Motorola Solutions Credit Co LLC *v* Kemal Uzan and others
[2015] SGHC 228

Case Number	: Suit No 1046 of 2013 (HC/Summons No 2356 of 2015)
Decision Date	: 03 September 2015
Tribunal/Court	: High Court
Coram	: Chua Lee Ming JC
Counsel Name(s)	: Chan Daniel and Chua Sui Tong (WongPartnership LLP) for the plaintiff; Daniel Chia and Stephany Aw Shu Hui (Morgan Lewis Stamford LLC) for the second to fifth and seventh defendants.
Parties	: MOTOROLA SOLUTIONS CREDIT COMPANY LLC — (1)KEMAL UZAN (2)CEM CENGIZ UZAN (3)MURAT HAKAN UZAN (4)MELAHAT UZAN (5)AYSEGUL AKAY (6)ANTONIO LUNA BETANCOURT (7)LIBANANCO HOLDINGS CO LIMITED (8)COLIN ALAN COOK (9)HAJ CAPITAL PTE LTD (10)LEVANT ONE INVESTMENTS PTE LIMITED (11)KRONOS INVESTMENTS & TRADING SINGAPORE PTE LTD

Civil Procedure – Legal Privilege – Common Interest Privilege – Waiver

3 September 2015

Chua Lee Ming JC:

Introduction

1 This was an application by the second to fifth defendants and seventh defendants ("the Applicants") for a declaration that four email chains ("the Emails") in the plaintiff's possession were protected by common interest privilege. The Applicants also sought orders to restrain the plaintiff from using the Emails in this action, and for the Emails to be delivered to the Applicants or destroyed. This application was one of several skirmishes in the plaintiff's long battle to enforce judgments which had been obtained in the United States ("US") and the United Kingdom ("UK") between 2003 and 2010.

2 It was not disputed that the Emails were privileged communications and that the Applicants were entitled to assert legal privilege unless they could be said to have waived privilege. The plaintiff's case was that legal privilege had been waived. I concluded that legal privilege had not been waived and now set out the reasons for my decision.

Background

3 In 2003, the plaintiff obtained judgment against the first to sixth defendants in the US for US$2,132,896,905.66 ("the US 2003 Judgment"). In 2006, judgment was entered against the first to sixth defendants for an additional US$1bn as punitive damages ("the US 2006 Judgment"). In 2010, judgment was entered against the seventh defendant for both amounts and interest on the ground that the seventh defendant was the alter ego of the first to sixth defendants ("the US 2010 Judgment"). These three judgments will be referred to collectively as "the US Judgments".

4 The English High Court entered judgment against the second and fifth defendants in 2004 and against the first and third defendants in 2010. Both judgments were entered based on the US 2003 Judgment. These two judgments will be referred to collectively as "the UK Judgments".

5 In this action, the plaintiff sought to enforce the US Judgments and/or the UK Judgments in Singapore. The plaintiff claimed that the eighth to eleventh defendants held certain assets as agents or nominees for the first to seventh defendants, and sued them for such assets to be delivered up to the plaintiff.

6 The plaintiff also commenced proceedings in Hong Kong against the first to seventh defendants and their alleged nominees in Hong Kong ("the HK Action"). One of the alleged nominees who was sued in the HK Action is Kwong Ka Yin, Phyllis ("Phyllis Kwong").

7 The plaintiff obtained the Emails from Phyllis Kwong in the HK Action pursuant to orders for discovery made by the Hong Kong High Court. Only the alleged nominees who were sued in the HK Action (including Phyllis Kwong) were given the opportunity to object to the disclosure of any document produced under the order of court. No objection to the disclosure of the Emails was made by them. The plaintiff subsequently obtained leave from the Hong Kong High Court to use, among others, the Emails in this action in Singapore.

8 The Emails were exchanged between Mr Ali Cenk Turkkan (a director of the seventh defendant), the second defendant, Phyllis Kwong, solicitors for the Applicants in Singapore, Hong Kong and France, and the then Singapore solicitors for the eighth to tenth defendants. The Emails were referred to and exhibited in the 13th Affidavit of George R. Calhoun, V filed on 15 April 2015 ("the 13th Affidavit") in support of the plaintiff's application for specific discovery against the Applicants and the eleventh defendant. The plaintiff relied on the Emails to show that Mr Ali Cenk Turkkan (as director of the seventh defendant) had sent emails on behalf of the second defendant.

9 The issues before me were whether the Applicants had waived legal privilege in respect of the Emails:

(a) implicitly by conduct; and/or

(b) as a result of the waiver by Phyllis Kwong in the HK Action.

Whether the Applicants had waived privilege by their conduct

10 The plaintiff disclosed the Emails in a List of Documents filed on 22 January 2015 ("the plaintiff's List"). The Applicants did not inspect the documents in the plaintiff's List. Instead, on 26 February 2015, the Applicants requested copies of all the documents in the plaintiff's List, and on 2 March 2015, copies were given to the Applicants. On 15 April 2015, the plaintiff filed the application for specific discovery against the Applicants and the eleventh defendant; the application was supported by the 13th Affidavit.

11 By way of a letter dated 29 April 2015, the Applicants' solicitors took objection to the reference to the Emails in the 13th Affidavit, and asked the plaintiff to explain how the plaintiff had obtained a copy of the Emails. The Applicants also reserved their rights. The plaintiff's solicitors replied on 5 May 2015 and informed the Applicants that the Emails were obtained pursuant to court orders granted in the HK Action. By way of a letter dated 12 May 2015, the Applicants' solicitors maintained that legal privilege over the Emails continued to exist. On 15 May 2015, the Applicants filed the present application.

12 The plaintiff submitted that the Applicants had waived privilege over the Emails as a result of their failure to object to the inclusion of the Emails in the plaintiff's List until some three months later.

The plaintiff relied on *Derby & Co Ltd and others v Weldon and others (No 10)* [1991] 1 WLR 660 ("*Derby*") in which the court held (at 674) that the defendants were entitled to assume that privilege had been waived in respect of documents included by the plaintiff in the trial bundles. In *Derby*, the plaintiff had erroneously included privileged documents in its trial bundles. The court held that since the defendants had no reason to suppose that any mistake had occurred, they were entitled to assume that the plaintiff intended to rely on the documents and that any privilege had been waived.

13 The facts in the present case are very different. Here, the Emails were in the plaintiff's List and the only conduct relied on by the plaintiff was the Applicants' silence between 22 January 2015 (when the plaintiff's List was filed) and 29 April 2015 (when the Applicants objected to the use of the Emails in the 13th Affidavit). In my view, these facts did not justify the plaintiff making any assumption that the Applicants had waived privilege. Although the plaintiff's List was filed on 22 January 2015, the Applicants received a copy of the Emails only on 2 March 2015. The Emails were provided to the Applicants together with numerous other documents and it was to be expected that the Applicants and their lawyers would need time to review the documents. Once the Applicants saw the Emails in the 13th Affidavit, they acted promptly and objected to the use of them on 29 April 2015. The delay in objecting to the Emails was thus not unreasonable.

14 The Applicants had also acted promptly in making this application and asking for it to be heard before the hearing of the plaintiff's application for specific discovery. This was important as it would have been too late for them to object once the application for specific discovery had been heard since the 13th Affidavit (filed in support of the application) would then have been deployed and the Emails admitted in evidence. Once admitted in evidence, privilege would be lost. Until the application was heard, the affidavit filed in support of the application was not yet admitted in evidence. The filing of the affidavit was only preparatory to the admission of that evidence: *Tentat Singapore Pte Ltd v Multiple Granite Pte Ltd and others* [2009] 1 SLR(R) 42 at [40]–[42].

15 I concluded that the Applicants had not waived privilege by their conduct.

Whether the waiver by Phyllis Kwong in the HK Action amounted to waiver by the Applicants

16 It was common ground that the Emails were protected by common interest privilege. Common interest privilege allows one person to share privileged materials with others who have a common interest in the subject matter to which the privileged materials relate, without any loss of legal privilege. Such sharing does not amount to a waiver of privilege except as between the provider of the materials and the recipients. In addition, each recipient can assert privilege over the shared materials against a third party: *Buttes Gas and Oil Co and another v Hammer and another (No 3)* [1981] 1 QB 223 at 243 ("*Buttes Gas"*); Bankim Thanki QC, *The Law of Privilege* (Oxford University Press, 2nd Ed, 2011) at paras 6.16–6.17 ("*The Law of Privilege*"); Colin Passmore, *Privilege* (Sweet & Maxwell, 3rd Ed, 2013) at para 6-061 ("*Privilege*"). The concept of common interest privilege has been accepted in Singapore: *The Oriental Insurance Co Ltd v Reliance National Asia Re Pte Ltd* [2009] 2 SLR(R) 385 at [190]–[192]. In the present case, each recipient of the Emails was entitled to assert legal privilege over the Emails because of a common interest in the subject matter of the Emails.

17 The question that arose in this case was whether waiver of privilege by one member of a common interest group constituted waiver by one or more other members of the group. In the case of joint interest privilege (*eg*, where two persons are jointly represented by a lawyer), it was clear that waiver by one joint interest holder would not amount to waiver by the other without the latter's agreement: *Gelatissimo Ventures (S) Pte Ltd and others v Singapore Flyer Pte Ltd* [2010] 1 SLR 833 at [17]; *The TAG Group Litigation Winterthur Swiss Insurance Company and another v AG (Manchester) Ltd (in liquidation) and others* [2006] EWHC 839 (Comm) ("*Winterthur*") at [133]; *The*

Law of Privilege at para 6.52. However, the position in the case of common interest privilege was less clear.

18 The position in England seems to be that a common interest holder cannot waive privilege for the other common interest holders without their agreement or authority: see *Winterthur* at [133], and Colin Tapper, *Cross and Tapper on Evidence* (Oxford University Press, 12th Ed, 2010) at p 445. No reasons were given for this view in either *Winterthur* or *Cross and Tapper on Evidence*. The view in *Winterthur* was also *dicta* as the case involved joint interest privilege. In contrast, the position in Australia is that if one common interest holder has waived privilege, the other common interest holders would not be entitled to assert legal privilege if it is unfair for them to do so: *The Law of Privilege* at para 6.53, referring to *Farrow Mortgage Services Pty Ltd (In Liq) v Webb and others* (1996) 39 NSWLR 601 ("*Farrow*") at 619–620 and *Patrick v Capital Finance Corporation (Australasia) Pty Ltd* (2004) 211 ALR 272 ("*Patrick*") at 277. The views in *Farrow* and *Patrick* were also *dicta* as *Farrow* involved joint interest privilege whereas in *Patrick* the court held that there was no common interest.

19 In *Farrow*, the court based its view on the fact that the underlying rationale of implied waiver was one of fairness, and referred to *Attorney-General for the Northern Territory v Maurice and others* (1986) 161 CLR 475 ("*Maurice*") at 488. The court also said (at 620) that in determining fairness, the court should consider "the circumstances in which the privileged communications took place and came to be exchanged and provided to others". *Farrow* was also referred to in *Patrick*.

20 The plaintiff submitted that the principle stated in *Farrow* and *Patrick* should be followed. According to the plaintiff, it was unfair for the Applicants to maintain privilege over the Emails in view of the waivers in the HK Action and the relevance of the Emails to the central factual issue in the present case. The Applicants submitted that the principle stated in *Winterthur* should be followed. In the alternative, the Applicants submitted that on the facts, it was not unfair for the Applicants to maintain legal privilege over the Emails. The Applicants were not parties to the discovery application in the HK Action and were not given the opportunity to inspect or object to the disclosure of documents by Phyllis Kwong.

21 *Winterthur*, *Farrow* and *Patrick* did not draw any distinction between waiver by the provider of the privileged materials and waiver by a recipient in the common interest group. However, in my view, such a distinction was necessary.

22 In the case of waiver by the provider of the privileged materials, I agreed with the view expressed in *The Law of Privilege* (at para 6.53) that common interest privilege can be waived unilaterally by the provider. In other words, waiver by the provider of the privileged materials would destroy the common interest privilege and the recipients in the group would no longer be able to assert such privilege. In my opinion, this was logical since the legal privilege was the provider's to begin with. I saw no reason why a recipient in the common interest group should be permitted to continue to assert legal privilege where the provider had waived it. The legal privilege acquired by the recipients in a common interest group was, to borrow a term used in *The Law of Privilege* at para 6.36, "parasitic" on the privilege of the provider.

23 As for waiver by a recipient of privileged materials in the common interest group, I was of the view that such waiver would not constitute waiver by the other common interest holders, including the provider. Each common interest holder, whether he was the provider or recipient, had the right to assert legal privilege over the shared materials against third parties. Except in the case of waiver by the provider, in principle, whether any common interest holder had waived his right to assert privilege ought to be determined by his own conduct. In my opinion, it would be unfair to allow waiver by one

recipient in a common interest group to constitute waiver by the other innocent common interest holders who had not participated in any way in the waiver. If any other common interest holder had in some way participated in the waiver then it would be his own conduct in doing so that determined whether he had waived privilege.

24 In the present case, Phyllis Kwong was not the provider but was a recipient of the Emails in the common interest group. It was also clear that the Applicants had not participated in any way in the waiver by Phyllis Kwong. Accordingly, I concluded that Phyllis Kwong's waiver did not constitute waiver by the Applicants and they remained entitled to assert legal privilege over the Emails.

25 I was also of the view that even if one adopted the view in *Farrow*, it was difficult to see how it would be unfair for the innocent common interest holders to continue to assert privilege in the case of waiver by one recipient in the common interest group unless they had themselves in some way participated in the waiver. However, as explained earlier, if there was any participation in the waiver then the question would be whether that conduct itself constituted waiver. The present case was a classic example. The Applicants had nothing to do with the waiver by Phyllis Kwong. There was no reason why it would be unfair for the Applicants to continue to assert privilege over the Emails. If, for example, the Applicants had been given the opportunity to object to Phyllis Kwong's production of the Emails in the HK Action and had chosen not to do so, then it would have been that conduct of the Applicants that would have determined whether they had waived privilege.

Whether the Emails should be delivered to the Applicants or destroyed

26 The Applicants sought an order that the copies of the Emails be delivered to them or destroyed. However, the plaintiff had properly obtained the Emails pursuant to the order of court in the HK Action. I agreed with the plaintiff's submission that there was no basis to grant the order sought and I did not do so.

Conclusion

27 I granted a declaration that the Applicants were entitled to claim legal privilege over the Emails, an injunction restraining the plaintiff from using the Emails against the Applicants in this action, an order striking out references to the Emails in the 13th Affidavit, and costs to be paid by the plaintiff fixed at $2,500 inclusive of disbursements.