

THE NATURE AND SCOPE OF THE “WITHOUT PREJUDICE” RULE

*Sinojaya Sdn Bhd v Metal Component Engineering Pte Ltd*¹

1 A rule of evidence that is particularly important to lawyers engaged in civil practice² is the rule relating to “without prejudice” negotiation.³ This rule came under the scrutiny of the High Court recently. In *Sinojaya Sdn Bhd v Metal Component Engineering Pte Ltd*,⁴ the plaintiff (“Sinojaya”) applied for summary judgment against the defendant (“MCE”) for the price of goods sold. The case for MCE was that they had made the agreement as the undisclosed agent for a company (“Hoyo”) which was a third party to the action. MCE alleged that the agency was disclosed soon after the agreement was made and that Sinojaya and Hoyo dealt directly with each other in carrying out the agreement.

2 In the affidavits filed by Sinojaya in support of their application, references were made to what had been said at a meeting between representatives of all three companies. No lawyer was present at the meeting and it was not expressly stated to be “without prejudice”. The purpose of the meeting was to work out a satisfactory arrangement in settlement of their dispute. The proposal, essentially, was that MCE should pay Sinojaya what was allegedly owed to them in instalments, the schedule of which was to be agreed, and that MCE should look to Hoyo for reimbursement. Minutes of the meeting were prepared by a representative of MCE and circulated to the other two parties. A copy of the minutes was exhibited in one of the affidavits filed on behalf of Sinojaya.

3 MCE applied to strike out those paragraphs of the affidavits filed on behalf of Sinojaya which referred to the discussion at the meeting and also to strike out the exhibit of the minutes. The basis for MCE’s application was that the communication made at the meeting was

¹ [2003] 1 SLR 281.

² An analogous rule applies in the criminal context. This rule was created recently in *PP v Knight Glenn Jeyasingam* [1999] 2 SLR 499, on which, see Michael Hor, “Evidential Privilege: Sacrifice in the Search for Truth” [2001] SJLS 410.

³ On the “without prejudice” rule, see generally David Vaver, “‘Without Prejudice’ Communications – Their Admissibility and Effect” (1974) 9 UBC Law Rev 85; Declan McGrath, “Without Prejudice Privilege” (2001) 5 International J of Evidence and Proof 213; J Pinsler, *Evidence, Advocacy and the Litigation Process* (2nd ed, 2003) at 121-130; Naresh Mahtani and Melissa Chen, “‘Without Prejudice’: Principles and Myths” (2003) Singapore Law Gazette 12.

⁴ *Supra* note 1.

protected by the “without prejudice” privilege. At the first hearing, the claim of privilege was dismissed by the Deputy Registrar. An appeal was made to the High Court. Woo JC allowed the appeal.

4 The arguments revolved around three issues. The first concerned the significance of the fact that nothing was said at the meeting, or in the minutes of it, that the meeting was conducted on a “without prejudice” basis. The judge held that a communication may be privileged even if it was not expressly stipulated to be “without privilege”.⁵ This is undoubtedly right at common law.⁶ But is the position the same under the Evidence Act?⁷ As the judge noted, the “without prejudice” rule “is given expression in ... s 23” of that Act.⁸ Section 23 comes into operation in two situations. The first is where there was “an express condition that evidence of [the negotiation] was not to be given” and the second is where the court can, from the circumstances, “infer that the parties agreed together that evidence of it should not be given”. Since the second limb of section 23 makes it clear that an agreement for the purpose of that provision may be implied from the circumstances of the case, it must be right that the failure to stipulate expressly that the meeting was “without prejudice” was no bar to the application of section 23.

5 The second issue was whether the meeting had resulted in a concluded agreement. Why should this matter? It seemed to have been assumed that the privilege ceases to protect a communication once it results in an agreement.⁹ But that would not be an accurate statement of the common law position. The “proposition that if the negotiations succeed and a settlement is concluded the privilege goes” was rejected by Lord Griffiths in *Rush & Tompkins Ltd v GLC*.¹⁰ It is true that, in *Walker v Wilsher*,¹¹ Lindley LJ said, in a dictum:¹²

“If the terms proposed in the letter are accepted a complete contract is established, and the letter, although written without

⁵ *Cf Panjacharam Raveentheran & Anor v Mookka Pillai Rajagopal* [1998] 1 SLR 28 at 34, para 24 (failure to stipulate that the correspondence was “without prejudice” was taken against the claim of privilege).

⁶ E.g., *Rush & Tompkins v GLC* [1989] AC 1280 at 1299-1300.

⁷ Cap. 97, 1997 rev ed.

⁸ *Ibid*, at p 288.

⁹ *Cf Dusun Desaru Sdn Bhd v Wang Ah Yu* [1999] 5 MLJ 449 at 457: “once the settlement is negotiated successfully and the matters finalized completely, then the document will lose its sting as a privileged document because its purpose is now complete and at an end.”

¹⁰ *Supra* note 6, at 1300.

¹¹ (1889) 23 QBD 335.

¹² *Ibid*, at 337.

prejudice, operates to alter the old state of things and to establish a new one. A contract is constituted in respect of which relief by way of damages or specific performance would be given.”

6 This dictum was applied in *Tomlin v Standard Telephones*.¹³ The plaintiff claimed against his employers for damages for personal injuries. His claim was grounded in an agreement allegedly reached with the defendants¹⁴ under the terms of which the latter agreed to pay compensation on the basis of 50 percent liability. The defendants denied that such an agreement was ever reached. To prove that there was such an agreement, the plaintiff sought to admit in evidence “without prejudice” correspondence between the parties. The Court of Appeal held by a majority that the letters were admissible. According to Danckwerts LJ, “the letters were admissible, because the point was whether there had been a concluded agreement of any kind between the parties in accordance with that correspondence and it would be impossible to decide whether there was a concluded agreement or not unless one looked at the correspondence.”¹⁵

7 It should be noted that in *Tomlin v Standard Telephones*, the plaintiff based his claim on the agreement which he said was reached in the without prejudice negotiation. But this was not the case in *Sinojaya v Metal Component Engineering*. As Woo JC pointed out: “The reference to the minutes was not to establish a fresh cause of action based on the alleged concluded agreement but to use them to assist Sinojaya to obtain summary judgment under the original cause of action”.¹⁶ Evidence of what transpired at the meeting assisted Sinojaya in their application for summary judgment only insofar as it showed an admission by the defendant (MCE) of liability to the original cause of action.

8 In *Tomlin v Standard Telephones*, on the other hand, the plaintiff did not rely on the “without prejudice” communication as an admission of liability but to prove the fact that an agreement was reached.¹⁷ That fact was relevant because the claim was based on the agreement. The

¹³ [1969] 1 WLR 1378. Followed by the Malaysian High Court in *Aluminium Industries Sdn Bhd v Cookermate (M) Sdn Bhd* [1990] 2 CLJ 777 at 779.

¹⁴ Or, more accurately, their insurers.

¹⁵ [1969] 1 WLR 1378 at p 1382. Sir Gordon Willmer was of a similar view: see *ibid*, at p 1386.

¹⁶ *Supra* note 1, at pp 283-4.

¹⁷ The same arguably can be said of *Malayan Banking Bhd v Foo See Moi* [1981] 2 MLJ 17. *Ibid*, at 18, Chang FJ held: “where the negotiations conducted without prejudice lead to a settlement, ... the letters become admissible *in evidence of the terms of the agreement*” (emphasis added). See also *Sun Soon Heng Coach Works Sdn Bhd v Nima Travel Sdn Bhd* [1986] 1 MLJ 252 at 255.

existence of an agreement can be relevant in other ways. For example, in *Bentley v Nelson*,¹⁸ the lessees applied for an interim injunction to restrain the lessors from entering onto the premises. A “without prejudice” agreement, which spelt out the terms of an “amnesty” between the parties pending final resolution of the dispute by the court, was held not to be privileged. The fact that there was such an agreement was material on the issue of whether to grant the injunction (since it affects the need for it) and ought to have been disclosed by the applicant. The general principle underlying such cases was so formulated by Hoffmann LJ in *Muller v Linsley & Mortimer*:¹⁹

“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.”

9 If this is right, the question to ask is whether the party seeking to admit evidence of the negotiation is using it as evidence of an admission of liability (in which case it is inadmissible) or as evidence of the fact that a settlement agreement was struck (in which case it would not be protected by the rule). In *Sinojaya*, evidence of the meeting was used for the former purpose, that is, to prove an admission of liability.²⁰ Significantly, section 23 of the Evidence Act offers protection only to admissions. Section 21 of the same Act provides: “Admissions are relevant and may be proved as against the person who makes them”.²¹ The effect of section 23 is to qualify section 21. An admission may not be proved as against the person who makes it, notwithstanding section

¹⁸ [1963] WAR 89.

¹⁹ [1996] 1 PNLR 74 at 79.

²⁰ It is clear from para 6 of Charles Wong’s affidavit quoted, *supra* note 1, at 284 (para 10 of the judgment) and from para (a) of the letter written by the plaintiff’s solicitors quoted, *ibid*, at 286 (para 13 of the judgment). See also *David Instance v Denny Bros. Printing Ltd* [2000] FSR 869 at 885 (applying Hoffmann’s analysis of the relevance of the intended use of the statements in question.) Cf *Soon Peng Yam v Maimon bte Ahmad* [1996] 2 SLR 609 at 617 (no admission could be drawn from the “without prejudice” correspondence).

²¹ More generally, see s 5 of the Evidence Act: leaving aside facts in issue, unless a fact (including an admission) is “relevant”, evidence cannot be given of it.

21, if the case falls under one of the limbs in section 23. It is interesting to note that Hoffmann LJ analysed the common law in precisely this way in the *Muller* case. His Lordship said:²²

“the [“without prejudice”] 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.”

10 In *Unilever v Procter & Gamble*,²³ Walker LJ took a wider view of the privilege. In general, the whole of the “without prejudice” communication should be protected and not only those parts of it that are admissions. The judge called in support both practical and policy considerations: “to dissect out identifiable admissions and withhold protection from the rest of without prejudice communications ... would not only create huge practical difficulties but would be contrary to the underlying objective of” encouraging parties to speak freely with a view to settlement; parties “cannot speak freely at a without prejudice meeting if they must constantly monitor every sentence, with lawyers ... sitting at their shoulders as minders.”²⁴

11 The wider view adopted by Walker LJ is difficult to square with section 23 as that provision is explicitly confined to statements which are admissions.²⁵ If statements other than admissions are also to be protected, the source of the principle that offers that protection must lie outside of section 23. Whether the protection should be so extended is an instance of the general problem of when and the degree to which common law can be adopted to “supplement” the Evidence Act.²⁶ In *A-B Chew Investments Pte Ltd v Lim Tjoen Kong*,²⁷ Coomaraswamy J held:

“Section 23 merely states a broad principle and does not specify detailed rules. For this, we must look to English law. Sir James Fitzjames Stephen, who drafted the Indian Evidence Act

²² *Supra* note 19, at 79.

²³ [2000] 1 WLR 2436.

²⁴ *Ibid*, at 2448-9. For more on this debate about the scope of the privilege, see McGrath, “Without Prejudice Privilege”, *supra* note 3, at 217-220; *David Instance v Denny Bros Printing Ltd* [2000] FSR 869 at 881-882; Susan McNicol, *Law of Privilege* (1992), at 435-6.

²⁵ That s 23 applies only to statements which are admissions, see further *Halsbury's Laws of Singapore*, vol 10 (Pinsler and Tan eds, 2000) at 620.

²⁶ See generally J Pinsler, “Approaches to the Evidence Act: The Judicial Development of a Code” (2002) 14 SAclJ 365.

²⁷ [1989] SLR 190 at 794.

1872...also wrote a Digest of the Law of Evidence and his art 20 is, with immaterial differences, identical to s 23 of our Act. In effect, therefore English common law on “without prejudice” statements in civil cases is part of our law.”

12 The wording of section 23 is indeed extremely wide. For example, the first limb, on the face of it, gives a party an absolute power to claim privilege by express stipulation. Yet, it is clear that this limb cannot be taken literally.²⁸ In *Wong Nget Thau v Tay Choo Foo*,²⁹ the Malaysian High Court held that a party cannot claim privilege over a letter just because he had expressly headed it “without prejudice” if the letter was not, as common law requires that it should be, “part of a genuine attempt to settle a dispute”.³⁰ In effect, the common law condition was read into the Malaysian equivalent of our section 23. Not only is section 23 short on details, as Coomaraswamy J puts it, on the requirements that must be satisfied to invoke its protection, it does not provide (explicitly anyway) for waiver of the rule nor with exceptions to the rule. Local cases have, however, accepted that parties may, by mutual consent waive the “privilege”,³¹ and that a party may, by conduct amounting to waiver, lose the protection of section 23.³² Many exceptions to the privilege are recognised at English law,³³ the applicability of which in Singapore will, no doubt, have to be considered by our judges in due course. In view of the generality of section 23, it is inevitable that common law cases will continue to be cited in and by our courts. What should not be assumed is that common law principles are necessarily applicable (in exactly the same form), and what is needed is a careful consideration of the extent to which section 2(2) of the Evidence Act permits, by implication, the “importation” of those principles.³⁴

²⁸ See *Pontiac Marina Pte Ltd v CDL Hotels International Ltd* [1997] 3 SLR 726 at 733-4; *Halsbury's Laws of Singapore*, *supra* note 25, at 621-2.

²⁹ [1994] 3 MLJ 723.

³⁰ *Ibid*, at 734. See also *Ted Bates (M) Sdn Bhd v Balbir Singh Jholl* [1979] 2 MLJ 257 at 258 F-G; *Nakano Singapore (Pte) Ltd v Federal Insurance Company*, unreported 1991 decision of the Singapore High Court in Suit No 1800 of 1987.

³¹ E.g., *Straits Engineering Contracting Pte Ltd v Merteks Pte Ltd* [1996] 1 SLR 227 at 231I.

³² E.g., *Lim Tjoen Kong v A-B Chew Investments Pte Ltd* [1991] SLR 188; and the same is true in Malaysia: eg, *Dusun Desaru Sdn Bhd v Wang Ah Yu*, *supra* note 9, at 457-8; *JB Kulim Development Sdn Bhd v Great Purpose Sdn Bhd* [2002] 2 MLJ 298 at 311. For a recent English decision on a similar point: *Somatra Ltd v Sinclair Roche & Temperley* [2000] 1 WLR 2453.

³³ Eight of the “most important” exceptions were listed in *Unilever Plc v Procter & Gamble Co* [2000] 1 WLR 2436 at 2444- 2448. See also *Berry Trade Ltd v Moussavi* [2003] EWCA Civ 715, unreported; *Butterworths' Annotated Statutes of Singapore*, vol 5 (1997 issue), at pp 85-6.

³⁴ See *Lim Tjoen Kong v A-B Chew Investments Pte Ltd*, *supra* note 32, at pp 193-4.

13 The third point made on behalf of Sinojaya was that MCE had waived the privilege because their solicitors did not mention the privilege until more than a month after Sinojaya's solicitors wrote to them about the meeting. It is difficult to see how this makes it "inequitable" for MCE to insist on the privilege. In any case, it may be argued that the law would be too uncertain and self-defeating if it, as a rule, denies a party the privilege whenever it would be "inequitable" of him to claim it.³⁵ In *Admiral Management Services Ltd v Para-Protect Ltd*,³⁶ counsel for the defendants submitted that the court should look "at without prejudice correspondence whenever it is necessary to do so in the interests of justice or to ascertain the truth." This submission was rejected by Burnton J who noted that it is "too wide" and "would if accepted destroy the privilege."³⁷ The effectiveness of the law in persuading negotiating parties "fully and frankly to put their cards on the table"³⁸ depends on how certain they are that what they say will remain out of court. It is important, therefore, that the scope of the rule, including the situations in which it will not apply, must not be left vague.

14 Sinojaya also argued that MCE should not be allowed to claim the privilege because they had sent the minutes to them and Hoyo, the third party, and did not put any restrictions on the circulation of the minutes. This argument was rightly rejected by Woo JC. His Honour held: "Even documents which are admittedly subject to the 'without prejudice' qualification may be circulated. The prohibition is not against circulation but against admission in a court, or tribunal, of law as evidence."³⁹ This is, conceptually, an important point. Section 23 is placed in Part I of the Evidence Act whereas the (other) privileges such as "legal professional privilege"⁴⁰ and "marital privilege"⁴¹ are located in Part III of the same Act. This suggests that the rule in section 23 is not of the same nature as the privileges provided for in Part 3. Part I deals with, and is indeed headed, "the relevance of facts". The concept of relevance is of central importance in the scheme of the Act for it determines

³⁵ Cf *Civil Procedure*, vol 1 (2002), para. 31.3.40, at 684: "The without prejudice rule is not absolute and resort may be had to the without prejudice material for a variety of reasons when the justice of the case requires it". This statement should be taken as an explanation of the rationale underlying the various exceptions to the "without prejudice" rule rather than as a statement of the terms of a general exception to the rule.

³⁶ [2002] 1 WLR 2722 at 2742.

³⁷ *Ibid.*

³⁸ *Cutts v Head* [1984] Ch 290 at 306.

³⁹ *Supra* note 1, p 293.

⁴⁰ S 128 to s 131, Evidence Act.

⁴¹ S 124, Evidence Act.

whether evidence may be given of a fact.⁴² To borrow the language of common law, section 23 is, in truth, a rule of (in)admissibility and not a rule of privilege.⁴³ As Hoffmann usefully noted, extra-judicially:⁴⁴

“Statements without prejudice are usually said to be privileged, but this involves a rather different use of the word privilege from its usual meaning in the law of evidence. Privilege generally means the right of a witness to refuse to disclose evidence, but in connection with statements without prejudice it means the right of a party to make statements which cannot be proved against him.”

15 Thus, while a witness cannot “give evidence of a discussion without prejudice which he had overheard”,⁴⁵ “it is axiomatic that secondary evidence can be given of privileged communication”.⁴⁶ For example, if a letter otherwise protected by legal professional privilege falls into the hands of the opponent, he may be able to adduce evidence of it at the trial. It is true that the other side may, in certain circumstances, be able to obtain an injunction to prevent the opponent from doing so, but the basis of the injunction is not inadmissibility as such.⁴⁷ If the “without prejudice” communication is inadmissible, that it was circulated will not, of itself, make the communication admissible.

16 Although more discussion, especially on the second issue (relating to the significance of the negotiation concluding in an agreement) would have been helpful, the judgment as a whole is sound. Reaffirmation of the point that protection does not depend on any express stipulation that the discussion was ‘without prejudice’, and the

⁴² S 5, Evidence Act.

⁴³ As Lord Griffiths observed in *Rush & Tompkins Ltd v GLC*, *supra* note 6, at 1299: “The ‘without prejudice rule’ is a rule governing the admissibility of evidence”.

⁴⁴ *The South African Law of Evidence* (2nd ed, 1970) at 155. See also, *ibid*, at 177. But *cf Halsbury’s Laws of Singapore*, *supra* note 25, at 620-621.

⁴⁵ *The South African Law of Evidence*, *supra* note 44, at 155, note 3. Hoffmann cited *Theodoropoulos v Theodoropoulos* [1964] P 311 for this proposition. That case addressed the admissibility of evidence of communication made between spouses with a view to reconciliation. But it seems that the court treated the principles that apply in such a context as analogous to those that apply to without prejudice negotiations: see, *ibid*, at p 314.

⁴⁶ *The South African Law of Evidence*, *supra* note 44 at 155, note 3.

⁴⁷ For a recent summary of this area of the law, see *ISTIL Group Inc v Zahoor* [2003] EWHC 165, [2003] 2 All ER 252, and in the context of discovery, see *Al Fayed v Commissioner of Police of the Metropolis* [2001] EWCA Civ 780, *The Times*, 17 June 2002. Indeed, if the evidence is inadmissible at law, the court must exclude it; there is clearly no need, in that context, for an injunction to stop a party from adducing the evidence.

conceptual line drawn between admissibility and privilege are especially welcome. There was an appeal from this decision to the Court of Appeal but it was dismissed without any written judgment. Thus, Woo JC's decision, if not his reasoning, was endorsed by the Court of Appeal. What makes the case interesting are the theoretical issues it raises. As this note has tried to show, questions remain of the proper scope of section 23, whether the 'without prejudice' protection is confined to admissions, of the extent to which the provision reflects or is different from the common law position, and if different, the role the common law has to play here. There is still much interpretive work to be done yet.

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