavit of James Loke filed on 6 September 1990 are privileged from disclosure … In my view, the second defendant can only succeed if she can show that she is entitled to claim the privilege.
>
> 15 In the case of *A-B Chew Investments Pte Ltd v Lim Tjoen Kong* [1989] 2 SLR(R) 149, P Coomaraswamy J held that the privilege on "without prejudice" negotiations applies to statements by the parties and the solicitors respectively acting for them. If a party took no part in the "without prejudice" negotiations either personally or through an agent, he cannot claim the privilege. Accordingly, I am of the view that the second defendant's appeal against the decision of the learned assistant registrar of 10 January 1991 cannot succeed.

21 Accordingly, the defendants are correct that a party needs to show, as a threshold issue, that he or she has standing by having taken part in the "without

prejudice" privilege negotiations or communications either personally or through an agent.

My decision: the claimant has standing to assert "without prejudice" privilege over the Emails

22 In my judgment, the claimant has standing to assert "without prejudice" privilege over the Emails. This is because, at the times when the Emails were exchanged, the claimant was a party to these exchanges through Mallal & Namazie, who was representing her and Soon Heng. Indeed, Soon Heng expressly admitted to this in his affidavit dated 12 May 2023, when he said that "Group B (comprising myself and the *Claimant* and excluding Soon Huat) *was represented by Mallal & Namazie*" [emphasis added].[17] Since the defendants have not successfully challenged the fact of this representation, I find that the claimant has the requisite standing.

Whether the Emails are protected by "without prejudice" privilege

23 I turn then to the issue of whether the Emails are protected by "without prejudice" privilege. I first set out some important, and well-established, principles of law in this regard.

The applicable law

24 The common law rule on "without prejudice" privilege is statutorily embodied in s 23 of the Evidence Act 1893 (2020 Rev Ed) (the "EA"), which states as follows:

> **Admissions in civil cases when relevant**
>
> **23.**—(1) In civil cases, no admission is relevant if it is made —

[17] 2nd Affidavit of Lim Soon Heng dated 12 May 2023 at para 21.

> (*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.
>
> (2) Nothing in subsection (1) is to be taken —
>
> (*a*) to exempt any advocate or solicitor from giving evidence of any matter of which he or she may be compelled to give evidence under section 128; or
>
> (*b*) to exempt any legal counsel in an entity from giving evidence of any matter of which he or she may be compelled to give evidence under section 128A.

25 There are two well-established rationales for "without prejudice" privilege. They were summarised in the Court of Appeal decision of *Mariwu Industrial Co (S) Pte Ltd v Dextra Asia Co Ltd and another* [2006] 4 SLR(R) 807 ("*Mariwu*") (at [24]):

> Section 23 of the Evidence Act is a statutory enactment of the common law principle relating to the admissibility of "without prejudice" communications based on the policy of encouraging settlements. In *Muller v Linsley and Mortimer* [1996] PNLR 74 ("*Muller*") at 77, Hoffmann LJ (as he then was) explained this principle in these words:
>
> > *Cutts v Head* [[1984] Ch 290] shows that the ["without prejudice"] rule has two justifications. Firstly, the public policy of encouraging parties to negotiate and settle their disputes out of court and, secondly, an implied agreement arising out of what is commonly understood to be the consequences of offering or agreeing to negotiate without prejudice. In some cases both these justifications are present; in others, only one or the other.
>
> The words in s 23 contemplate two different situations that invoke the underlying rationales of the "without prejudice" rule. The first situation is where there is an express condition that any admission made by either party in the context of negotiations to settle a dispute is not to be "given", *ie*, admissible in evidence against the party making the admission. The situation applies to all communications made expressly "without prejudice". The second situation is where an admission is made "under circumstances from which the court

> can infer that the parties agreed together that evidence of it should not be given". This situation will cover cases where even though a statement is not expressly made "without prejudice" the law holds that it is made without prejudice because it was made in the course of negotiations to settle a dispute: see the judgment of Lord Hoffmann in *Bradford & Bingley plc v Rashid* [2006] 1 WLR 2066 at [13] ("*Bradford & Bingley*").

26 The first, and the primary rationale, is public policy. Indeed, as the Court of Appeal explained in *Greenline-Onyx Envirotech Phils, Inc v Otto Systems Singapore Pte Ltd* [2007] 3 SLR(R) 40 ("*Greenline-Onyx*"), "without prejudice" privilege "is founded on the public policy of encouraging litigants to settle their differences rather than to litigate them to the finish" (at [14], citing *Rush & Tompkins* at 1299). As such, "parties should not be discouraged by the knowledge that anything said in the course of negotiations may be used to their prejudice in the course of proceedings" (at [14], citing *Cutts v Head* [1984] Ch 290 at 306). The second rationale is grounded in contract, in that "without prejudice" communications constitute an implied agreement arising out of what is commonly understood to be the consequences of offering or agreeing to negotiate without prejudice (see *Mariwu* at [24]).

27 In so far as s 23 of the EA expresses only the broad principles behind "without prejudice" privilege and does not specify the scope of its operation, many of the detailed rules governing the operation of "without prejudice" privilege must be discerned from the common law (see, *eg*, *A-B Chew (HC)* at [15]). I turn to examine these rules.

28 First, the existence of a dispute and an attempt to compromise it are at the core of the "without prejudice" privilege. As such, "without prejudice" privilege cannot be involved where no dispute exists (see *Mariwu* at [30]). Indeed, the communications in respect of which privilege is claimed must arise in the course of genuine negotiations to settle a dispute (see the Court of Appeal

decision of *Ernest Ferdinand Perez De La Sala v Compañia De Navegación Palomar, SA and others and other appeals* [2018] 1 SLR 894 ("*Ernest Ferdinand*") at [67]). In addition to the existence of a dispute, communications are protected by "without prejudice" privilege when such communications involve statements or conduct amounting to admissions against a party's interests. The rationale behind this was explained by Sundaresh Menon JC (as he then was) in the High Court decision of *Sin Lian Heng Construction Pte Ltd v Singapore Telecommunications Ltd* [2007] 2 SLR(R) 433 ("*Sin Lian Heng*") in the following terms (at [43]):

> … A statement or action that appears on its face to go against the interest of the maker might be seized upon by the opposite party as an admission. This may take the form of statements which are prejudicial in any number of ways. Where one party enters into negotiations with another to explore the possibilities of settlement, it makes sense of course to attempt to convince the opponent of the weaknesses of his position; but it is not unusual – even common – to seem to acknowledge possible weaknesses in one's own case. Even the level of an offer may be seen as a barometer of the offering party's enthusiasm for the merits of his own position, and while that may be quite irrelevant if the communication was cloaked by the privilege, one can see that most litigants would avoid any attempt at settlement if there was a risk that their offers to settle were later going to be raised against them as a sign of weakness. It is thus in the overall spirit of encouraging negotiations that parties be sufficiently protected when they "lay their cards on the table". …

As such, where correspondence shows an intention to compromise a dispute, or contains such an offer, this would amount to an admission against interest that can attract "without prejudice" privilege. This, as Menon JC explained in *Sin Lian Heng*, is entirely consistent with the rationale of encouraging parties to speak frankly in the course of their negotiations, without concern that anything which they have said can be used against them in the event of litigation.

29 Second, when determining whether a particular correspondence is protected by "without prejudice" privilege, the use of the label "without prejudice" is important but not conclusive. As the High Court explained in *Swee Wan Enterprises Pte Ltd v Yak Thye Peng* [2017] SGHC 313 ("*Swee Wan*") (at [10], citing *Cytec* at [16]), "attaching a 'without prejudice' label to a communication does not conclusively or automatically render it privileged". This is consistent with the focus that the law has on the substantive rather than just the form. However, this does not mean that the use of a "without prejudice" label should be completely disregarded. On the contrary, as the High Court also explained in *Swee Wan* (at [10]), "[t]he presence of such words would, however, place the burden of persuasion on the party who contends that they should be ignored". This is again consistent with the idea that the law attributes importance to a person's conduct, especially if it was knowing and intentional. As such, the intentional use of the "without prejudice" label has to mean something, and the very least that should lead to is that the party who contends that it should be ignored bears the burden of proving so. Further, correspondence that is not expressly labelled as being "without prejudice" will be privileged if it is written in reply to a correspondence that is so labelled, or is part of a continuing sequence of negotiations, whether by correspondence or orally (see Bankim Thanki QC, *The Law of Privilege* (Oxford University Press, 2nd Ed, 2011) at para 7.13).

30 Third, "without prejudice" privilege can also arise in a multi-party situation. In this regard, the Court of Appeal in *Mariwu* recognised (at [28]) that because "the rationale of the s 23 [EA] privilege is to encourage settlements … [there is] no inconsistency between that section and *Rush & Tompkins*". In the House of Lords decision of *Rush & Tompkins*, a dispute arose between the plaintiffs, the first defendant, and the second defendants over the construction

of some buildings. As the plaintiffs and the first defendant reached an out-of-court settlement, this left only the plaintiffs and the second defendants engaged in litigation. The court denied the second defendants' application for discovery of the correspondence between the plaintiffs and the first defendant leading to their settlement, because the correspondence was protected by "without prejudice" privilege. Lord Griffiths explained why it was important for "without prejudice" privilege to apply to a multi-party situation (at 1301):

> … Suppose the main contractor in an attempt to settle a dispute with one subcontractor made certain admissions[. It is] clear law that those admissions cannot be used against him if there is no settlement. The reason they are not to be used is because it would discourage settlement if he believed that the admissions might be held against him. But it would surely be equally discouraging if the main contractor knew that if he achieved a settlement those admissions could then be used against him by any other subcontractor with whom he might also be in dispute. The main contractor might well be prepared to make certain concessions to settle some modest claim which he would never make in the face of another far larger claim. It seems to me that if those admissions made to achieve settlement of a piece of minor litigation could be held against him in a subsequent major litigation it would actively discourage settlement of the minor litigation and run counter to the whole underlying purpose of the "without prejudice" rule. …

Indeed, in so far as "without prejudice" privilege applies in a two-party situation to promote settlement negotiations, the same privilege applies to a multi-party situation to protect settlement negotiations between some of the parties, even if the other parties are not willing to resolve the matter amicably.

31 Further, the High Court decision of *United Overseas Bank v Lippo Marina Collection Pte Ltd and others* [2018] 4 SLR 391 provides a useful summary on the application of "without prejudice" privilege to a multi-party situation (at [103]):

> As noted by Prof 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).

My decision: some of the Emails are protected by "without prejudice" privilege

32 With the above principles in mind, I find that all of the Emails are protected by "without prejudice" privilege, save for the last email from Mr Wee sent on 9 November 2020 at 4.42pm, for the following reasons.

The Emails were intended to further discuss the issues in dispute that the meeting of 7 August 2020 was meant to resolve

33 Generally, I agree with the claimant that there remained disputed issues that were not resolved at the meeting of 7 August 2020. As such, the Emails were sent as a continuation of the discussions at the meeting.

34 As a starting point, I agree with Mr Singh's reliance on the English High Court decision of *BE v DE* [2014] EWHC 2318 (Fam) ("*BE*") for the proposition that the court must have regard to the circumstances of the meeting of 7 August 2020 in assessing whether the Emails were meant to follow up on

discussions therefrom. In *BE*, the husband and wife had dinner in an attempt to reconcile their marriage. During the dinner, the husband presented his wife with an agreement to sign. This agreement stated, among others, that the wife shall continue to live in her property in London. The wife did not sign the agreement. She later sought to adduce the agreement as evidence to prove that she was domiciled in England, in support of her argument that the English court had jurisdiction. The husband sought to redact the agreement on the basis that it was made in the course of settlement negotiations. The English High Court, proceeding on the assumption that there was a dispute between the parties, held that the parties could not be said to have met to compromise the dispute as the wife merely attended a dinner with her husband and was not aware that it was an opportunity to negotiate (at [24]). Applying this to the present application, I have no difficulty agreeing with Mr Singh that the court must have regard to the circumstances from which the Emails originated from, when assessing whether they are protected by "without prejudice" privilege.

35 With this general premise in mind, I, however, disagree with the defendants' characterisation of the meeting as being "less a discussion and more a declaration of the position taken by the Group A Beneficiaries".[18] This is because the circumstances in which the Emails originated against the backdrop of the meeting of 7 August 2020, which shows that they were exchanged with the aim of compromising the parties' dispute. I say this for the following reasons.

36 First, the meeting of 7 August 2020 was apparently called for because it had been proposed that the transfer of the Properties and the Assignment Amount take place in a manner which departed from what was stated in the

[18] D1WS at para 49.

Amended Deed. Second, the members of the opposing Group A and Group B beneficiaries attended with their lawyers, a fact which shows that they anticipated needing to go into negotiations requiring the assistance of their lawyers. Third, the meeting was cut short because it was "tense",[19] as suggested by Soon Heng, which showed that there was a dispute between the parties that needed to be settled. Thus, when the Emails were exchanged between the parties' lawyers, starting with the email sent by Mr Wee on 18 August 2020 at 10.47am, it was clear that the Emails were sent as a continuation of the discussion of the various issues raised at the meeting on 7 August 2020.

37 The fact that the Emails were meant to continue the parties' discussion of the issues that had remained unresolved from the meeting on 7 August 2020 can be seen from the email that Mr Tan had sent on 24 August 2020 at 1.38pm, in which Mr Tan wrote at paragraph 28 that:[20]

> In respect of your email of 17 August 2020, I had expected a substantive response that eventually came the following day. Your 18 August 2020 email elaborated on what you very briefly stated on 7 August 2020. *I think correspondence should remain focused on the matters our respective clients want to move forward on. We should work together to address the outstanding matters in Clauses 9 and 12 of the Amended Deed.*
>
> [emphasis added]

The italicised words speak for themselves. It is clear that, from the perspective of Mr Tan, that all of the parties "want to move forward", and the parties should "work together to address the outstanding matters in Clauses 9 and 12 of the Amended Deed". As such, far from each Group being resolute in their respective positions, Mr Tan's email clearly suggests that the parties were attempting to reach a compromise in their dispute.

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19 D1WS at para 49.

20 Soon Heng's 1st Affidavit at pp 193–199.

38 A further example of the attempt to compromise the dispute can be seen in the email sent by Mr Ang on 24 September 2020 at 4.25pm.[21] In that email, Mr Ang stated that Soon Huat "also confirms that he is prepared for the S$ 9 million [*ie*, the Assignment Amount] to be transferred to the Group B Holding Company immediately". This is different from what Soon Heng promised in his email of 15 July 2020, where he suggested that the Assignment Amount be paid to Dato Lim instead.[22] This is thus a concession on the part of Soon Huat, presumably in an attempt to compromise the dispute between the parties.

39 More holistically, I find that the Emails were, generally speaking, exchanges for the parties to negotiate on the conditions for the transfers of the Properties and the Assignment Amount. Indeed, while the language used may have been firm at times, it is clear that Mr Wee, on behalf of the Group A beneficiaries, was proposing certain conditions, which the other parties had not agreed to. The parties were trying to find a middle ground to resolve their dispute. Although, as we now know, the parties did not manage to resolve their dispute amicably, this does not mean that the Emails had not been an attempt to compromise that dispute.

40 However, I do not think that *all* of the Emails reveal such an attempt to resolve the parties' dispute. In my judgment, the last of the Emails sent by Mr Wee on 9 November 2020 at 4.42pm cannot amount to such an attempt.[23] While marked as being "without prejudice", this email contains a host of allegations and contains no hint of an attempt to settle or compromise the

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21 Soon Heng's 1st Affidavit at pp 180–181.

22 Soon Heng's 1st Affidavit at pp 163–164.

23 Soon Heng's 1st Affidavit at pp 178–179.

parties' dispute. Indeed, it expressly states at paragraph 5.2 that "[y]ou and your clients are free to do as they wish". There is no attempt to settle or compromise the dispute.

41 Accordingly, I find that all the Emails, save for the one sent by Mr Wee on 9 November 2020 at 4.42pm, were intended to further discuss the issues in dispute that the meeting on 7 August 2020 was meant to resolve. This therefore cloaks them with "without prejudice" privilege.

The Emails were marked as being "without prejudice" and were sent by lawyers

42 I am fortified in my conclusion above by the fact that some of the Emails were marked as being "without prejudice" and were sent by lawyers. In my view, it is significant that several of the Emails were marked as being "without prejudice". Notably, the first of the Emails, which was sent by Mr Wee on 18 August 2020 at 10.47am, was marked "without prejudice".[24] This shows that Mr Wee, who, being a lawyer, obviously can be taken to know the effect of the "without prejudice" label, regarded the purpose of his email to be for the discussion of the issues arising from the meeting on 7 August 2020, and with a view of settling them with the other parties. Moreover, Mr Wee continued to label his other emails (which are part of the Emails) as "without prejudice".

43 Indeed, when the other lawyers replied to this first email, there were indications that they regarded the subsequent correspondence to be "without prejudice". First, in his email sent on 23 September 2020 at 6.15pm, Mr Tan ended his email at paragraph 27 by stating that his firm "will send your firm *an*

[24] Soon Heng's 1st Affidavit at pp 199–202.

open letter on the foregoing shortly" [emphasis added].[25] Although this email of 23 September 2020 was not marked as "without prejudice", Mr Tan must have regarded this to be so, otherwise there would be no need for his firm to send an open letter that is distinct from the said email. Second, the email sent by Mr Ang on 24 September 2020 at 4.25pm was expressly marked as "without prejudice save as to costs".[26] Third, none of the other lawyers protested the use of the "without prejudice" label by Mr Wee and others, even when they were responding directly or indirectly to Mr Wee.

44 Thus, as the High Court noted in *Swee Wan* (at [24]), it is important that correspondence is marked as "without prejudice" and more so if the correspondence was written by lawyers. This places the burden on the defendants, who are now urging the court to ignore the "without prejudice" label, to explain why the Emails are not privileged. Apart from the last email sent by Mr Wee on 9 November 2020 at 4.42pm, I am not satisfied that the defendants have provided a satisfactory explanation in this regard. Indeed, I do not think that it is satisfactory for the defendants to now explain before me that the "without prejudice" labels were used by the lawyers at the time only "out of caution", when it is not clear what this caution is about. Instead, for the reasons I explained earlier, I do not think that the parties were so resolute in their positions that there was no compromise to be made.

45 For all of these reasons, I find that all of the Emails, save for the last email from Mr Wee sent on 9 November 2020 at 4.42pm, are protected by "without prejudice" privilege.

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25 Soon Heng's 1st Affidavit at pp 181–187.

26 Soon Heng's 1st Affidavit at pp 180–181.

Whether the claimant has waived "without prejudice" privilege over the Emails

46 Having decided that all but one of the Emails are protected by "without prejudice" privilege, I turn now to consider if the claimant has waived such privilege.

The applicable law

47 Although s 23 of the EA does not address the doctrine of waiver, the Singapore courts have accepted that the doctrine of wavier applies to "without prejudice" privilege (see *Swee Wan* at [14]). The applicable law in relation to waiver is trite. First, waiver requires the consent of both parties (see *Swee Wan* at [14], citing the High Court decision of *Krishna Kumaran s/o K Ramakrishnan v Kuppusamy s/o Ramakrishnan* [2014] 4 SLR 232 at [22]). Apart from an express waiver, an implied waiver of privilege can only be effective if it is clear and involves "conduct that unequivocally points to an intention not to rely on the privilege" (see *Sin Lian Heng* at [61]). This must be proven to the standard of a balance of probabilities based on "clear evidence" (see the High Court decision of *Lau Chin Eng and another v Lau Chin Hu and others* [2009] SGHC 225 at [17]). As such, the fact that a party makes reference to the existence of a privileged document (but not its contents) cannot be taken as a waiver of "without prejudice" privilege.

48 Thus, in *Sin Lian Heng*, Menon JC noted that a "single reference to the letter in the context of correspondence between the parties themselves" did not amount to a waiver of privilege (at [61]). This can be contrasted with *A-B Chew (HC)*, in which there was a waiver of privilege because the parties had not only referred to "without prejudice" communications, but also on affidavit "descended into the details of what had actually transpired" (at [24]). Indeed,

"[r]ather than close the door of privilege, the defendant and his solicitors opened it even wider" (at [24]). Similarly, in *Greenline-Onyx*, the defendant failed to assert "without prejudice" privilege over certain documents that had been included in the agreed bundle of documents for the trial of the matter (at [20]–[22]).

49 Second, a party cannot unilaterally waive privilege only to claim it later when his opponent makes reference to those communications (see *A-B Chew (HC)* at [22]). This is consistent with the rule against cherry picking, that one party may not cherry pick parts of documents that were favourable and retain privilege for parts that were unfavourable (see the High Court decision of *Tentat Singapore Pte Ltd v Multiple Granite Pte Ltd and others* [2009] 1 SLR(R) 42 at [24]).

50 Third, there is no requirement that waiver must result in injustice or detriment to the other party. This is because waiver is a rule of evidence and should not be confused with waiver as a form of proprietary estoppel, which is a rule of equity (see the Court of Appeal decision of *Lim Tjoen Kong v A-B Chew Investments Pte Ltd* [1991] 2 SLR(R) 168 at [25]).

My decision: the claimant did not waive "without prejudice" privilege over the Emails

51 With the above principles in mind, I find that the claimant did not waive "without prejudice" privilege over the Emails. First, I do not think the fact that the Group A beneficiaries referred to one of the Emails in the 15 June 2022 Letter is material because the claimant was not even a party to that Letter. Thus, she cannot be taken to have waived any privilege. Second, if the defendants' argument is that the claimant has waived privilege by not objecting to the contents of the 15 June 2022 Letter being disclosed in Soon Heng's and Soon

Huat's affidavits, I disagree. This is because the claimant did not discuss the contents of the Emails. Further, the 15 June 2022 Letter only contains a passing reference to *one* of the Emails, and did not discuss its contents. As such, this cannot, without more, amount to unequivocal conduct that is sufficient to waive privilege.

52 Accordingly, I find that the claimant did not waive "without prejudice" privilege over the Emails.

Whether any exception to "without prejudice" privilege over the Emails applies

53 The final issue that I must consider is whether any exception to "without prejudice" privilege over the Emails applies. The defendants have raised two exceptions: (a) the *Muller* exception; and (b) the doctrine of approbation and reprobation, which I shall consider in turn.

The applicable law on the Muller *exception*

54 Although the *Muller* exception has received considerable judicial attention in the UK, little – if at all – has been said about it in Singapore. In this regard, I will set out the relevant cases discussing the *Muller* exception in the UK, before turning to how it may potentially apply in Singapore.

The Muller *exception in the UK*

55 It is appropriate to begin with the English Court of Appeal decision of *Muller*, from which the *Muller* exception emanated. The brief facts are as follows. The plaintiffs sued the defendants – who were their solicitors – for negligence. The plaintiffs had consulted the defendants about a dispute between the plaintiffs and shareholders and directors of a company, which eventually

culminated in a settlement. In the course of that dispute, the plaintiffs claimed the defendants negligently submitted an unstamped transfer document that led to the first plaintiff's dismissal from the said company. As a result, the first plaintiff was forced to sell his shares in the company. The share price subsequently increased. One of the issues in the parties' dispute was whether the settlement constituted a reasonable attempt by the plaintiffs to mitigate their damage. The plaintiffs sought to withhold disclosure of documents leading to the settlement based on "without prejudice" privilege. The court, which comprised Hoffmann, Swinton Thomas, and Leggatt LJJ, ordered the plaintiffs to disclose the documents. Hoffmann LJ reasoned his decision on an exception to "without prejudice" privilege:

> If one analyses the relationship between the without prejudice rule and the other rules of evidence, it seems to me that the privilege operates as an exception to the general rule on admissions (which can itself be regarded as an exception to the rule against hearsay) that the statement or conduct of a party is always admissible against him to prove any fact which is thereby expressly or impliedly asserted or admitted. The public policy aspect of the rule is not in my judgment concerned with the admissibility of statements which are relevant otherwise than as admissions, i.e. independently of the truth of the facts alleged to have been admitted.
>
> Many of the alleged exceptions to the rule will be found on analysis to be cases in which the relevance of the communication lies not in the truth of any fact which it asserts or admits, but simply in the fact that it was made. Thus, when the issue is whether without prejudice letters have resulted in an agreed settlement, the correspondence is admissible because the relevance of the letters has nothing to do with the truth of any facts which the writers may have expressly or impliedly admitted. They are relevant because they contain the offer and acceptance forming a contract which has replaced the cause of action previously in dispute. Likewise, a without prejudice letter containing a threat is admissible to prove that the threat was made. A without prejudice letter containing a statement which amounted to an act of bankruptcy is admissible to prove that the statement was made; see [*Re Daintrey* [1893] 2 QB 116]. Without prejudice correspondence is always admissible to explain delay in commencing or prosecuting litigation. Here again, the relevance

> lies in the fact that the communications took place and not the truth of their contents. Indeed, I think that the only case in which the rule has been held to preclude the use of without prejudice communications, otherwise than as admissions, is in the rule that an offer may not be used on the question of costs; a rule which, as I have said, has been held to rest purely upon convention and not upon public policy.

Hoffmann LJ's reasoning was that the public policy rationale of "without prejudice" privilege did not apply to statements that are relevant, not because of the truth of any fact it asserts or admits, but simply on the fact that *it was made*. On the other hand, Swinton Thomas and Leggatt LJJ reasoned their decisions on the basis that the plaintiffs had waived any "without prejudice" privilege that protected the negotiations.

56 The subsequent cases and the discussions of the *Muller* exception therein have centered around the following concerns: (a) whether the exception undermines the rationales behind "without prejudice" privilege; (b) what the basis for the exception is; and (c) what the test for the exception is. The upshot of these concerns is that the status of the *Muller* exception is very much in doubt in the UK.

57 The first concern is that the exception undermines the rationales behind "without prejudice" privilege. As mentioned earlier, the primary rationale is the public policy of encouraging parties to settle their disputes rather than litigate them. Indeed, in the English Court of Appeal decision of *Unilever plc v Procter & Gamble Co* [2000] 1 WLR 2436 ("*Unilever*"), Walker LJ stated as follows (at 2443–2444 and 2448–2449):

> Without in any way underestimating the need for proper analysis of the rule, I have no doubt that busy practitioners are acting prudently in making the general working assumption that the rule, if not "sacred" (*Hoghton v Hoghton* (1852) 15 Beav. 278, 321), has a wide and compelling effect. That is particularly true where the 'without prejudice' communications in question

> consist not of letters or other written documents but of wide-ranging unscripted discussions during a meeting which may have lasted several hours.
>
> At a meeting of that sort the discussions between the parties' representatives may contain a mixture of admissions and half-admissions against a party's interest, more or less confident assertions of a party's case, offers, counter-offers, and statements (which might be characterised as threats, or as thinking aloud) about future plans and possibilities. As Simon Brown LJ put it in the course of argument, a threat of infringement proceedings may be deeply embedded in negotiations for a compromise solution. Partial disclosure of the minutes of such a meeting may be, as Leggatt LJ put it in *Muller*, a concept as implausible as the curate's egg (which was good in parts). …
>
> …
>
> … But to dissect out identifiable admissions and withhold protection from the rest of without prejudice communications (except for a special reason) would not only create huge practical difficulties but would be contrary to the underlying objective of giving protection to the parties, in the words of Lord Griffiths in [*Rush & Tompkins* at p.1300]: "to speak freely about all issues in the litigation both factual and legal when seeking compromise and, for the purpose of establishing a basis of compromise, admitting certain facts." Parties cannot speak freely at a without prejudice meeting if they must constantly monitor every sentence, with lawyers or patent agents sitting at their shoulders as minders.

As such, Walker LJ proposed adopting a broader approach in respect of the *Muller* exception, such that communications between negotiating parties are protected by "without prejudice" privilege as a whole, and the court should not dissect parts of such communications as *not* being privileged. For convenience, I term this the "Broad Approach".

58 Walker LJ's concern was echoed in the House of Lords decision in *Ofulue v Bossert* [2009] AC 990 ("*Ofulue v Bossert*"). In Lord Rodger's words, although "it would be possible to carve out an exception along those lines", *ie*, the *Muller* exception, "[t]he question is whether creating such an exception would be consistent with the overall policy behind the rule" (at [39]). In the

same judgment, Lord Neuberger also highlighted that the *Muller* exception does not consider the contractual rationale behind "without prejudice" privilege (at [95]):

> Despite the very great respect I have for any view expressed by Lord Hoffmann, and the intellectual attraction of the distinction which he draws, I am inclined to think that it is a distinction which is too subtle to apply in practice; I consider that its application would often risk falling foul of the problem identified by Robert Walker LJ in the passage quoted above. In any event, the observation appears to be limited to the public policy reason for the rule, and says nothing about the contractual reason, which plainly applies here.

59 For completeness, I note that in the UK Supreme Court decision of *Oceanbulk Shipping and Trading SA v TMT Asia Ltd and others* [2011] 1 AC 662, Lord Clarke stated as follows (at [27]):

> The without prejudice rule is thus now very much wider than it was historically. Moreover, its importance has been judicially stressed on many occasions, most recently perhaps in *Ofulue v Bossert* [2009] AC 990, where the House of Lords identified the two bases of the rule and held that communications in the course of negotiations should not be admissible in evidence. It held that the rule extended to negotiations concerning earlier proceedings involving an issue that was still not resolved and refused, on the ground of legal and practical certainty, to extend the exceptions to the rule so as to limit the protection to identifiable admissions.

60 The second concern is the unclear basis for the exception. As Fancourt J held in the English High Court decision of *Briggs and others v Clay and others* [2019] EWHC 102 (Ch) ("*Briggs*"), the exception may be justified on two alternative bases, and it was unclear which was the true basis for Hoffmann LJ's decision (at [49]):

> There therefore appear to be two bases for Hoffmann LJ's decision. The first is that the without prejudice rule only applies to protect admissions, not facts that are relevant independently of their truth or falsity, and the defendant was not seeking to rely on the content of the without prejudice negotiations to

> prove any admissions. The second basis is that the plaintiff himself had raised (or "put in issue") the reasonableness of the negotiations; that issue could not be determined without disclosure of the negotiations, and the public policy underlying the rule was not infringed by ordering disclosure in favour of the defendant for the purpose of the second claim. The shareholders were not parties to the second claim or (apparently) affected by its outcome.

61 *Briggs* is additionally relevant for the gloss that it adds to the test set out in the *Muller* exception, *ie*, the third concern I have identified above. Indeed, it is clear that there is no one settled test in the application of the *Muller* exception. As Fancourt J puts it in *Briggs*, "the general principle that bringing a claim or making an allegation does not disentitle a party to rely on without prejudice privilege may well be qualified *where an issue is raised that is only justiciable upon proof of without prejudice negotiations*" (at [99]) [emphasis added]. In his view, this test is reflected in the reasoning in *Muller*, where all three judges "considered it to be material that the plaintiff had put in issue the reasonableness of his negotiations with the shareholders and that that issue would not be justiciable without disclosure of the negotiations" (at [98]). However, as later cases show, the test only resulted in further confusion as to what the test for the *Muller* exception really is.

62 Thus, in the English High Court decision of *Berkeley Square Holdings and others v Lancer Property Asset Management Ltd and others* [2020] EWHC 1015 (Ch) ("*Berkeley (HC)*"), Roth J applied the *Muller* exception as developed in *Briggs*. His interpretation of "fairly justiciable" was whether "the evidence is so central to an issue which the party resisting disclosure has introduced that there is a serious risk that there will not be a fair trial if that evidence is excluded" (at [83]). On the facts of *Berkeley (HC)*, Roth J admitted the relevant evidence, because "if the material is not admitted, the court at the trial will be misled" (at [88(iii)]).

63 When *Berkeley (HC)* went on appeal, the English Court of Appeal, however, voiced concerns about the seeming extension of the *Muller* exception (see *Berkley Square Holdings Ltd and others v Lancer Property Asset Management Ltd and others* [2021] 1 WLR 4877 ("*Berkley (CA)*")). Richards LJ raised the following concerns:

(a) A new exception was developed by Fancourt J in *Briggs* and Roth J in *Berkeley (HC)*. This exception "would apply where one party raises an issue which cannot, or cannot fairly, be decided without recourse to evidence of without prejudice negotiations or communications but the party raising the issue resists disclosure or use of such evidence" (at [84]).

(b) There is uncertainty over the word "justiciable". The word is conventionally used to describe an issue that the court will not consider because of its subject matter, *ie*, it must be impossible to determine the issue without recourse to the "without prejudice" evidence. However, Roth J in *Berkeley (HC)* set the bar lower, by referencing whether the court is able to fairly determine an issue and to the centrality of the evidence (at [87]).

(c) It is unclear whether the exception "is available in both two-party cases and three-party cases. If it is available where the person resisting disclosure or admission has not waived privilege, it would logically appear to be as applicable in a two-party case as in a three-party case" (at [88]).

(d) There "would need to be careful consideration of whether this exception would involve an unacceptable interference with the public

> policy of encouraging compromises which is the reason for the without prejudice rule" (at [89]).

Despite his concerns, Richards LJ ultimately concluded that *Berkeley (CA)* was "not the case to decide whether a new exception of this type exists" because it was unnecessary on the facts of the case (at [90]). That said, it is clear that Richards LJ had expressed considerable doubt about the *Muller* exception.

64 I conclude my analysis of the development of the *Muller* exception in the UK by stating that there is uncertainty over whether the exception should even apply as a matter of principle, and even if it applies, what the scope of the exception is.

The Muller *exception in Singapore*

(1) The relevant cases

65 Turning then to how the *Muller* exception may apply in Singapore, I begin with the Court of Appeal decision of *Quek Kheng Leong Nicky and another v Teo Beng Ngoh and others and another appeal* [2009] 4 SLR(R) 181 ("*Quek Nicky*"), which discussed *Unilever* (at [23]):

> The rule against the admission of "without prejudice" communications is, however, subject to a number of exceptions. The most important instances were set out by Robert Walker LJ in the English Court of Appeal decision of *Unilever Plc v The Procter & Gamble Co* [2000] 1 WLR 2436 at 2444–2445 ("*Unilever*") (where the comprehensive article by David Vaver, "'Without Prejudice' Communications – Their Admissibility and Effect" (1974) 9 UBC Law Rev 85 (which was justly described by Lord Mance in the House of Lords decision of *Bradford & Bingley plc v Rashid* [2006] 1 WLR 2066 at [84] as being "an article of great learning and continuing value") was cited; see also the House of Lords decision of *Ofulue v Bossert* [2009] 2 WLR 749 at [86]).

66 I note that *Quek Nicky* considers that *Unilever* (at 2444–2445) sets out "the most importance instances" of exceptions to the rule on "without prejudice" privilege. For brevity, I reproduce only what Walker LJ in *Unilever* said about the *Muller* exception (at 2444–2445):

> (1) As Hoffmann LJ noted in *Muller's* case, when the issue is whether without prejudice communications have resulted in a concluded compromise agreement, those communications are admissible. *Tomlin v Standard Telephones and Cables Ltd.* [1969] 1 WLR 1378 is an example.
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> …
>
> (6) In *Muller's* case (which was a decision on discovery, not admissibility) one of the issues between the claimant and the defendants, his former solicitors, was whether the claimant had acted reasonably to mitigate his loss in his conduct and conclusion of negotiations for the compromise of proceedings brought by him against a software company and its other shareholders. Hoffmann LJ treated that issue as one unconnected with the truth or falsity of anything stated in the negotiations, and as therefore falling outside the principle of public policy protecting without prejudice communications. The other members of the court agreed but would also have based their decision on waiver.

67 Contrary to the defendants' submission, I do not think that *Quek Nicky* can be taken as authority that the *Muller* exception applies in Singapore. In my view, when the Court of Appeal referred to *Unilever* and the exceptions to "without prejudice" privilege therein, the court did not go so far as to say that those exceptions apply in Singapore, and more specifically, that the *Muller* exception applies. Even if the *Muller* exception applies in Singapore, the development of the exception in the UK since *Quek Nicky* was decided in 2009 requires that I nevertheless determine the true scope of the exception.

68 There are two High Court decisions that I consider to be relevant to my decision: *Sin Lian Heng* and *CSO v CSP and another* [2023] SGHC 24 ("*CSO v CSP*"). First, in *Sin Lian Heng*, Menon JC considered the issue of

whether "without prejudice" privilege applies to negotiations on quantum even if there has been an admission of liability. Menon JC cited *Unilever* and alluded to the Broad Approach (at [49]–[51]):

> 49 It was not disputed that the letter, at the very least, involved negotiations over the amount that might be paid and this was not as a matter of pure indulgence. The policy reasons behind the "without prejudice" privilege have been shortly stated in the cases referred to above at [9]. In a nutshell, the underlying policy justification for the rule is:
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> > [P]arties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations … may be used to their prejudice in the course of the proceedings. [*Per* Oliver LJ in *Cutts v Head* [1984] Ch 289 at 306, quoted with approval by the House of Lords in *Rush & Tompkins* ([9] *supra*) at 1299.]
>
> 50 In my view, this rationale applies with equal force to negotiations on quantum where there is a real dispute over this. In such situations, even though one party may have admitted to liability, as long as there remains a dispute as to the extent of that liability, the policy interests are implicated. The privilege is thus equally well justified since it is just as important to the avoidance of the litigation of such matters. It is plain that if parties cannot agree on the specific settlement *amount*, they will continue to litigate that issue.
>
> 51 In my judgment, the same result can also be seen to be justified *in principle*. In *Unilever* ([12] *supra*), Robert Walker LJ stated that it would be undesirable to "dissect out identifiable admissions and withhold protection from the rest of without prejudice communications". The rationale for this proposition is that if there is a risk that some part of the communications that take place in circumstances where the parties are trying to come to a settlement may later be found not to be privileged, it would inhibit the discussions as a practical matter. In my judgment, the same sort of practical difficulties would arise if the "without prejudice" rule were held not to apply to negotiations directed at settling disputes on quantum.
>
> [emphasis in original]

69 Second, in *CSO v CSP*, the High Court discussed the interaction between s 23 of the EA and the common law rule on "without prejudice" privilege,

holding that such privilege applied to the whole of "without prejudice" communications and not only admissions. The court considered that the Broad Approach in *Unilever* applies in Singapore (at [51]–[58]):

> 51 In *Unilever*, Walker LJ explained (at 2448–2449) that the Broad Approach furthers the public policy objective of encouraging settlements; indeed, protecting only admissions (and not the whole of "without prejudice" communications) would go against that policy …
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> …
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> 57 Walker LJ recognised (at 2448) that "the protection of admissions against interest is the most important practical effect of the rule", but admissions are not the only communications that "without prejudice" privilege would cover.
>
> 58 Admissions against interest made during "without prejudice" negotiations might be seized upon by the opposing party if they were not privileged, and it is "thus in the overall spirit of encouraging negotiations that parties be sufficiently protected when they 'lay their cards on the table'" (*Sin Lian Heng* at [43]). Admissions against interest are, however, not the only communications made during "without prejudice" negotiations that might prejudice their author if the communications were not protected by privilege. One example would be actionable threats such as that pleaded in *Unilever*. Likewise, a party might during negotiations assert a claim or defence that is not later pursued in court proceedings – it should not be prejudiced by the other party being able to make forensic use of that discrepancy. So too, if an exaggerated claim sum is put forward in negotiations, or if a party emphasises the strength of his case to an unreasonable extent, or indeed in an unreasonable manner. It would encourage settlements if the *whole* of "without prejudice" communications are protected, and not merely *admissions against interest*.
>
> 59 The Broad Approach furthers the objective of encouraging settlements, as a matter of *policy* and *principle*; and it is the position at common law. Is the Broad Approach, however, precluded in Singapore by the Evidence Act or by binding authority (in particular, the Court of Appeal's decision in *Ernest Ferdinand*)?
>
> [emphasis in original]

70 The court in *CSO v CSP* (at [73]–[76]) also considered the compatibility of the Broad Approach with the Court of Appeal decision of *Ernest Ferdinand*, which I reproduce:

> 73 Indeed, the very formulation of the second pre-requisite (*Ernest Ferdinand* at [67]) that "the communication must *constitute* ***or*** *involve* an admission against the maker's interest" [emphasis added in italics and bold italics] itself shows that admissions are not the only aspects that are privileged. It is not only communications that "constitute" admissions that are privileged; communications that "involve" admissions (and also involve non-admissions) are privileged too.
>
> 74 The Court of Appeal (at [86]) noted the argument that "the broader purpose of without prejudice privilege is to provide parties with a general freedom to negotiate, and therefore *things which go beyond admissions against interest should be capable of being protected*" [emphasis added]. The court did not disagree with this. On the contrary, the court (at [68] and [90]) approved of the observations in *Schering Corporation v CIPLA Ltd* [2004] EWHC 2587 (Ch) ("*Schering*")[,]a decision that applied the Broad Approach.
>
> 75 In *Schering*, the court held that a certain letter was a "negotiating document", *ie*, a document indicating a willingness to negotiate, and as such the letter was protected by "without prejudice" privilege. The letter contained two paragraphs asserting the author's confidence, on the basis of legal advice, that the other party's patent was invalid, and a further paragraph to the effect that the author's confidence in the correctness of its position was so great that it felt it is safe to proceed without regard to the other side's position if negotiations were not entered into and resolved satisfactorily. The court however held that "the overall message continues to be one of wishing to negotiate" (at [21]). The court did not dissect out identifiable admissions (such as references to willingness to negotiate) and withhold protection from the rest of the "without prejudice" communications (such as the author's assertions of the strength of its own position). The *whole* letter was privileged, not just the identifiable admissions in it.
>
> 76 *Ernest Ferdinand* (which endorsed *Schering*) does not preclude the Broad Approach. On the contrary, *Ernest Ferdinand* supports the Broad Approach.

(2) My decision: the *Muller* exception does not apply in Singapore

71 As a starting point, I am bound by s 2(2) of the EA, which states "all rules of evidence not contained in any written law, so far as such rules are inconsistent with any of the provisions of this Act, are repealed". As the EA codified only the law of evidence existing at the time of its enactment, new rules of evidence can be given effect to only if they are not inconsistent with the provisions of the EA or their underlying rationale (see the High Court decision of *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [117], cited with approval in the Court of Appeal decisions of *Lee Chez Kee v Public Prosecutor* [2008] 3 SLR(R) 447 at [116] and *ARX v Comptroller of Income Tax* [2016] 5 SLR 590 at [32]).

72 With s 2(2) of the EA in mind, I find that the *Muller* exception does not apply in Singapore. This is because the *Muller* exception is incompatible with the public policy and contract rationales behind "without prejudice" privilege. For the public policy rationale, I broadly agree with Walker LJ's explanation in *Unilever* that parties will be unable to speak freely in negotiations if they are preoccupied with determining which portion of their negotiations falls within the *Muller* exception and is admissible as evidence. For the contract rationale, as Lord Neuberger alluded to in *Ofulue v Bossert*, it is unclear how the *Muller* exception is compatible with the contract rationale for "without prejudice" privilege. This is because if the basis for "without prejudice" privilege is the implied agreement between negotiating parties that their communications are privileged, for the *Muller* exception to apply, a similar implied agreement must apply. Yet, I find it difficult to fathom how there can be such an implied agreement, especially when the *Muller* exception requires dissecting parties' negotiations into admissions and all other communications.

73 Further, in so far as the Broad Approach applies in Singapore, I consider that it will be inconsistent to adopt the *Muller* exception in Singapore. This is because, as I mentioned above, the Broad Approach prevents the court from dissecting communications that are protected by "without prejudice" privilege. Yet, an application of the *Muller* exception requires the court to undertake this exact process of dissection.

My decision on the* Muller *exception: the exception does not apply

74 Given my finding that the *Muller* exception does not apply in Singapore, I reject the defendants' argument that the claimant is precluded from relying on "without prejudice" privilege for the Emails.

75 In the event that I am wrong, and the *Muller* exception applies in Singapore, I similarly reject the defendants' argument that the claimant is precluded from relying on "without prejudice" privilege for the Emails. This is because, applying the test for the extended *Muller* exception as developed in *Briggs* and *Berkeley (HC)*, I do not find that the defendants have satisfactorily particularised an issue which cannot, or cannot fairly, be decided without recourse to the Emails. In any event, when Mr Singh realised that the *Muller* exception had been subject to such trenchant criticism in *Berkeley (CA)*, he dropped his reliance on the exception without more.

The applicable law on the doctrine of approbation and reprobation

76 I turn then to Mr Tan's argument that the claimant should not be allowed to approbate and reprobate. The law on the doctrine of approbation and reprobation has been comprehensively explored by the Court of Appeal in *BWG v BWF* [2020] 1 SLR 1296 (at [101]–[118]) and I need not add to it. To briefly summarise, the doctrine is a principle of equity that a person who accepts a

benefit under an instrument must adopt it in its entirety and renounce any other rights that are inconsistent with it. For instance, a person who has benefitted from a judgment cannot allege the invalidity of the judgment that conferred him the benefit. The doctrine extends more broadly to a situation of inconsistent positions asserted against different parties in different proceedings, as long as the party has received an actual benefit as a result of an earlier inconsistent position, as reflected in the English decisions of *Express Newspapers* and *First National Bank plc v Walker* [2001] 1 FLR 505.

77 Unlike the common law doctrine of election, the doctrine of approbation and reprobation does not require the electing party to make a conscious choice between alternative rights and remedies, but a party's election that gives rise to a prior position must still be reasonably clear to be effective (see the Court of Appeal decision of *Aries Telecoms (M) Bhd v ViewQwest Pte Ltd* [2018] 1 SLR 108 at [5]).

78 In the context of the present application, I consider that there may also be a related issue of whether a party may use "without prejudice" privilege to escape disclosure obligations, such as in without notice applications under the Rules of Court 2021 (the "ROC 2021"). In my view, no such concern arises. This is because when communications are protected by "without prejudice" privilege, the parties have no obligations to disclose this to the court. I raise O 9 r 3 of the ROC 2021 as an example, which states that "without prejudice" communications must not be disclosed to the court:

> **Non-disclosure (O. 9, r. 3)**
>
> **3.** Subject to the law governing the admissibility of evidence at trial, any communication made in the course of a case conference in any action or proceedings must not be disclosed to the Court conducting the trial of the action or proceedings if such communication —

> (*a*) has been stated by any of the parties to the action or proceedings to be "confidential" or "without prejudice"; or
>
> (*b*) has been marked by the Registrar or Judge (as the case may be) as being "confidential" or "without prejudice".

Accordingly, in so far as communications are protected by "without prejudice" privilege, parties have no obligation to disclose them to the court. On the contrary, they are obliged to *not* disclose them to the court.

My decision on the doctrine of approbation and reprobation: the doctrine does not apply

79 With the above principles in mind, I find that the doctrine of approbation and reprobation does not apply here. In my judgment, the claimant has not simultaneously accepted a benefit and renounced any rights inconsistent with that benefit. The claimant is seeking only to strike out the Emails, and not the 15 June Letter. As a result, the defendants can rely on the 15 June Letter in SUM 2781. Accordingly, and contrary to the defendants' submission, the doctrine of approbation and reprobation does not apply in the present application.

80 I also do not find that the claimant has, by relying on "without prejudice" privilege, failed to make any material disclosure in SUM 2781. This is because, as I set out above, when communications are protected by "without prejudice" privilege, the parties have no obligation to disclose them to the court.

Conclusion

81 For all these reasons, I allow the claimant's application to the extent that I find that all of the Emails, save for the one sent by Mr Wee on 9 November 2020 at 4.42pm, are protected by "without prejudice" privilege. I accordingly order that all these Emails, as well as the relevant paragraphs, be expunged from

the affected affidavits as set out in the present application. The defendants are to refile the affected affidavits, without the expunged materials, within 14 days of this decision.

82 Unless the parties are able to agree on costs, they are to write in with their submissions limited to seven pages each, also within 14 days of this decision.

Goh Yihan
Judicial Commissioner

Ng Ka Luon Eddee, Tnee Zixian Keith, Lee Pei Hua Rachel and Natalie Ng Hai Qi (Tan Kok Quan Partnership) for the claimant;
Sarbjit Singh Chopra, Roshan Singh Chopra and Sakthi Vel s/o Raman (Selvam LLC) for the first, third and fifth defendants;
Tan Teng Muan and Loh Li Qin (UniLegal LLC) for the second defendant;
Eugene Jedidiah Low Yeow Chin (Ark Law Corporation) for the fourth defendant (watching brief).