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Protect Your
Privilege: The
“Broad Approach”
to “without
prejudice”
communications in
Singapore

CSO v CSP and another
[2023] SGHC 24

17 March 2023

**LEGAL
UPDATE**

In this Update

In *CSO v CSP and another* [2023] SGHC 24, the General Division of the High Court held that the “Broad Approach” to “without prejudice” privilege is the position at common law and is not precluded by Section 23(1) of the Evidence Act 1893 or by binding authority.

Our update discusses this decision.

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INTRODUCTION

At common law, anything that is said in the course of “without prejudice” negotiations is privileged. The court does not dissect out identifiable admissions and withhold protection from the rest of “without prejudice” communications. This is described as the “**Broad Approach**” to “**without prejudice**” privilege. As a matter of policy and principle, the Broad Approach furthers the objective of encouraging settlements.

In *CSO v CSP and another* [2023] SGHC 24, the General Division of the High Court held that the Broad Approach to “without prejudice” privilege is the position at common law and is not precluded by Section 23(1) of the Evidence Act 1893 (“EA”) or by binding authority.

Our update discusses this decision.

BACKGROUND

The Plaintiff provided the 1st Defendant (contractor for a project) with a guarantee (issued by the 2nd Defendant bank) in respect of the performance of the Plaintiff’s obligations to supply equipment for the project to the 1st Defendant under a supply contract. The 1st Defendant procured a letter of credit (“LC”) in favour of the Plaintiff, pursuant to which certain sums would be paid to the Plaintiff for the performance of the supply contract.

Disputes arose between the Plaintiff and the 1st Defendant in relation to the supply contract. In March 2022, the 1st Defendant called on the guarantee, alleging that the Plaintiff had failed to fulfil its obligations under the supply contract. In response, the Plaintiff applied for an injunction to restrain the 2nd Defendant bank from paying on the guarantee and the 1st Defendant from receiving payment.

The Plaintiff subsequently applied to strike out (a) five emails which bore the subject header “Settlement/Gentlemen Agreement” and were exhibited to the 1st Defendant’s reply affidavit; and (b) a number of paragraphs of the 1st Defendant’s reply affidavit which referred to these emails. The Plaintiff contended that these emails were covered by “without prejudice” privilege and the 1st Defendant could not put them into evidence or refer to their contents.

At first instance, the Assistant Registrar (“AR”) dismissed the Plaintiff’s striking out application. The AR held that portions of the emails which were relied upon by the 1st Defendant were never covered by “without prejudice” privilege. The Plaintiff appealed to a judge in the General Division of the High Court.

DECISION OF THE GENERAL DIVISION OF THE HIGH COURT

Summary

The Court dismissed the Plaintiff's appeal.

While the Court disagreed with the AR's reasoning and considered that the emails were privileged, the Court held that the 1st Defendant could rely on an exception and refer to the emails "to explain delay or apparent acquiescence" (the "**Delay/Acquiescence Exception**"). The Court therefore allowed the 1st Defendant to rely on portions of the emails, excluding other portions that did not relate to the Plaintiff's assertions.

Common law: Broad Approach

At common law, "anything that is said" in the course of "without prejudice" negotiations is privileged (*Cutts v Head* [1984] Ch 290, at 306). The court does not "dissect out identifiable admissions and withhold protection from the rest of without prejudice communications" (per Walker LJ in *Unilever Plc v Procter & Gamble Co* [2000] 1 WLR 2436 ("**Unilever**"), at 2448–2449). This is described as the Broad Approach to "without prejudice" privilege.

KEYPOINT

As a matter of policy and principle, the Broad Approach to "without prejudice" privilege furthers the objective of encouraging settlements.

KEYPOINT

The Broad Approach is the position at common law and is not precluded by Section 23(1) of the Evidence Act 1893, or by binding authority.

Broad Approach is consistent with EA and binding authority

The Broad Approach is not precluded by s 23(1) of the EA, which provides as follows:

Admissions in civil cases when relevant

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

- (a) upon an express condition that evidence of it is not to be given; or
- (b) upon circumstances from which the court can infer that the parties agreed together that evidence of it should not be given.

While s 23(1) of the EA refers only to an “admission”, the Court held that the provision does not limit the Broad Approach under the common law. Given that s 23 of the EA and the common law “without prejudice” principle have the same rationale (*ie* public policy and agreement of parties), the common law principle (and the Broad Approach) is not inconsistent with s 23 of the EA.

Further, the Court of Appeal’s decision in *Ernest Ferdinand Perez De La Sala v Compañía De Navegación Palomar, SA and others and other appeals* [2018] 1 SLR 894 (“**Ernest Ferdinand**”) supports the Broad Approach. The second pre-requisite for a communication to be “without prejudice” is that the communication “must constitute or involve an admission against the maker’s interest”. The very formulation of this pre-requisite in *Ernest Ferdinand* itself shows that admissions are not the only aspects that are privileged. Communications that “involve” admissions (and may also involve non-admissions) are privileged too.

Delay/Acquiescence Exception

The Delay/Acquiescence Exception was stated by Walker LJ in *Unilever* at 2444–2445 and accepted by the Court of Appeal in *Quek Kheng Leong Nicky and another v Teo Beng Ngoh and others and another appeal* [2009] 4 SLR(R) 181: a party could refer to “without prejudice” communications “to explain delay or apparent acquiescence”.

The Court considered that the concept of “delay” included not only belated action, but also complete inaction.

Application to facts

Applying the Broad Approach, the whole of all five emails were protected by “without prejudice” privilege.

However, the Delay/Acquiescence Exception applied to allow the 1st Defendant to refer to portions of those emails to rebut the Plaintiff’s assertions that (a) the 1st Defendant had taken no steps to extend the LC; and (b) the 1st Defendant had not taken issue with the Plaintiff’s claim to retention money under the LC.

COMMENTARY

The Court's decision provides clarity on the scope and practical application of "without prejudice" privilege.

This is helpful in view of the requirement under Order 5 Rule 1 of the Rules of Court 2021 for a claimant to make an offer of amicable resolution before commencing an action unless the party has reasonable grounds not to do so.

Parties may engage in substantial "without prejudice" communications prior to commencing Court proceedings to satisfy the requirement under O 5 r 1 and/or as part of a proactive litigation management strategy. The contents of such communications are likely to comprise both admissions and non-admissions (eg statements about a party's wrongdoing or statements emphasising the strength of a party's case). The decision clarifies that the Court will not dissect such communications to identify only admissions, but the whole of the contents would be considered privileged. This gives parties assurance to communicate freely and effectively in negotiations at an early stage without worry that their statements may be used against them in subsequent proceedings.

Given the pending appeals, however, it remains to be seen how the matter will be decided on further appeal.

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