Neutral Citation Number: [2020] EWHC 1015 (Ch)

Claim No: BL-2018-001982

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Royal Courts of Justice
Rolls Building, London, EC4A 1NL

Date: 01/05/2020

Before:

THE HONOURABLE MR JUSTICE ROTH

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Between:

BERKELEY SQUARE HOLDINGS and OTHERS	**Claimants**
- and -	
(1) LANCER PROPERTY ASSET MANAGEMENT LIMITED **(2) JOHN TOWNLEY KEVILL** **(3) DUNCAN ROBERT FERGUSON** **(4) ANDREW JOHN WINDLE LAX** **(5) BYRON HOWARD PULL** **(6) LANCER PROPERTY HOLDINGS LIMITED**	**Defendants**

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David Quest QC and **George McPherson** (instructed by **Eversheds Sutherland (International) LLP**) for the **Claimants**
David Wolfson QC and **Richard Mott** (instructed by **Reynolds Porter Chamberlain LLP**) for the **Defendants**

Hearing dates: 28-29 January 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

Mr Justice Roth:

INTRODUCTION

1. This case comes before the Court on an application by the Claimants to strike out parts of the Defence as an abuse of process and an application by the Defendants to amend their Defence. However, both applications turn on the question whether certain facts on which the Defendants seek to rely are excluded as privileged under the Without Prejudice ("WP") rule, or admissible under one or more of the exceptions to that rule. If they are admissible, then the Defendants can rely on that material in their pleaded Defence and further in the amendments which they seek to make to that Defence, and the application to strike out fails.

2. The applications therefore involve issues of principle concerning the scope of the WP rule and the proper interpretation of the exceptions to it. They have been very well argued by Mr David Quest QC leading Mr George McPherson for the Claimants and Mr David Wolfson QC leading Mr Richard Mott for the Defendants.

3. It will be necessary in this judgment to refer to some of the contested passages of the pleading and the facts which are said to be privileged. As should be obvious, if the Court holds that those passages are not allowed because the underlying facts are privileged, this judgment may not be relied on as a means of adducing that information. That is important, because it enables the delivery of an open judgment and avoids the need for undesirable redactions.

THE FACTS

4. The Claimants are 24 companies incorporated in the British Virgin Islands ("BVI"). The ultimate beneficial owner of all except the 8th Claimant is Sheikh Khalifa bin Zayed Al Nahyan ("Sheikh Khalifa"), who since November 2004 has been the Emir of Abu Dhabi and President of the United Arab Emirates. The 8th Claimant is beneficially owned by his daughter. The Claimants between them own a portfolio of valuable properties in Central London currently worth about £5 billion (the "Portfolio" and the "Properties").

5. From 2004 to 2017, the 1st Defendant ("Lancer") acted for the Claimants as the asset manager for the Properties. The 6th Defendant was until 2018 the holding company of Lancer. The 2nd to 5th Defendants are directors of Lancer and of the 6th Defendant.

6. Dr Mubarak Al Ahbabi was, from the outset of the Claimants' dealings with Lancer, the chairman of the Department of Presidential Affairs in Abu Dhabi, an office with responsibility for management of Sheikh Khalifa's private assets. Dr Al Ahbabi held powers of attorney from the Claimants.

7. By an agreement dated 18 November 2005 (the "2005 Agreement"), the 1st to 14th Claimants appointed Lancer to act as asset manager of the Portfolio. The 15th to 19th Claimants subsequently became parties to the 2005 Agreement and the 20th to 24th Claimants either became parties or in any event acted as if they were parties. For present purposes, nothing turns on that distinction.

8. By clause 4.1 of the 2005 Agreement, Dr Al Ahbabi (there referred to as HE Engineer Dr Mubarak) was appointed the "Owners' Representative" for the purpose of all dealings under that agreement.

9. By clause 7.1 and Schedule 2 of the 2005 Agreement, Lancer was to be paid in respect of asset management services a "performance fee" of 10% of the excess of the net proceeds of sale of any individual Property above its value at purchase after allowing for annual RPI increases. Lancer was also to receive fees for particular management services under Schedule 3.

10. The 2005 Agreement was executed as a deed and signed by Dr Al Ahbabi on behalf of the Claimants.

11. By a side letter to the 2005 Agreement ("the Side Letter") signed in about April 2006 on behalf of Lancer and approved by Dr Al Ahbabi, but back-dated to 18 November 2005, it was provided that the fees payable to Lancer under the 2005 Agreement were increased and amended by:

    i) the payment of a "capital performance bonus" if "as a direct result of the actions of Lancer, the capital value of a property has been increased", calculated at 10% of the difference in value of between the original purchase price and the resultant increase in value, after deduction of (a) the effects of inflation based upon the RPI, and (b) all costs of the exercise including legal and other fees;

    ii) a set of fees related to the rental income derived from the individual Properties;

    iii) revised fees for asset and property management, in place of those set out in Schedule 3 to the 2005 Agreement.

12. Dr Al Ahbabi is the ultimate beneficial owner of Becker Services Ltd ("Becker") and the Claimants allege (and the Defendants do not dispute) that he is also beneficially interested in Reilly Consultants Ltd ("Reilly"). Both Becker and Reilly are BVI companies. Part of the further fees payable under the Side Letter as set out in para 11(ii) and (iii) above when received by Lancer were paid over to Becker and, to a much lesser extent, to Reilly. The Claimants allege that between 2005 and 2015 Lancer made payments to Becker in the sum of about £26.48 million and that Becker did not provide any services in relation to the Portfolio or otherwise. A major area of dispute between the parties is whether those payments were authorised by, and known to, the Claimants and/or Sheikh Khalifa.

13. In March 2011, the 1st to 14th Claimants and Lancer executed a deed of variation to the 2005 Agreement ("the 2011 Variation"). The 2011 Variation:

    i) provided that the 15th to 19th and 21st to 24th Claimants were to become parties to the 2005 Agreement and added specified Properties to the Portfolio;

    ii) confirmed that the Owners' Representative (i.e. Dr Al Ahbabi) had authority to vary the terms and fees in Schedules 2 and 3 of the 2005 Agreement and direct the 6th Defendant and Lancer to make payments to third parties, including Becker;

    iii) ratified all payments made prior to the 2011 Variation by Lancer at the direction of the Owners' Representative to Becker and other third parties and

required Lancer to submit to the Owner's Representative an annual reconciliation of future payments to Becker.

14. By early 2012, a dispute had developed on Lancer's demand from the Claimants of payments in respect of the capital performance bonus pursuant to the Side Letter as set out at para 11(i) above. Lancer claimed that the total due was just over £75.5 million. The parties agreed to go to mediation under the auspices of the Centre for Effective Dispute Resolution ("CEDR").

15. On 5 September 2012, Lancer submitted its position statement, prepared by its then solicitors, for the mediation. On 12 September, the Claimants submitted their position statement, prepared by the solicitors who continue to act for them in these proceedings. And on 17 September, Lancer submitted its statement in response. The parties' respective mediation statements essentially agreed in identifying the key issues for the mediation as being:

    i) the proper interpretation of the provision in the Side Letter setting out the capital performance bonus;

    ii) what actions for what Properties gave rise to a right to such a bonus; and

    iii) the quantum of the claim.

    In their position statement, the Claimants expressly reserved their right to dispute the legality of the Side Letter but agreed not to take that point in the mediation in order to try to compromise the dispute. All the position statements were marked "Without Prejudice".

16. The mediation was held on 24 September 2012. The dispute was settled, not in the mediation itself but shortly afterwards. The settlement included the Claimants making a payment of £30 million to Lancer, which was approved by Sheikh Khalifa in writing on about 3 October 2012. The terms of the settlement were set out in two deeds dated 28 November 2012: A Deed of Settlement and a linked Deed of Variation ("the 2012 Deed of Variation"). The 2012 Deed of Variation was stated to be effective from 29 September 2012. It revoked the Side Letter, stated that the 16th and 21st to 24th Claimants were no longer parties to the 2005 Agreement, and made various amendments to the 2005 Agreement including the substitution of a new Schedule 2 of in respect of fees. The Deed of Settlement and the 2012 Deed of Variation were signed by Dr Al Ahbabi on behalf of the Claimants.

17. Following this settlement, the Claimants made payments to Lancer in accordance with the terms of the 2005 Agreement as varied by the 2012 Variation.

18. The Defendants say that Sheikh Khalifa is reported to have suffered a stroke in January 2014. On 8 May 2015, Dr Al Ahbabi was removed as chairman of the Department of Presidential Affairs and on 3 September 2015 he was replaced as Owner's Representative under the 2005 Agreement. In August 2016, Dr Ahmed Al Mazrouei became the sole Owner's Representative pursuant to clause 4.1 of the 2005 Agreement. Since about 1 October 2016, he has been assisted in that role by Mr Qazi Bhatti.

19. In September 2016, the Claimants served notice to terminate Lancer's appointment as asset managers under the 2005 Agreement. Pursuant to clause 6 of that Agreement, Lancer's appointment accordingly terminated on 28 September 2017.

THE PROCEEDINGS

20. The Claimants commenced these proceedings on 4 September 2018. Amended Particulars of Claim (APOC") were served on 7 November 2019. The APOC summarise the claim at para 7 as follows:

> "After notice to terminate Lancer's appointment as the Claimants' property asset managers was served in September 2016, the Claimants discovered that from April 2006 at the latest Lancer and its directors had been complicit in a substantial fraud perpetrated on the Claimants by their own appointed representative, Dr Al Ahbabi, in dishonest breach of fiduciary duty."

21. The APOC proceeds to state, at para 7.3, that "the main instrument for the fraud described above was the Side Letter" which significantly increased the management fees payable under the 2005 Agreement. The APOC alleges:

> "The true purpose for this increase was to provide a funding source from which Al Ahbabi (through Becker and Reilly) could make a profit for himself and for Lancer also. The Claimants infer that Lancer and its directors knew or suspected that entering into the Side Letter was a breach of Dr Al Ahbabi's fiduciary duties to the Claimants."

22. Further, the Claimants contend that by entering into the Deed of Settlement and the 2012 Deed of Variation, Dr Al Ahbabi "acted in further dishonest breach of his fiduciary duties to the Claimants" (para 7.5).

23. The Claimants therefore contend:

    i) that Dr Al Ahbabi had neither actual nor ostensible authority to commit the Claimants to the Side Letter, and that the Side Letter is void or alternatively, voidable; alternatively that it was void and ineffective as it was not executed as a deed in accordance with clause 18.2 of the 2005 Agreement;

    ii) that the Deed of Settlement and the 2012 Deed of Variation are void.

24. The Claimants claim:

    i) restitution from Lancer of the increased payments made under the Side Letter to Lancer (whether or not paid on to Becker or Reilly); and

    ii) restitution from Lancer of the payments made under the Deed of Settlement, including the £30 million paid in settlement of the capital performance claim, and increased payments made under the 2012 Deed of Variation; and/or

iii) that Lancer is liable to account to the Claimants for the payments in (i) and (ii) as knowingly received by reason of Dr Al Ahbabi's breach of fiduciary duty; and/or

iv) that the 2nd to 6th Defendants are each liable to account to the Claimants on the grounds of knowing receipt of any sums received by them from Lancer as constructive trustees as a result of payments made to Lancer by reason of Dr Al Ahbabi's breach of his fiduciary duty; and/or

v) that the 2nd to 5th Defendants are liable for dishonestly assisting Dr Al Ahbabi in relation to his breaches of fiduciary duty.

25. The APOC also pleads claims of bribery, breach of fiduciary duty and breach of contract against Lancer, and of conspiracy against all the Defendants.

26. The Defendants served a Part 18 Request which asked when the Claimants first came to believe or know that:

a) Dr Al Ahbabi controlled and was beneficially interested in Becker;

b) payments were made by Lancer to Becker; and

c) that Lancer had paid at least £27.04 million to Becker.

By their Response (the "Part 18 Response") served on 1 April 2019, prior to service of the Defence, the Claimants stated at 3-4 that the 1st to 14th Claimants learnt in March 2011 from the 2011 Variation that Lancer had from time to time made payments to Becker (but not the amount, scale or purpose of those payments) but that it was only in May 2017 that they learnt that Becker was Dr Al Ahbabi's company, that Lancer had made payment of £32 million to Becker, and that Becker had provided no consultancy services to Lancer. This followed a meeting on 9 May 2017, when the 2nd Defendant gave this information to Mr Bhatti, who relayed it to Dr Al Mazrouei.

27. The Defendants contend that the claim is misconceived. In the overview of their case set out at the start of the lengthy Defence, they allege that Sheikh Khalifa approved the payments to Becker in a document which pre-dated the 2005 Agreement; and state at para 1.C(IV) [as corrected by the draft Amended Defence]:

> "Further and in any event, the Claimants knew (and, insofar as necessary ratified or affirmed) independently of Sheikh Khalifa more than 6 years ago (a) that Lancer had paid millions of pounds to Becker by reason of the payment of sums to Lancer; and (b) of the terms set out in, and the contractual nature of, the Side Letter, the March 2011 Amendment, and the two 2012 Deeds. In particular:
>
> (1) Representatives of each Claimant (including at least Eversheds LLP, a Dr [Elgaili Abbas], the personal lawyer to Sheikh Khalifa, [Dr Al Ahbabi and Mr Ismail]) knew, because Lancer informed them of these facts in its

mediation position papers prepared in connection with the negotiation and settlement of Lancer's Capital Performance Bonus Claim:
(a) by not later than 5 September 2012, that Lancer had made payments to "*HE Mubarak's* [Dr Al Ahbabi's] *company, Becker Services Limited"* in the sum of the *"difference between the fees in the 2005 Agreement and the Side Letter"*; and
(b) by not later than 17 September 2012, that Lancer had paid at least £27.04 million to Becker.

(2) Subsequently, with that knowledge and (as admitted in the [Part 18 Response] at 13) following the receipt of legal advice from Eversheds LLP (the same or predecessor limited liability partnership as the Claimants' current solicitors), the Claimants proceeded to enter into the November 2012 Deed of Variation and the November 2012 Deed of Settlement.

(3) Accordingly, those two 2012 Deeds were duly executed by the Claimants with knowledge of the facts which they assert, at paragraph 7 of the Particulars of Claim and in the [Part 18 Response] at 3-4, they first learned of only after the termination of Lancer's engagement."

28. Paragraph 1 of the Defence concludes, at sub-para 1.C(VI):

> "Accordingly, the fundamental premise for this substantial claim – the allegation of fraud that lay undiscovered until recently – is, as the Claimants must know, misplaced and wrong."

29. The Defendants further assert that Dr Al Ahbabi had both ostensible and actual authority to execute the Side Letter and the two 2012 Deeds, and/or that they reasonably believed that this was the case; and that the directors of the Claimants who executed the 2011 Amendment similarly had authority to do so. They also state that Becker, through Dr Al Ahbabi, did provide services in connection with the management of the Portfolio and that they had been told that Sheikh Khalifa had agreed that Dr Al Ahbabi could be remunerated for his own work on the Portfolio out of the fees paid to Lancer.

30. The Reply repeated the assertion in the Part 18 Response that it was only in May 2017 that the Claimants learnt that Becker was owned and controlled by Dr Al Ahbabi and that it had been paid approximately £32 million by Lancer: see para 26 above.

31. By their proposed Amended Defence, the Defendants seek to introduce further arguments and defences, including:

i) at para 58.B(III)(3) a defence of estoppel by representation or convention. This is pleaded as follows:

> "Prior to the mediation, the Claimants and/or their representatives were clearly informed in writing of the matters set out at paragraph 1.C.IV above [i.e. of Dr Al Ahbabi's interest in Becker and of the substantial payments to Becker: see para 27 above]. A reasonable party in the position of Lancer would expect the Claimants, acting honestly and responsibly, to inform them if Dr Al Ahbabi and Becker were not authorised to receive the Becker payments. In the premises, the Claimants represented by their silence that Dr Al Ahbabi and Becker were authorised to receive the Becker payments and that the Side Letter was valid and approved by the Claimants. Further or alternatively, that representation reflected the shared assumption of the parties. The Defendants reasonably relied on and/or acquiesced in that representation and/or assumption to their detriment by (amongst other things) refraining from seeking a formal written ratification from the Claimants and/or by continuing to make payments to Becker and/or deal with Dr Al Ahbabi. In the circumstances it would be unjust, unfair and/or inequitable for the Claimants to resile from that representation and/or assumption."

This plea is effectively repeated at para 66D.

ii) at para 72.B(IV.A), in response to the Claimants' allegation that the two 2012 Deeds were in the interests only of Dr Al Ahbabi and Lancer and contrary to the Claimants' interests, it is asserted that the Claimants knew or believed that the substantial payments made to Becker (and thus to Dr Al Ahbabi) were legitimate and appropriate and that there were no apparent indications of any breach of trust or fiduciary duty by Dr Al Ahbabi.

32. I should add that estoppel is pleaded in the existing Defence at para 90D, but in a more limited way as a defence to the claim in bribery. The basis of the estoppel is not there fully articulated, but it is now clear that the Defendants seek to advance it on the same basis as summarised at para 31.i)31(i) above.

THE QUESTION

33. The Defendants' assertion that the Claimants became aware of some of the fundamental facts at least in September 2012 relies on what is said in Lancer's position statements for the mediation. In particular, the Defendants seek to rely on:

i) The statement in their opening position statement of 5 September 2012 at para 25:

> "In addition to the wording of the Capital Uplift Bonus, the Side Letter also records the uplift in management fees applicable under Schedule 3 of the 2005 Agreement, the difference between the fees in the 2005 Agreement and the Side Letter respectively representing the sums to be paid to HE Mubarak's company, Becker Services Limited."

ii) The statement in their position statement in response of 17 September 2012, at para 18:

> "The sum of £27.04 million has been paid pursuant to the terms of the Side Letter. The entirety of this sum has been paid to Becker…"

This point is repeated at para 20.

34. Therefore, in the first position statement it was made clear that:

a) Becker was in effect Dr Al Ahbabi's company; and

b) the increased Schedule 3 fees substituted by the Side Letter represented the sums to be paid to Becker.

It was evident from the documents that the increase in the Schedule 3 fees was substantial, but Lancer's position statement in reply specified that that the sum paid to Becker resulting from those increased fees was £27.04 million.

35. As set out above, the Defendants plead those points at the very outset of their existing Defence at para 1.C(IV); and they seek further to rely on them in their draft Amended Defence to support defences of estoppel and a defence to the allegation that the Defendants knew or suspected that Dr Al Ahbabi was not authorised or in breach of his fiduciary duty in agreeing to the 2012 Deed of Settlement and 2012 Deed of Variation on behalf of the Claimants.

36. It is common ground that both sides' position statements in the mediation come within the WP rule. The position statements are expressly marked "without prejudice" and were negotiating positions in the endeavour to reach a settlement through a mediation. The question to be determined is whether the Defendants are therefore precluded from relying on these facts or whether the circumstances come within an exception to the WP rule.

37. As mentioned above, the mediation was conducted through CEDR. Both parties signed the CEDR Model Mediation Agreement (13th edn) (Dr Al Ahbabi signing on behalf of the Claimants). Clause 4 of that Agreement states:

> "4. Every person involved in the Mediation –
>
> 4.1 will keep confidential all information arising out of or in connection with the Mediation, including the fact and terms of any settlement, but not including the fact that the Mediation is to take place or has taken place or where disclosure is required by law to implement or to enforce the terms of settlement or to notify their insurers, insurance brokers and/or accountants; and
>
> 4.2 acknowledges that all such information passing between the Parties, the Mediator ad/or CEDR Solve, however communicated, is agreed to be without prejudice to any Party's legal position and may not be produced as evidence or

> disclosed to any judge, arbitrator or other decision-maker in any legal or other formal process, except where otherwise disclosable in law."

38. The WP protection of the parties' position statements in the mediation was therefore based on express agreement as well as on the public policy that applies when parties invoke WP in seeking to settle their dispute. However, since clause 4.2 includes an exception for information "otherwise disclosable in law", I do not consider that this takes the matter any further. If an exception to the WP rule applies under the general law, that has an equivalent effect under the agreed mediation terms. Accordingly, the question whether anything said in the position papers is disclosable turns on the application of the WP rule at common law.

THE WP RULE

39. The classic statement of the WP rule is now that endorsed by the House of Lords in *Rush & Tompkins Ltd v GLC* [1989] AC 1280, in the speech of Lord Griffiths who said, at 1299:

> "The "without prejudice" rule is a rule governing the admissibility of evidence and is founded upon the public policy of encouraging litigants to settle their differences rather than litigate them to a finish. It is nowhere more clearly expressed than in the judgment in the judgment of Oliver LJ in *Cutts v Head* [1984] Ch 290, 306:
>
> "That the rule rests, at least in part, upon public policy is clear from many authorities, and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties 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 (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should…be encouraged fully and frankly to put their cards on the table… The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability.""

40. In *Muller v Linsley and Mortimer* [1996] PNLR 74, a case to which it will be necessary to return, Hoffmann LJ said, at 77:

> "Some of the decisions on the without prejudice rule show a fairly mechanistic approach, but the recent cases, most notably the decisions of this court in *Cutts v Head* [1984] Ch 290, and the House of Lords in *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280 are firmly based upon an analysis of the rule's underlying rationale.

> *Cutts v Head* shows that the rule has two justifications. First, 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 of these justifications are present; in others, only one or the other.
>
> So, in *Cutts v Head* the rule that one could not rely upon a without prejudice offer on the question of costs after judgment was held not to be based upon any public policy. It did not promote the policy of encouraging settlements because as Oliver LJ said:
>
> > "As a practical matter, a consciousness of a risk as to costs if reasonable offers are refused can only encourage settlement...."
>
> It followed that the only basis for excluding reference to a without prejudice offer on costs was an implied agreement based on general usage and understanding that the party making the offer would not do so. Such an implication could be excluded by a contrary statement as in a *Calderbank* offer."

41. More recently, in *Ofulue v Bossert* [2009] UKHL 16, Lord Hope (with whose speech Lord Walker agreed) observed (at [12]):

> "The essence of [the public policy basis of the WP rule] lies in the nature of the protection that is given to parties when they are attempting to negotiate a compromise. It is the ability to speak freely that indicates where the limits of the rule should lie. Far from being mechanistic, the rule is generous in its application. It recognises that unseen dangers may lurk behind things said or written during this period, and it removes the inhibiting effect that this may have in the interests of promoting attempts to achieve a settlement. It is not to be defeated by other considerations of public policy which may emerge later, such as those suggested in this case, that would deny them that protection."

42. However, it is well established that the WP rule is not absolute and is subject to exceptions. In *Rush & Tompkins*, Lord Griffiths stated:

> "… the rule is not absolute and resort may be had to "without prejudice" material for a variety of reasons when the justice of the case requires it."

This was echoed by Lord Walker in *Ofulue v Bossert* where, after observing that the WP rule had developed in England "more vigorously", probably, than in other common law jurisdictions, he said, at [57]:

> "As a matter of principle, I would not restrict the without prejudice rule unless justice clearly demands it."

43. The exceptions to the WP rule were considered by Robert Walker LJ in *Unilever Plc v Proctor & Gamble Co* [2000] 1 WLR 2436, in what Lord Clarke in the Supreme Court in *Oceanbulk Shipping SA v TMT Ltd* [2010] UKSC 44 described as an "illuminating judgment". Robert Walker LJ said this, at 2444-2446:

> "Nevertheless, there are numerous occasions on which, despite the existence of without prejudice negotiations, the without prejudice rule does not prevent the admission into evidence of what one or both of the parties said or wrote. The following are among the most important instances.
>
> (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* [1969] 1 WLR 1378 is an example.
>
> (2) Evidence of the negotiations is also admissible to show that an agreement apparently concluded between the parties during the negotiations should be set aside on the ground of misrepresentation, fraud or undue influence. *Underwood v Cox* (1912) 4 DLR 66, a decision from Ontario, is a striking illustration of this.
>
> (3) Even if there is no concluded compromise, a clear statement which is made by one party to negotiations, and on which the other party is intended to act and does in fact act, may be admissible as giving rise to an estoppel. That was the view of Neuberger J in *Hodgkinson & Corby v Wards Mobility Services* [1997] FSR 178, 191, and his view on that point was not disapproved by this court on appeal.
>
> (4) Apart from any concluded contract or estoppel, one party may be allowed to give evidence of what the other said or wrote in without prejudice negotiations if the exclusion of the evidence would act as a cloak for perjury, blackmail or other "unambiguous impropriety" (the expression used by Hoffmann LJ in *Foster v Friedland*, 10 November 1992, CAT 1052). … But this court has, in *Foster v Friedland* and *Fazil-Alizadeh v Nikbin*, 1993 CAT 205, warned that the exception should be applied only in the clearest cases of abuse of a privileged occasion.
>
> (5) Evidence of negotiations may be given (for instance, on an application to strike out proceedings for want of prosecution) in order to explain delay or apparent acquiescence. Lindley LJ in *Walker v Wilsher* (1889) 23 QBD 335, 338, noted this exception but regarded it as limited to "the fact that such letters

> have been written and the dates at which they were written". But occasionally fuller evidence is needed in order to give the court a fair picture of the rights and wrongs of the delay.
>
> (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."

The two other instances enumerated concerned offers made "without prejudice save as to costs" and the distinct privilege concerning communications in confidence with a view to matrimonial conciliation.

44. After considering a number of older authorities, Robert Walker LJ concluded, at 2448-2449:

> "…I consider that this court should, in determining this appeal, give effect to the principles stated in the modern cases, especially *Cutts v Head*, *Rush & Tompkins* and *Muller*.…
>
> Lord Griffiths in *Rush & Tompkins* noted (at p.1300c), and more recent decisions illustrate, that even in situations to which the without prejudice rule undoubtedly applies, the veil imposed by public policy may have to be pulled aside, even so as to disclose admissions, in cases where the protection afforded by the rule has been unequivocally abused."

45. Robert Walker LJ expressly acknowledged that his list of exceptions to the WP rule was not exhaustive. In *Oceanbulk Shipping*, the Supreme Court accepted as correct the parties' recognition that another exception was rectification. Lord Clarke, with whose judgment the other six members of the Court agreed, said (at [33]) that such an exception was "scarcely distinguishable from" Robert Walker LJ's first exception:

> "No sensible line can be drawn between admitting without prejudice communications in order to resolve the issue of whether they have resulted in a concluded compromise agreement and admitting them in order to resolve the issue of what that agreement was. This can be seen most clearly where the alleged agreement is oral but, in my opinion, must equally apply where the agreement is partly oral and partly in writing and where the agreement is wholly in writing but the issue is whether it reflects the common understanding of the parties."

46. In that case, the Supreme Court held that an exception would also apply to admit objective facts which emerge during the course of WP negotiations which form part of the factual matrix relevant to the correct interpretation of a contract. Lord Clarke said, at [42], that any other approach would introduce "an unprincipled distinction" between that kind of case and the case of rectification or the first exception identified by Robert Walker LJ in *Unilever* (i.e. to determine whether an agreement had been reached). He concluded at [46]:

> "For these reasons I would hold that the interpretation exception should be recognised as an exception to the without prejudice rule. I would do so because I am persuaded that, in the words of Lord Walker in *Ofulue* (at para 57), justice clearly demands it. In doing so I would however stress that I am not seeking either to underplay the importance of the without prejudice rule or to extend the exception beyond evidence which is admissible in order to explain the factual matrix or surrounding circumstances to the court whose responsibility it is to construe the agreement …."

47. Finally, in this brief review of the governing approach, I should refer to the recent statement of Teare J in *Single Buoy Moorings Inc v Aspen Insurance Ltd* [2018] EWHC 1763 (Comm) at [54]:

> "In my judgment an exception can only be allowed where it is of the same character as one already established or where it is an incremental but principled extension of an existing exception, as was the exception in *Oceanbulk v TMT*."

DO ANY OF THE EXCEPTIONS APPLY IN THIS CASE?

48. The Defendants relied on three of the exceptions to the WP rule, any one of which, Mr Wolfson submitted, would enable the admission of the material on which they sought to rely:

    i) the second *Unilever* exception: the question whether a contract could be set aside for misrepresentation, fraud or undue influence;

    ii) the third *Unilever* exception: estoppel;

    iii) the sixth *Unilever* exception: *Muller*.

    I shall consider them in that order.

(i) The Misrepresentation/Fraud Exception

49. As expressed in *Unilever*, this exception applies to the case where in seeking to set aside a concluded agreement on the grounds of misrepresentation or fraud, the claimant wishes to rely on what was said in the WP negotiations. Although it appears that this exception has never been applied in any reported English case, the

formulation in *Unilever* had repeatedly been approved by the appellate courts and neither side here suggested that this exception does not exist.

50. Mr Quest argued that it applies where a party uses the WP negotiations as a cloak to do something that is wrongful, in other words to engage in conduct which, were it not WP, would be actionable. In those circumstances, the WP rule will not be applied because such conduct is a form of abuse. In that respect, it may be said that this exception is related to the fourth, "unambiguous impropriety" exception. That of course is not the case here: the Defendants are not seeking to set aside any agreement but on the contrary to uphold the 2012 Settlement Deed and Deed of Variation.

51. Mr Wolfson, by contrast, emphasised that the underlying issue here was the same: can the agreements be set aside as a result of essentially fraudulent conduct? Since a party to a concluded agreement can rely on the preceding WP discussions to show that the agreement was reached following a fraudulent misrepresentation by the other party which undermined the agreement, so also should a party to a concluded agreement be able to rely on the preceding WP discussions to show that the agreement was reached following a representation which shows that there was no fraud on the other party as alleged which would undermine the agreement. The Defendants stated in their skeleton argument: "It cannot be right that without prejudice communications can be referred to in order to undermine an apparently valid compromise, but not to uphold it."

52. In my judgment, the statements here are admissible either under this exception, properly interpreted, or by reason of a small and principled extension of it to serve the interests of justice. If Lancer had misled the Claimants by misrepresentation in the mediation, then the Claimants could rely on that in challenging the 2012 Deeds. It seems to me contrary to principle to hold that where Lancer was truthful in the mediation, their statement cannot be admitted to rebut a case that the Claimants were deceived by Lancer as to the true state of affairs. In their skeleton argument, counsel for the Claimants submitted that this is unjustified as a radical innovation which

> "turns an existing exception (permitting a party to rely on without prejudice communications to set aside an agreement) on its head: the evidence would be adduced to defend a fraud claim rather than pursue it".

In my view, it is the maintenance of such a distinction in the present circumstances which is unjustified. To paraphrase Ward LJ's observation in *Oceanbulk* in the Court of Appeal [2010] EWCA Civ 79 at [37], if you can use the antecedent negotiations to prove a misrepresentation and thereby rescind an agreement, it is illogical to say that you cannot use them to disprove a misrepresentation and thereby uphold an agreement.

53. Moreover, I think this approach is consistent with the rectification exception and the extension of the first exception established by the Supreme Court in *Oceanbulk*. In a rectification dispute, the WP negotiations are admissible to determine what was the true agreement reached by the parties and whether that is properly reflected in the resulting contract. In a dispute as to interpretation of a contract, *Oceanbulk* held that the negotiations are admissible to determine the facts of which the parties were aware which constituted the relevant surrounding circumstances of the agreement which

they concluded. In the present case, the mediation papers are being looked at to determine what were the facts of which both parties were aware, on a dispute as to whether the contracts they concluded were made in ignorance by one party of certain key facts. Furthermore, there is no conflict here with the fundamental principle that parties should be encouraged to speak freely in negotiations, without concern that what they say may be used against them in litigation. The Defendants are seeking to adduce evidence of what was said by the 1st Defendant, not of anything said by the Claimants.

54. That is sufficient to dispose of this application, but I think it is appropriate to address the other exceptions as they were fully argued.

(ii) The Estoppel Exception

55. In *Unilever,* Robert Walker LJ derived this head from what Neuberger J said in *Hodgkinson & Corby Ltd v Wards Mobility Services Ltd* [1997] FSR 178. That was a trademark and passing off case, where the plaintiffs had obtained an interim injunction to restrain the defendant from dealing with the goods but then failed at trial. On the defendant's inquiry as to damages under the cross-undertaking, the plaintiffs argued that no damages should be awarded because the goods could not have been sold without infringing copyright. In response to the contention that it was not open to the plaintiffs to raise in the inquiry a copyright case which they had not advanced at trial, the plaintiffs sought to argue that the defendant was estopped from making that argument because earlier WP correspondence showed that they had 'held fire' on the copyright issue at the defendant's request. The plaintiffs submitted that the relevant letters should be admitted as an exception to the WP rule.

56. Neuberger J stated, at 190-19:

> "As a matter of principle, it seems to me that, even where a party can in principle rely upon correspondence being "without prejudice" on contractual as well as public policy grounds, the court will not allow him to do so if it is satisfied that it would be unconscionable."

Drawing an analogy with the "unambiguous impropriety" exception, he continued:

> "… there is, to my mind, a powerful argument for saying that if a clear and unambiguous statement is made by one party in "without prejudice" correspondence, and the statement is acted on, and reasonably acted on, by the other party, an objection by the first party to the correspondence being put in evidence by the second party in order to justify the step taken by the second party would be plainly unconscionable and would not be upheld by the court."

However, he proceeded to hold that there had been no such clear representation that would give rise to an estoppel on the facts of the case, and this issue was not considered further when the case reached the Court of Appeal: [1997] EWCA Civ 2571.

57. Here, the Defendants raised an estoppel argument on several grounds. However, for present purposes, the only relevant basis is that summarised at para 31(i) above. The allegation is accordingly of estoppel by silence or by convention, on the basis that having been told in Lancer's mediation statements about the substantial payments being made to Becker as Dr Al Ahbabi's company, the Claimants did not thereafter express any concern about this and the parties continued to deal on the same basis as regards payments from the Claimants to Lancer. For present purposes I shall assume that if the material were admitted, such an estoppel could be established, although no doubt that will be strongly contested.

58. Mr Quest submitted that the exception should be limited to a case of promissory estoppel, which was the form of estoppel at issue in *Hodgkinson*. Mr Wolfson drew attention to *Pavilion Property Trustees Ltd v Urban & Civic Projects Ltd* [2018] EWHC 1759 (Ch), where Mr Martin Griffiths QC (as he then was), sitting as a Deputy High Court Judge, observed at [103] that the exception should apply "to any enforceable estoppel." However, that was an *obiter* observation in a case which concerned promissory estoppel and where the wider point was not argued.

59. I do not think it is necessary to decide this point, which would involve consideration of the effect of the Supreme Court's acceptance of the additional estoppel argument, albeit without discussion, at the end of Lord Clarke's judgment in *Oceanbulk* at [47]. In my view, the estoppel exception does not avail the Defendants here in any event. The basis of the exception, as explained in *Hodgkinson*, is that a party should not be able to make an unambiguous statement in WP negotiations with the intention that the other party should rely on it, but then prevent the other party giving evidence of that statement in subsequent litigation when he has relied on it to his detriment. That is the unconscionable abuse of the WP protection, to which Neuberger J referred.

60. However, in the present case the Defendants seek to put in evidence not a representation, whether express or implied, made by the Claimants and otherwise covered by the WP rule. They seek to put in Lancer's own statements. The estoppel on which they seek to rely is based on the subsequent silence and conduct of the Claimants outside the confines of the mediation. The Defendants do not seek to rely on the Claimants' WP position statement in the mediation. The fact that the Claimants there said nothing about this matter is unsurprising since, as discussed below, it had nothing to do with the issues being mediated. The implied representation by silence and conduct of the Claimants alleged to found the estoppel accordingly occurred on occasions to which the WP rule did not reply.

61. Of course, in order to establish an estoppel based on that implied representation and conduct, the Defendants would have to give evidence of what Lancer told the Claimants in the mediation. But that is in my view a very different situation from the object of the estoppel exception, as explained in *Hodgkinson* and effectively adopted in *Unilever*. Accordingly, if the relevant passages in Lancer's WP position statements are to be admitted, I consider that this must rest on a different ground.

62. I should add that if I have misunderstood the Defendants' case and they do indeed wish to rely also on silence by the Claimants in the mediation, I would hold that this falls outside the estoppel exception. Such silence is a very far cry from a "clear and unambiguous statement" to which Neuberger J referred. To extend this exception to an implied representation by silence would in my view impair the policy served by the

WP rule, since parties seeking to compromise a dispute would then have to take care to controvert in the negotiations any statements made by the other side, which is not an approach conducive to open and constructive discussion.

(iii) The *Muller* Exception

63. The so-called *Muller* exception is problematic. As its name suggests, it is based on the decision of the Court of Appeal in *Muller*: para 40 above. There, the plaintiffs ("the Mullers") had sued a company over the dismissal of Mr Muller as a director and the loss suffered by the compulsory acquisition of his shareholding. Those proceedings were settled and the Mullers then sued their solicitors who had advised them in the dispute, alleging negligence in failing to present a properly stamped transfer of the shares from Mr Muller to his wife, which the Mullers alleged would have avoided the loss. In their claim, the Mullers gave credit for the amount received in the settlement, which they pleaded had been in reasonable mitigation of their loss. As part of their defence, the solicitors contended that the conduct and settlement of the earlier action with the company was not a reasonable mitigation.

64. The Mullers disclosed the writ and statement of claim, and letter before action, in the earlier proceedings and the final settlement agreement with the company. But the solicitors sought disclosure of all the communications in the negotiations, which the Mullers resisted as privileged under the WP rule. The Master and, on appeal, the High Court judge refused to order disclosure. The Court of Appeal allowed the appeal.

65. I have set out above an extract from the judgment, Hoffmann LJ where he discussed the justifications for the WP rule to be derived, in particular, from *Cutts v Head* and *Rush & Tomkins Ltd*. Hoffmann LJ then stated, at 79-80 of the report:

> "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.
>
> This is not the case in which to attempt a definitive statement of the scope of the purely convention-based rule, not least because, as Fox LJ pointed out in *Cutts v Head* at p 316, it depends upon customary usage which is not immutable. But the public policy rationale is, in my judgment, directed solely to admissions. In a case such as this, in which the defendants were not parties to the negotiations, there can be no other basis for the privilege.

66. On that basis, Hoffmann LJ proceeded to hold that disclosure of negotiations should be given:

> "If this is a correct analysis of the rule, then it seems to me that the without prejudice correspondence in this case falls outside its scope. The issue raised by paragraph 17 of the statement of claim is whether the conduct of the Mullers in settling the claim was reasonable mitigation of damage. That conduct consisted in the prosecution and settlement of the earlier action.
>
> The without prejudice correspondence forms part of that conduct and its relevance lies in the light it may throw on whether the Mullers acted reasonably in concluding the ultimate settlement and not in its admissibility to establish the truth of any express or implied admissions it may contain. On the contrary, any use which the defendants may wish to make of such admissions is likely to take the form of asserting that they were not true and that it was therefore unreasonable to make them.
>
> I do not think that interpreting the rule in this way infringes the policy of discouraging settlements…"

67. Leggatt LJ stated:

> "In my judgment the plaintiffs cannot both assert the reasonableness of the settlement and claim privilege for the

> documents through which it was reached. They are relevant because the plaintiffs rely not only on the fact of settlement, but also on the reasonableness of it."

He expressed his agreement with Hoffmann LJ's reasoning that the WP correspondence fell outside the scope of the privilege, but proceeded to hold that even if it were privileged, he would reach the same conclusion on the basis of waiver. By producing the letter before action and the compromise agreement, the Mullers had impliedly waived any privilege in all other documents concerning the settlement.

68. Swinton Thomas LJ agreed with both judgments. He proceeded succinctly to explain his reasons as to why the instant case differed from the usual situation:

> "Different considerations apply because it is the litigants who were engaged in the previous without prejudice negotiations and have themselves put their own conduct in issue. In paragraph 17 of their statement of claim, the plaintiffs allege that they have made a reasonable attempt to mitigate their damage. Accordingly, they have alleged in settling their proceedings for the sum that they accepted, they acted reasonably. It is the plaintiffs who have brought the reasonableness of their conduct in issue. As Mr Sher QC [counsel for the defendants] rightly submitted, that allegation made by the plaintiffs would in reality not be justiciable without the court having sight of the Without Prejudice negotiations and correspondence. By bringing their conduct into the arena, and putting it in issue, the plaintiffs have, in my judgment, waived any privilege attached to Without Prejudice negotiations and correspondence."

69. However, Hoffmann LJ's analysis of the WP rule as concerned only with admissions was doubted by Robert Walker LJ in *Unilever* and in effect disavowed by the majority of the House of Lords in *Ofulue v Bossert*: see the speeches of Lord Roger at [43] and Lord Neuberger at [95]-[97] (with whom Lords Hope and Walker agreed). As Lord Scott observed in his dissenting speech at [28], if Hoffmann LJ's view in *Muller* that the rule was restricted to admissions was correct, the appeal in *Ofulue* had to be allowed, whereas it was dismissed. As for the alternative reasoning of Leggatt and Swinton Thomas LJJ based on waiver, it is generally recognised that the privilege conferred by the WP rule is a joint privilege which cannot be waived unilaterally by only one party to the negotiations (in contrast to the position on legal professional privilege): see e.g. *Avonwick Holdings Ltd v Webinvest Ltd* [2014] EWCA Civ 1436 at [21]. There was no suggestion in *Muller* that the other parties to the original action had agreed to waive the privilege.

70. Nonetheless, the House of Lords in *Ofulue v Bossert* did not overrule *Muller* and in *Oceanbulk* the Supreme Court expressly approved Robert Walker LJ's exposition in *Unilever* of the exceptions to the WP rule, which of course expressly includes *Muller* as a distinct category. In *Avonwick*, the Court treated *Muller* as rightly decided. Lewison LJ (with whose judgment Sharp and Burnett LJJ agreed) said at [22]:

> "That was a case in which the plaintiff asserted that a settlement that he had made was a reasonable settlement and the defendant asserted that it was not. The reasonableness of the settlement was therefore directly in issue and it was the plaintiff who had put it in issue. It is hardly surprising that in those circumstances the court ordered disclosure of the negotiations leading to the settlement."

71. The difficulty, therefore, is to determine the ambit of the *Muller* exception, given that much of the reasoning of all three judges who decided that case cannot stand. This was considered in two recent decisions: *EMW Law v Halborg* [2017] EWHC 1014 (Ch) and *Briggs v Clay* [2019] EWHC 102 (Ch).

72. In *EMW Law*, Mr Halborg, a solicitor, acted for his parents and a family company under a conditional fee agreement ("CFA") on their claim against a firm of architects, Savage Hayward. Mr Halborg engaged EMW Law ("EMW") to assist him under an agency arrangement which itself incorporated a CFA in that it provided that EMW would be paid only fees which Mr Halborg or the Halborg claimants had recovered from Savage Hayward. The proceedings against Savage Hayward were settled on terms under which they were liable to pay the Halborg claimants' costs. When it appeared that Mr Halborg had failed to recover anything in respect of its fees, EMW sued him for breach of implied terms of the agency agreement that he would take all reasonable measures to recover its fees.

73. A significant issue in the proceedings was whether Mr Halborg had made all reasonable efforts to recover EMW's costs in his negotiations on costs with Savage Hayward's solicitors (BMW) and, indeed whether the costs had finally been settled (which Mr Halborg disputed). Mr Halborg sought to withhold, as covered by the WP rule, disclosure of correspondence and notes of communications with BMW relating to those negotiations (referred to as the "Class A Documents").

74. In his judgment, Newey J (as he then was), after discussing the criticism of the reasoning in *Muller*, said that he should proceed on the basis that there was an exception which encompasses the facts of the *Muller* case. He held that the documents should be disclosed, stating, at [64]:

> "… I have concluded that, to echo Lord Walker in *Ofulue v Bossert* and Lord Clarke in the *Oceanbulk* case, justice clearly demands that an exception to the without prejudice rule (whether that encompassing the facts of the *Muller* case or another, comparable, exception) should apply …."

75. Newey J set out a number of factors which supported that conclusion, of which three seem to me particularly relevant for the present case. He noted that Mr Halborg had referred in his defence to the negotiations with BMW, and further:

> "iv) It is hard to see how EMW's claim would be justiciable without disclosure of Class A Documents. EMW and the Court would both, on the face of it, be in the dark as to, for example, what any payments Savage Hayward have made related to, how they came to be made on that basis, why nothing has been paid

> in respect of other items of costs and, should it prove to be the case that no settlement has been concluded, why not;
>
> v) I see no likelihood that recognising that an exception to the without prejudice rule applies would deter parties from seeking to settle. Those undertaking negotiations will, if well informed, already be aware that the without prejudice rule will not apply if there is a dispute about whether they have reached agreement and that the facts of the *Muller* case have been held to fall within another exception. The existence of the *Muller* exception, moreover, means that communications otherwise protected by the without prejudice rule may become disclosable and admissible because the other party to negotiations unilaterally chooses, for reasons of his own, to put forward a case about the negotiations in litigation with a third party;…"

76. The facts of *Briggs v Clay* were complex. The case concerned a pension scheme for employees within a group of companies. In a prior action by way of a Part 8 claim brought by the trustees of the scheme, the court had held that various deeds prepared for the scheme over many years by the scheme administrators, Aon, were invalidly executed and of no effect. As a result, the burden on the participating employers was increased. There were many employees of associated companies whose claim to membership of the scheme derived not from the deeds directly at issue in the proceedings but from deeds of adherence. Following judgment on the Part 8 claim, there was consideration by the trustees and employers as to whether to appeal, and the solicitors for Aon were involved in those discussions since it was clear that the extra burden on the employers and the expenses of the litigation would be the subject of a claim against Aon. Following negotiations between the trustees/employers and the representative beneficiaries, the parties reached a settlement ("the Settlement") which included the granting of benefits to those employees whose membership depended on the deeds of adherence.

77. The employers then brought professional negligence proceedings against Aon. By its defence, Aon contended that the employers should never have accepted in the Settlement that those employees who were subject to deeds of adherence became part of the scheme; and that the legal advisors of the employers had been negligent in failing to pursue that argument (referred to as "the Participating Employer Argument") in the Part 8 litigation and the settlement negotiations, which negligence broke the chain of causation. The employers thereupon joined their former lawyers, both solicitors (Gowling) and counsel, as additional defendants, adopting Aon's allegations. By their defence, the lawyer defendants contended that Aon, through its solicitors, had been kept closely informed about the issues and arguments in the Part 8 proceedings and, although not directly involved, had liaised with them on those issues and arguments, including during the negotiations which led to the Settlement.

78. The judgment explains, at [21]:

> "Aon disputes in particular that it was "closely" involved or that there was close liaison in such matters. There is, however, no dispute that Aon were involved to some extent with the way in which the negotiations with the representative beneficiaries

> were being conducted: some of the communications between Gowling and Aon's lawyers are open and will be admissible to prove a degree of liaison and involvement."

79. The lawyer defendants sought to rely extensively on the WP communications which they conducted on behalf of their clients with Aon's lawyers regarding the negotiations which led to the Settlement. They stressed that they sought to rely on that material not for the truth or falsity of anything said or for any admission or implied admission, but only so that the trial judge could see the extent to which Aon's lawyers were involved. The lawyer defendants contended that this evidence was admissible under the *Muller* exception to the WP rule.

80. After a comprehensive review of the authorities, Fancourt J explained the issue facing the court as follows:

> "75. In both *Muller* and *EMW Law*, the without prejudice negotiations involved third parties and related to a different claim, albeit a claim that had some connection with the proceedings before the court. In *Muller* the negotiations had been concluded and the claim against the third party had been resolved. In *EMW Law*, there was no finding that the dispute with the third party had been resolved. The orders for disclosure made in neither case included without prejudice communications about the claim that was before the court.
>
> 76. What is distinctive about this case is that there is one claim against different parties: Aon – who, unless they have waived it, have the benefit of privilege in the without prejudice communications with the Claimants – and the Lawyer Defendants, who acted for and advised the Claimants in those negotiations and who wish to rely on the privileged material. The case is unusual in that related without prejudice communications between the Claimants and the representative beneficiaries will be in evidence at trial. The Claimants have waived privilege by suing their former solicitors and Counsel in relation to the conduct of those negotiations and the representative beneficiaries have confirmed their agreement to those negotiations being disclosed. But the Lawyer Defendants seek to put in evidence the content of separate without prejudice communications made in an attempt to settle this claim at the same time as the Approved Settlement was being negotiated with the representative beneficiaries' lawyers."

81. Having rejected the argument that Aon had impliedly waived the WP protection, Fancourt J turned to consider the ratio and scope of the *Muller* exception. He said:

> "98. It is significant that all three Lords Justices in the *Muller* case 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. Similarly, in *EMW*,

Newey J considered it to be material that Mr Halborg had referred to the content of his without prejudice negotiations with BLM and that it was hard to see how EMW's claim would be justiciable without disclosure of the negotiations. Lewison LJ observed in *Avonwick* that it was hardly surprising that the court ordered disclosure of the negotiations in *Muller* given that the plaintiff had put that matter directly in issue.

99. In this light, 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. Indeed, in cases where the *Muller* exception has been applied, the judges have emphasised that the claim would otherwise be non-justiciable. A claimant (or defendant) cannot at one and the same time raise an issue to be tried and rely on without prejudice privilege to prevent the court from seeing the evidence that is needed to decide it. However, this exception has not previously been held to apply in the case of without prejudice negotiations in the very claim that is before the court.

100. I consider that there are a number of facets to the so-called *Muller* exception, which go beyond the fact that the negotiations have some independent relevance as a fact apart from the truth or falsity of anything stated in them. That is no doubt a necessary condition for any exception applying, otherwise the policy underlying the without prejudice rule would be directly infringed, but it is not a sufficient condition for the application of the *Muller* exception. This appears to me to depend on the necessity of admitting the material to resolve an issue raised by a party to without prejudice negotiations, in circumstances in which the legitimate protection given to the parties to the negotiations is not adversely affected.

101. It is clear, on authority, that there is no exception to the without prejudice rule merely because justice can be argued to require one on the facts of a particular case. In *EMW Law*, Newey J did not conclude that disclosure should be given because justice required it: he concluded that it was just to regard an established exception to the without prejudice rule, whether the *Muller* exception or a comparable one, as applying on the facts of that case. The facts of *EMW Law* were somewhat different from *Muller*, in that there was no evidence of a concluded settlement with Savage Hayward on costs, therefore there was a possibility of prejudice from disclosure of the negotiations. However, given that the family's and Savage Hayward's rights were not being adjudicated by the court in that claim, the court felt able to protect them in a different way. The outcome was the same: the legitimate interests of neither party

> to the without prejudice communications would be prejudiced by their being available to be referred to at trial."

82. Analysing the issues raised in the proceedings on that basis, Fancourt J held that evidence of the WP discussions between Aon and the lawyer defendants should not be admitted. He found that consideration of that evidence was not necessary in order to determine whether the lawyer defendants were negligent in failing to raise the Participating Employer Argument, nor to determine whether the Settlement was reasonable. On the issue whether there was a break in the chain of causation, Fancourt J noted that the fact that Aon's solicitors failed to identify the Participating Employer Argument "will surely be uncontentious at trial" and in any event could be proved without reference to the WP correspondence. Nonetheless he acknowledged that this correspondence was potentially relevant to show the degree of Aon's involvement. He explained his decision as follows:

> "108. In my judgment, the issue of causation pleaded by Aon is far from being non-justiciable in the absence of the content of the without prejudice negotiations. The fact of Aon's involvement to some degree in discussing the basis of the Approved Settlement emerges from the open correspondence. What on a fair analysis the Lawyer Defendants seek to establish by relying on the without prejudice communications is, first, a greater degree of involvement in discussions that may emerge from those communication (such as to justify their pleading that Aon was "closely involved"), and secondly some colour derived from statements and assertions in that correspondence, which they hope will make it less credible for Aon to argue that the failure to identify the Participating Employer Argument was grossly negligent.
>
> 109. I accept that the fact of the without prejudice communications and the content of some of them is relevant, but it is far from necessary to refer to them in order to have a fair trial of the issues of gross negligence and break in the chain of causation. Even in the absence of the content of the without prejudice communications, Aon cannot mislead the court by making untrue assertions about the extent of any involvement, and (for reasons I give in the final part of this judgment) the Lawyer Defendants will be entitled to refer to the fact of without prejudice discussions with the Claimants at the time of the appeal and Approved Settlement. It should also be borne in mind that the Lawyer Defendants' primary defence is that they were not negligent because, as the trustees were advised in November 2011 by a different Leading Counsel, the Participating Employer Argument would fail.
>
> 110. I therefore do not accept that by pleading a new intervening act defence Aon has disentitled itself to rely on the privilege attaching to the contents of its without prejudice communications with the Claimant. Some relevant material will be excluded from evidence, but that is often the case where

> legal professional privilege or without prejudice privilege is invoked. Once the fact (rather than the content) of the without prejudice communications is admitted, there is relatively little of any substance that will be excluded."

83. I respectfully agree with Fancourt J's analysis of the *Muller* exception, which I gratefully adopt. The question then arises what is meant by "fairly justiciable." This of course does not mean justiciable in the sense applied to an act of State or a claim to title over foreign land. In my judgment, it means that 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. Hence in *Muller,* the issue was whether the Mullers had acted in reasonable mitigation of loss by settling the proceedings in the amount that they did. Plainly, that issue could be determined without seeing the content of the WP negotiations, since the court would see the letter before action, the pleadings and the terms of the settlement. But to reach a fair decision, the court would need to see the WP negotiations which led to the settlement. This is the point made in the short judgment of Swinton Thomas LJ who, although justifying the outcome in terms of waiver, said:

> "It is the plaintiffs who have brought the reasonableness of their conduct in issue…. [T]hat allegation made by the plaintiffs would in reality not be justiciable without the court having sight of the without prejudice negotiations and correspondence."

The same applies, it seems to me, to EWW's allegation in *EMW Law* that Mr Halborg had failed to make reasonable efforts to secure agreement by Savage Hayward to cover its fees.

84. Mr Quest submitted that the *Muller* exception applies only in a three-party case, where the other party to the WP negotiations is not a party to the action and so cannot waive the privilege. I do not agree. Although that was the case on the facts in *Muller* and *EMW Law*, it was not the basis on which Fancourt J rejected application of the exception in *Briggs v Clay* and I see no logical basis for such a limitation on the exception if its justification is as set out above. The justification may apply as much in a two-party case, where the other party to the negotiations is a party to the action but, in its own litigation interest, refuses to agree to a waiver.

85. Accordingly, I consider whether this exception should apply in the present case. The Claimants here have alleged that the Defendants were complicit in "a substantial fraud perpetrated on them" by Dr Al Ahbabi, by arranging for very large sums to be paid to a company which Dr Al Ahbabi controlled (Becker): APOC, para 7: see para 20 above. Fundamental to the allegation is the contention that the Claimants did not know about these payments or Dr Al Ahbabi's interest in Becker. The Claimants plead that they discovered this only after Lancer's appointment was terminated: APOC, para 7. They assert that this was in May 2017, in the circumstances set out in para 26 above, and indeed assert that they "could not with reasonable diligence have discovered it earlier": Part 18 Response to requests 3-4; Reply, paras 6.1, 30.2.

86. A fundamental issue in the trial of the claim will be whether the Defendants, as the Claimants assert, acted dishonestly; and therefore whether the Claimants were indeed

unaware of these key facts before May 2017, and more particularly before entering into the 2012 Deed of Settlement and Deed of Variation.

87. Since the Claimants rely strongly on their lack of knowledge, I consider that this is an issue, and indeed a potentially critical issue, raised by the way the Claimants have advanced their case. In my judgment, this issue is not fairly justiciable if the Defendants cannot put in evidence of what the First Defendant (Lancer) told the Claimants in its mediation statements in September 2012. Put another way, I do not see that the Claimants can fairly advance a case based on their ignorance until May 2017 of certain key facts while excluding evidence that they were told those facts some five years earlier. Like Newey J in *EMW Law*, I consider that justice clearly demands this evidence should be admitted.

88. In concluding that, to this extent, the information in the Lancer position papers falls within an exception to the WP rule, I further take account of the following:

i) the Defendants are not seeking to put in an admission by the Claimants relating to any part of the dispute which led to the mediation; on the contrary, the material to be admitted comprises only what was said by one of the Defendants;

ii) the information when conveyed in Lancer's position statements was included by way of background and was largely irrelevant to the actual dispute which was the subject of the mediation. The issues in the mediation, as set out at para 15 above, concerned the provision in the Side Letter for a capital performance bonus. The one sentence which the Defendants seek to have admitted from Lancer's opening position statement is contained in the section headed "Factual Background" and simply explains the other aspect of the Side Letter, i.e. the uplift in management fees introduced by the new Schedule 3 to the 2005 Agreement. Lancer there stated that those represented the sums to be paid to Dr Al Ahbabi's company, Becker. As regards the few sentences relied on from Lancer's response position statement, setting out the specific amount which Becker had received, that was arguably of some relevance to the dispute in showing that Lancer had not benefitted from a significant part of the sums paid; but even that was a relatively minor point in a dispute that concerned interpretation of the Side Letter and valuation of the Properties.

iii) Unlike *Briggs v Clay*, there is to my mind a serious risk that if the material is not admitted, the court at the trial will be misled. The Claimants have pleaded a positive case as to how they first learnt of the key facts, and presumably will give evidence to that effect. Even if the Claimants will contend that Dr Al Ahbabi and Dr Abbas who attended the mediation lacked authority to represent them, the Claimants were represented in the mediation by Eversheds and have confirmed in the Part 18 Response (to request 13) that Eversheds were acting on their behalf. Their authorised solicitors accordingly received this information while acting on their behalf. I accept that the risk of the court being misled may not alone be sufficient to justify admission of the WP material, but I regard it as a relevant factor.

iv) I do not see that admitting this material risks undermining the public policy justifying the WP rule. Since the material being admitted (i) comprises

exclusively statements by the party seeking to have them admitted, and (ii) was peripheral to the issues subject to mediation, this does not impair or fetter free and open exchanges by parties seeking to settle their dispute. Indeed, the Claimants accept that Lancer would have been fully entitled to repeat this information outside the mediation, and if it had done so the Claimants would have no basis to object to Lancer giving evidence of what it said.

89. I do not consider that the case of *Savings & Investment Bank Ltd v Fincken* [2003] EWCA Civ 1630, on which Mr Quest strongly relied, affects the above conclusion. There, proceedings for the recovery of a debt had been settled by an agreement which contained a warranty that the defendant had disclosed all his assets worth £5000 or more in an affidavit of means. The claimant subsequently brought an action seeking to set aside the settlement on the ground that the defendant had fraudulently or negligently misrepresented his assets in that affidavit. A few months before trial, a without prejudice meeting was held at which the defendant allegedly admitted owning shares which he had not disclosed in his affidavit. The claimant then applied to amend its statement of claim to include this admission on the basis that it came within the fourth, "unambiguous impropriety" exception enumerated in *Unilever* (see para 423 above).

90. The Court of Appeal rejected that argument. After summarising the various authorities, Rix LJ (with whose judgment Carnwath LJ agreed) noted that if the exception applied, then Mr Fincken would be obliged to explain what he said in the WP meeting or face the consequences, since that admission would be in the public domain. Rix LJ set out his conclusion as follows, at [57]:

> "In my judgment that philosophy is antagonistic to treating an admission in without prejudice negotiations as tantamount to an impropriety unless the privilege is itself abused. That, it seems to me, is what Robert Walker LJ meant in *Unilever* when he repeatedly spoke in terms of the abuse of a privileged occasion, or of the abuse of the protection of the rule of privilege: see at 2444G, 2448A and 2449B. That is why Hoffmann LJ in *Forster* emphasised that it was the use of the privileged occasion to make a threat in the nature of blackmail that was, if unequivocally proved, unacceptable under the label of an unambiguous impropriety. And that is why Peter Gibson LJ in *Berry Trade* suggested, without having to decide, that talk of "a cloak for perjury" was itself intended to refer to a blackmailing threat of perjury, as in *Greenwood v. Fitt*, rather than to an admission in itself. It is not the mere inconsistency between an admission and a pleaded case or a stated position, with the mere possibility that such a case or position, if persisted in, may lead to perjury, that loses the admitting party the protection of the privilege (see the first holding in *Fazil-Alizadeh,* described in para 47 above). It is the fact that the privilege is itself abused that does so. It is not an abuse of the privilege to tell the truth, even where the truth is contrary to one's case. That, after all, is what the without prejudice rule is all about, to encourage parties to speak frankly to one another in aid of reaching a

> settlement: and the public interest in that rule is very great and not to be sacrificed save in truly exceptional and needy circumstances."

91. Rix LJ further observed, at [59], that a litigant "understands that he may make admissions for the purpose of settling litigation under the protection of privilege if the negotiations fail." If the case is one of fraud or dishonesty, it becomes difficult to settle if the defendant is at risk if he candidly admits his past faults, or alternatively, "the less scrupulous who make no admissions are better served by the very rules which are designed to encourage frank exchanges than are the more candid." Rix LJ acknowledged the clear public interest in the discouragement of perjury, but stated, at [62]:

> "It is of course distasteful for this or any court to avert its eyes from an admission which, subject to any point about value, appears to incriminate Mr Fincken in lying in a sworn document. However, in the tension between two powerful public interests, it seems to me that that in favour of the protection of the privilege of without prejudice discussions holds sway – unless the privilege is itself abused on the occasion of its exercise."

92. However, as is clear from the passages quoted above, *Fincken* was concerned with the unambiguous impropriety exception, which is not at issue in the present case. As the court explained, that is addressed to an abuse of the WP protection by using the privileged occasion to make an otherwise unlawful threat. Further, *Fincken* was concerned with an admission, and protection for admissions in the attempt at a settlement is at the heart of the public policy underlying the WP rule. That is very different from the circumstances of the present case.

Another basis: an "Independent Fact" exception?

93. In *Rush and Tompkins Ltd*, Lord Griffiths in his discussion of exceptions to the WP rule said, at 1300:

> "There is also authority for the proposition that the admission of an "independent fact" in no way connected with the merits of the cause is admissible even if made in the course of negotiations for a settlement. Thus an admission that a document was in the handwriting of one of the parties was received in evidence in *Waldridge v. Kennison* (1794) 1 Esp. 142. I regard this as an exceptional case and it should not be allowed to whittle down the protection given to the parties 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."

Later in his speech, when discussing an early 20th century case reported only in *The Times*, *Stretton v Stubbs Ltd*, 28 February 1905, where the Court of Appeal allowed admission of a WP letter which contained an admission of insolvency, Lord Griffiths suggested that the decision may possibly be justified on the ground of establishing an

independent fact (i.e. the plaintiff's insolvency) which was unconnected with the merits of the dispute in which the letter was written: see at 1302.

94. This was the subject of further discussion by several members of the Appellate Committee in *Ofulue v Bossert*. Lord Rodger noted that the Scottish courts had developed such an exception but said, at [39]:

> "In my view there must indeed be a significant danger that allowing in evidence of admissions of "independent facts" would undermine the effectiveness of the rule as an encouragement to parties to speak freely when negotiating a compromise of their dispute. As was said many years ago,
>
> > "If the proper basis of the rule is privilege, is there any logical theory under which the court can, by methods akin to chemistry, analyze a compromise conversation so as to precipitate one element of it as an offer of settlement and the other as an independent statement of fact? Would not the layman entering into a compromise negotiation be shocked if he were informed that certain sentences of his conversation could be used against him and other sentences could not?"
>
> See J E Tracy, "Evidence - Admissibility of Statements of Fact made during Negotiation for Compromise" (1935-1936) 34 Michigan Law Review 524, 529."

However, Lord Rodger added that since that approach had not been relied on in the instant case, it was unnecessary to come to a concluded view on the point.

95. Lord Walker referred at [58] to Lord Griffiths' suggestion but stated simply:

> "It is unnecessary to consider that exception here, since the letter of 14 January 1992 was undoubtedly connected with the possession proceedings that the parties were trying to settle."

96. Lord Neuberger went rather further, at [92]-[93]:

> I leave open the question of whether, and if so to what extent, a statement made in without prejudice negotiations would be admissible if it was "in no way connected" with the issues in the case the subject of the negotiations. That point was mentioned by Lord Griffiths in *Rush & Tompkins* [1989] AC 1280, 1300, where he referred to *Waldridge v Kennison* (1794) 1 Esp 142, in which a without prejudice letter was admitted solely as evidence of the writer's handwriting. That was a factor wholly extraneous to the contents of the letter, and Lord Griffiths described it as "an exceptional case [which] should not be allowed to whittle down the protection given to the parties 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".
>
> I note also that in obiter observations, Lord Hope suggested in *Bradford & Bingley plc v Rashid* [2006] UKHL 37, [2006] 1 WLR 2066, para 25, that "[a]n admission which was made in plain terms is admissible, if it falls outside the area of the offer to compromise". There is no reason to think that this amounts to a different approach from that adopted by Lord Griffiths *in Rush & Tompkins* [1989] AC 1280 when discussing *Waldridge* (1794) 1 Esp 142. In any event, it is unnecessary to consider the precise ambit of "the area of the offer to compromise" on the facts of this case. Even if one gives the rule a relatively circumscribed effect, the offer in the Letter fell within "the area of . . . compromise", as I have explained."

97. In the present case, neither of the two passages relied on from (a) Lancer's opening position statement and (b) Lancer's position statement in reply constituted admissions and, more significantly, the statement in (a) was mentioned only as part of the general background and could readily have been omitted as it was an independent fact which had nothing to do with the issues in the mediation. If there is an exception, albeit a narrow one, for a statement of independent fact, it seems to me that it should apply at least to the first of the two statements which the Defendants seek to have included.

98. However, although I raised this possibility in the course of argument, the Defendants did not advance their case on that basis and Mr Quest for the Claimants submitted that there is no such exception. Accordingly, and given that I have found that the material is admissible under two other exceptions to the WP rule, I do not think it is necessary or appropriate to determine whether there is indeed such a further exception.

CONCLUSION

99. For the reasons set out above, I accordingly conclude that:

    i) the passages relied on from Lancer's position statements in the mediation are admissible in evidence under exceptions to the WP rule;

    ii) the Claimants application to strike out parts of the Defence is therefore dismissed; and

    iii) the Defendants' application to amend their Defence in that regard is allowed.