

NOVEL ISSUES OF LITIGATION AND WITHOUT PREJUDICE PRIVILEGE IN MULTI-PARTY CIVIL PROCEEDINGS

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I. Introduction

A. Novel issues

1 Novel issues of privilege arising from multi-party litigation were recently raised by *United Overseas Bank Ltd v Lippo Marina Collection Pte Ltd*¹ (“*Lippo Marina Collection*”) in which the High Court’s decisions and observations were upheld by the Court of Appeal.² These issues are as follows:

- (a) May litigation privilege operate against one or more of the parties?
- (b) Is a final affidavit of the evidence-in-chief (“AEIC”) protected by litigation privilege?
- (c) Is litigation privilege completely waived when the protected document is disclosed to one or more parties but not the other(s)?
- (d) May a party who has not created the document assert litigation privilege over it?

1 [2018] 4 SLR 391.

2 The first defendant’s appeal from this decision in Civil Appeal No 129 of 2017 was dismissed by the Court of Appeal with no written grounds of decision rendered.

- (e) Does litigation privilege apply to a copy of the original document protected by litigation privilege?
- (f) Is there a set procedure for asserting litigation privilege?
- (g) Does “without prejudice” privilege extend to an AEIC which is specifically made for the purpose of settlement?
- (h) May one of the parties (but not the others) assert the privilege protecting “without prejudice” communications?

B. Facts of *United Overseas Bank Ltd v Lippo Marina Collection Pte Ltd*

2 *Lippo Marina Collection* concerned an action by the plaintiff bank against the developer of a condominium (the first defendant), real estate agents (the second and third defendants) and relatives of the latter (fourth to eighth defendants) relating to loans made to purchasers of units in the property. The plaintiff contended that the first defendant (who offered rebates to the purchasers)³ had misled the plaintiff into granting the loans.⁴

3 Subsequently, the plaintiff entered into a settlement agreement with the second and third defendants. The second and third defendants agreed that the second defendant would file an affidavit on behalf of himself and the third defendant describing the alleged wrongdoing of the first defendant in the matter, and that the second defendant would give truthful testimony at trial. In consideration, the plaintiff undertook to regulate the conduct of its case against the second to eighth defendants in accordance with the settlement agreement. The settlement agreement provided, *inter alia*, that the plaintiff would discontinue the

3 After the loans were extended, the plaintiff discovered that the first defendant had offered significant furniture rebates to the purchasers which exceeded market norms and were not reflected in the loan application forms.

4 The plaintiff’s claims were based on the tort of unlawful means conspiracy and the tort of deceit.

claims against the fourth to eighth defendants and would not enforce any judgment obtained by the plaintiff against the second and third defendants.⁵

4 Pursuant to the settlement agreement, the plaintiff discontinued the action against the fourth to eighth defendants. The first defendant applied for specific discovery of the second defendant's affidavit from the plaintiff and/or the second and third defendants. This application was resisted by the plaintiff on the grounds of litigation privilege and/or without prejudice privilege. The second and third defendants were absent from the hearings but there was evidence that they resisted disclosure on the ground of litigation privilege.⁶ The assistant registrar dismissed the application for specific discovery on the ground of litigation privilege. On appeal, before Aedit Abdullah JC, the learned judge confirmed that the affidavit was protected by litigation privilege. The learned judge also addressed the first defendant's submission that "without prejudice" did not apply.

II. Litigation privilege in multi-party proceedings

A. Did litigation privilege apply to second defendant's affidavit?

5 The principles governing litigation privilege were clearly established by the Court of Appeal in *Skandinaviska Enskilda Banken AB (Publ) v Asia Pacific Breweries (Singapore) Pte Ltd*⁷ ("*Skandinaviska*"). To succeed, a claim to litigation privilege over a document (a) must have been prepared or created at a time when litigation was pending or reasonably contemplated and (b) must have been prepared or created for the dominant purpose of litigation.

5 *United Overseas Bank Ltd v Lippo Marina Collection Pte Ltd* [2018] 4 SLR 391 at [12]–[14].

6 See para 14 below.

7 [2007] 2 SLR(R) 367 at [69]–[77] (cited in *United Overseas Bank Ltd v Lippo Marina Collection Pte Ltd* [2018] 4 SLR 391 at [45]).

6 Applying the above principles, the court in *Lippo Marina Collection* ruled that litigation privilege applied to the affidavit as it was created for the dominant purpose of ongoing litigation. The settlement agreement stated that the affidavit was created for use at trial by the second and third defendants. This was not disputed by the first defendant. This is the first case in which a court has applied litigation privilege to a document (the affidavit) intended to resolve the dispute between certain parties in litigation (the plaintiff and the second and third defendants) and to enable the plaintiff to rely on critical evidence against the first defendant.

7 A further novel feature of this case is that litigation privilege applied even though the plaintiff did not bring the affidavit into existence. The affidavit belonged to the second defendant. The plaintiff merely had a copy of it. The learned judge acknowledged that usually the privilege belongs to the party who created that document, or on whose behalf the document was created so that only he or his successor may assert it.⁸ The learned judge favoured the reasoning of Simon Brown LJ in *Robert Hitchins Ltd v International Computers Ltd*⁹ to the effect that litigation privilege could apply to recipients of privileged documents in the appropriate circumstances.¹⁰ Although the plaintiff in *Lippo Marina Collection* did not possess the traditional standing to assert litigation privilege (because it did not generate the document), the learned judge opined 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

8 *United Overseas Bank Ltd v Lippo Marina Collection Pte Ltd* [2018] 4 SLR 391 at [86].

9 [1996] Lexis Citation 1579.

10 *United Overseas Bank Ltd v Lippo Marina Collection Pte Ltd* [2018] 4 SLR 391 at [89]. The learned judge also relied on Paul Matthews & Hodge M Malek, *Disclosure* (Sweet & Maxwell, 4th Ed, 2012) at para 11.34 to the same effect: “A copy made of a document already privileged in the hands of one party ... for handing over to another party with no intention of waiving privilege as against other parties is privileged in that second party’s hands and that second party may himself assert the privilege ...”

such privilege over his copy at least in so far as the privilege in the original affidavit subsists”.¹¹

8 On the issue of whether the plaintiff could assert litigation privilege over a copy of the affidavit (the original remained with the second and third defendants), the learned judge ruled that litigation privilege applied to the copy as it did to the original. As a general rule, the mere making of copies does not destroy or waive the privilege that otherwise subsists in the original document.¹² A contrary approach would mean that litigation privilege or other privilege could be evaded if copies are available. As the learned judge emphasised: “[I]t 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.”¹³ It was also pointed out by the court that a distinction must be made between a copy of an original document that is privileged and a copy of an original document that is not privileged. In the latter case, the copy is not privileged simply because it was made for the purpose of litigation.¹⁴ Furthermore, in *Lippo Marina Collection*, it was undisputed that the copy of the affidavit was made in the context, and for the purpose, of ongoing litigation. The litigation privilege which attached to the original affidavit “was not destroyed or waived by the fact that it was copied, or because of the purpose for which it was copied.”¹⁵

11 *United Overseas Bank Ltd v Lippo Marina Collection Pte Ltd* [2018] 4 SLR 391 at [90].

12 *United Overseas Bank Ltd v Lippo Marina Collection Pte Ltd* [2018] 4 SLR 391 at [92].

13 *United Overseas Bank Ltd v Lippo Marina Collection Pte Ltd* [2018] 4 SLR 391 at [92].

14 *United Overseas Bank Ltd v Lippo Marina Collection Pte Ltd* [2018] 4 SLR 391 at [94]–[98].

15 *United Overseas Bank Ltd v Lippo Marina Collection Pte Ltd* [2018] 4 SLR 391 at [98].

9 The fact that the affidavit was finalised and intended to be used at trial did not bar the application of litigation privilege. As the learned judge stated:¹⁶

[T]he 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.

10 The affidavit was protected by litigation privilege until such time that it was served.¹⁷ Nor did the fact that the affidavit was finalised and intended to be used at trial constitute waiver.¹⁸

B. *Is litigation privilege completely waived when the protected document is disclosed to one or more parties but not the other(s)?*

11 It is clearly established that litigation privilege may be impliedly waived (*ie*, without a verbal expression of waiver) through disclosure of the privileged information. For example, where a party decides not to call an expert witness to testify, that expert's report is protected from disclosure by litigation privilege if the *Skandinaviska* conditions¹⁹ are satisfied. In *Lippo Marina Collection*, the second defendant disclosed the affidavit to the plaintiff (but not the first defendant) pursuant to the settlement agreement. This selective disclosure raised the issue of whether litigation privilege had been waived. As observed by

16 *United Overseas Bank Ltd v Lippo Marina Collection Pte Ltd* [2018] 4 SLR 391 at [48].

17 *United Overseas Bank Ltd v Lippo Marina Collection Pte Ltd* [2018] 4 SLR 391 at [49].

18 *United Overseas Bank Ltd v Lippo Marina Collection Pte Ltd* [2018] 4 SLR 391 at [65].

19 See para 5 above.

the learned judge in this case, even though the Evidence Act²⁰ (“EA”) does not contain specific provisions concerning the waiver of privilege by disclosure, the case law does support the common law position regarding clear waiver of privilege by disclosure.²¹

12 Implied waiver by disclosure may also arise in multi-party litigation, as in *Lippo Marina Collection*. Here, the second defendant shared his affidavit with the plaintiff in confidence pursuant to their settlement agreement and the plaintiff took a copy. The affidavit was not disclosed to the first defendant as it was not the intention of the plaintiff and second defendant that the first defendant have access to the affidavit until it was presented in court. The privilege was not waived regarding the first defendant as there was no intention that he see the document. The learned judge observed²² that “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 on the confidentiality of the document concerned”. It was not determinative that the party to whom disclosure was made (the plaintiff) stood in an adversarial position *vis-à-vis* the party who made the disclosure (the second defendant), or that the document concerned was intended to be used at trial or otherwise. Putting these points together, it may be said that litigation privilege is not waived simply because a party wishes to share the protected information with another party on a confidential basis for a *bona fide* purpose (such as settlement). Implied waiver would operate if the circumstances of the disclosure show that the information is no longer treated as confidential. “The question is whether a shield of

20 Cap 97, 1997 Rev Ed.

21 See *Tentat Singapore Pte Ltd v Multiple Granite Pte Ltd* [2009] 1 SLR(R) 42 and *Gelatissimo Ventures (S) Pte Ltd v Singapore Flyer Pte Ltd* [2010] 1 SLR 833. Disclosure in the course of discovery is contemplated by O 24 r 19 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed).

22 *United Overseas Bank Ltd v Lippo Marina Collection Pte Ltd* [2018] 4 SLR 391 at [69].

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confidentiality can reasonably be expected to exist following the sharing of the heretofore privileged document.”²³ The rationale is that if a privileged document is shared with an opposing party in the interest of resolving the dispute between them, this would not amount to waiver even though the litigation concerning any other party remains live.²⁴ As the learned judge put it:²⁵

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.

13 On the facts, the second and third defendants had disclosed the affidavit under cover of a without prejudice letter pursuant to the settlement negotiations with the plaintiff. Further, the settlement agreement provided that the plaintiff and the second and third defendants were to keep all the information arising from the settlement agreement (including the content of the affidavit) confidential to themselves.²⁶ The conduct of these three parties was consistent with the litigation privilege they claimed.²⁷ It also must be borne in mind that “[g]iven the importance of legal professional privilege, waiver is not to be easily implied”.²⁸ The court ruled that the litigation privilege had not been waived.

23 *United Overseas Bank Ltd v Lippo Marina Collection Pte Ltd* [2018] 4 SLR 391 at [68].

24 *United Overseas Bank Ltd v Lippo Marina Collection Pte Ltd* [2018] 4 SLR 391 at [84].

25 *United Overseas Bank Ltd v Lippo Marina Collection Pte Ltd* [2018] 4 SLR 391 at [84].

26 *United Overseas Bank Ltd v Lippo Marina Collection Pte Ltd* [2018] 4 SLR 391 at [85].

27 *United Overseas Bank Ltd v Lippo Marina Collection Pte Ltd* [2018] 4 SLR 391 at [85].

28 *United Overseas Bank Ltd v Lippo Marina Collection Pte Ltd* [2018] 4 SLR 391 at [68], citing *ARX v Comptroller of Income Tax* [2016] 5 SLR 590 at [69].

C. Whether litigation privilege may be asserted without a supporting affidavit

14 Ordinarily, a party who believes that a document is privileged would assert privilege in the discovery process and support this position in an affidavit. In *Lippo Marina Collection*, the second and third defendants were not involved in the first defendant’s application for specific discovery and did not file such an affidavit. The learned judge observed that privilege may be asserted in different ways but ideally through an affidavit. In the absence of an affidavit, privilege could also be “expressed clearly in some form, so that the matter can be readily determined by the court”.²⁹ The court ruled that as the second and third defendants had communicated their rejection (by letter) of the first defendant’s request for disclosure pursuant to litigation privilege, they were entitled to invoke it. A relevant consideration appeared to be that those defendants were unrepresented at the time. The court warned that where privilege is not clearly asserted in a supporting affidavit, there is a risk that the privilege may not be upheld or a possibility that the court may penalise the party concerned in costs.³⁰

III. Without prejudice privilege

A. Section 23 of Evidence Act

15 In *Lippo Marina Collection*, the court decided that as the affidavit was protected by litigation privilege, it could not be disclosed prior to trial. The court went on to consider the plaintiff’s argument that the affidavit was also protected by without prejudice privilege. In Singapore, this privilege is rooted in s 23 of the EA and the common law. Section 23(1) states:

29 *United Overseas Bank Ltd v Lippo Marina Collection Pte Ltd* [2018] 4 SLR 391 at [42].

30 *United Overseas Bank Ltd v Lippo Marina Collection Pte Ltd* [2018] 4 SLR 391 at [42].

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In civil cases, no admission is relevant if it is made —

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

16 It is evident from the terminology of this provision that the doctrine is based on an admission made in the course of settlement negotiations. This explains why s 23 is part of a series of provisions³¹ concerning admissions in Part I of the EA (which addresses admissibility generally) and is not placed with the other privileges in Part III of the EA.³² The Singapore courts have preferred to take a flexible approach towards this provision. For example, although s 23(1) of the EA does not address multi-party litigation, the broader common law principles have been applied. In *Mariwu Industrial Co (S) Pte Ltd v Dextra Asia Co Ltd*³³ (“*Mariwu*”), the Court of Appeal declared³⁴ that s 23 (as it then was) is “a statutory enactment of the common law principle relating to the admissibility of ‘without prejudice’ communications based on the policy of encouraging settlements”. The privilege is based on two principles: (a) the public policy of encouraging out-of-court settlement negotiations and (b) an implied agreement arising out of what is commonly understood to be the consequences of offering or agreeing to negotiate without prejudice.³⁵ In *Mariwu*, the Court of Appeal endorsed the application of *Rush & Tompkins Ltd v Greater London Council*³⁶ (“*Rush & Tompkins*”) on the basis that the rationale for s 23 of the

31 Including ss 17–22 of the Evidence Act (Cap 97, 1997 Rev Ed).

32 The primary privileges are included in ss 124–131 of the Evidence Act (Cap 97, 1997 Rev Ed).

33 [2006] 4 SLR(R) 807.

34 *Mariwu Industrial Co (S) Pte Ltd v Dextra Asia Co Ltd* [2006] 4 SLR(R) 807 at [24].

35 *Mariwu Industrial Co (S) Pte Ltd v Dextra Asia Co Ltd* [2006] 4 SLR(R) 807 at [24], citing Hoffmann LJ in *Muller v Linsley and Mortimer* [1996] PNLR 74. Also see *United Overseas Bank Ltd v Lippo Marina Collection Pte Ltd* [2018] 4 SLR 391 at [102].

36 [1989] AC 1280.

EA, which is to encourage the amicable settlement of disputes, is the same at common law. *Rush & Tompkins* stands for the proposition that without prejudice privilege applies in a multi-party litigation in order to protect settlement negotiations between some of the parties even if the other parties were not willing to resolve the case amicably.³⁷

B. Position in *United Overseas Bank Ltd v Lippo Marina Collection Pte Ltd*

17 In *Lippo Marina Collection*, the learned judge accepted the view that, unlike legal professional privilege (which belongs to the person claiming the right of protection over the information), without prejudice privilege belongs to all the negotiating parties in respect of the discussions between them. This means that any of the negotiating parties may assert the privilege even if the others do not.³⁸ In this case, the plaintiff did so. It follows that without prejudice privilege may only be waived by all the parties to the settlement negotiations because “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”.³⁹

18 The first defendant (who was not involved in the settlement negotiations between the plaintiff and the second and third defendants) contended that without prejudice privilege did not apply because the affidavit was made pursuant to, and not in the course of, the settlement negotiations and, furthermore, the affidavit did not contain any admissions against the interests of the second or third defendant. The learned judge agreed. The settlement agreement itself contemplated the creation of the affidavit after the conclusion of the settlement agreement.

37 *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280 at 1304.

38 *United Overseas Bank Ltd v Lippo Marina Collection Pte Ltd* [2018] 4 SLR 391 at [107].

39 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); *United Overseas Bank Ltd v Lippo Marina Collection Pte Ltd* [2018] 4 SLR 391 at [106].

Therefore, the affidavit could not be regarded as containing admissions in the course of the negotiations. The affidavit merely set out the final outcome of the negotiations and referred to the first defendant's involvement in and liability for the alleged wrongful conduct. The affidavit did not constitute or contain admissions by the second and third defendants against their own interest.⁴⁰ The settlement agreement also appeared to include the affidavit as part of that agreement.⁴¹ Under s 23(1) of the EA and at common law, without prejudice privilege only operates on the basis of admissions against the interest of the negotiating party.⁴² The conclusion in *Lippo Marina Collection* was that although the plaintiff was entitled to independently assert without prejudice privilege over the affidavit, this privilege did not operate because the affidavit was made pursuant to, and not in the course of, the settlement negotiations and, further, the affidavit did not contain an admission against the interests of its makers.⁴³

C. Possibility of broader test for section 23(1)(b) of Evidence Act

19 The learned judge pointed out that as the creation of the affidavit, which was referred to in the settlement agreement between the plaintiff and second and third defendants, was contemplated after the conclusion of the settlement agreement, the affidavit was not an admission made during settlement negotiations. This was so even though the affidavit was incorporated by the settlement agreement. The learned judge went on to say that “[t]here may be other factual and legal

40 *United Overseas Bank Ltd v Lippo Marina Collection Pte Ltd* [2018] 4 SLR 391 at [112].

41 *United Overseas Bank Ltd v Lippo Marina Collection Pte Ltd* [2018] 4 SLR 391 at [110].

42 See *United Overseas Bank Ltd v Lippo Marina Collection Pte Ltd* [2018] 4 SLR 391 at [111]; *Mariwu Industrial Co (S) Pte Ltd v Dextra Asia Co Ltd* [2006] 4 SLR(R) 807 at [31]; *Sin Lian Heng Construction Pte Ltd v SingTel* [2007] 2 SLR(R) 433 at [13] and *Krishna Kumaran s/o K Ramakrishnan v Kuppusamy s/o Ramakrishnan* [2014] 4 SLR 232 at [16].

43 *United Overseas Bank Ltd v Lippo Marina Collection Pte Ltd* [2018] 4 SLR 391 at [113].

arguments not canvassed before me, which may merit argument on another occasion”.⁴⁴

20 One possible argument is that the term “admission” in s 23(1) of the EA should be read more broadly to encompass the essence of the circumstances of the settlement. Section 23(1)(b) of the EA denies the admissibility of an admission that is made “upon circumstances from which the court can infer that the parties agreed together that evidence of it should not be given”. Could it not be said that the second and third defendants were admitting (at least to some extent) to their liability by agreeing to file an affidavit concerning the first defendant’s role in the alleged wrongdoing in consideration of the plaintiff undertaking to regulate the future conduct of its claims against the second to eighth defendants (including discontinuance of the action against the fourth to eighth defendants)? If so, the admission arose from these “circumstances” (the term used in s 23(1)(b) of the EA) with the effect that the affidavit (which was part of those “circumstances”) was protected by s 23(1)(b) of the EA against disclosure.

IV. Concluding observations

21 *Lippo Marina Collection* raises the not uncommon issue in multi-party litigation of certain parties (but not all) who may wish to resolve their differences. Clearly it is consistent with the policy of the administration of justice that such a practice should be favoured. As the learned judge stated:⁴⁵

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

44 *United Overseas Bank Ltd v Lippo Marina Collection Pte Ltd* [2018] 4 SLR 391 at [110].

45 *United Overseas Bank Ltd v Lippo Marina Collection Pte Ltd* [2018] 4 SLR 391 at [118].

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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 ...

22 Moreover, where a party (such as the plaintiff in *Lippo Marina Collection*) seeks to secure relevant evidence (in this case, from the second and third defendants) against a party (in this case, the first defendant), this can only enhance the public interest in correct adjudication by the court if such evidence is accessible (in this case, the second defendant’s AEIC). Even if litigation privilege had not operated to prevent disclosure to the first defendant, the first defendant would not have been entitled to see the affidavit until the time when the parties’ AEICs would be exchanged. To have permitted early disclosure of the second defendant’s affidavit before this stage of the proceedings would have been contrary to the rules of procedure and due process because the AEICs of the other parties would only be disclosed at a later time.⁴⁶ Finally, as argued above,⁴⁷ the argument for a broad interpretation of s 23(1)(b) might justify the application of without prejudice privilege in such circumstances. Such an outcome would be desirable given the difficulties faced by the court in *Lippo Marina Collection* in applying litigation privilege.

46 *United Overseas Bank Ltd v Lippo Marina Collection Pte Ltd* [2018] 4 SLR 391 at [117].

47 See paras 19–20 above.