Neutral Citation Number: [2021] EWCA Civ 551

Case No: A3/2020/1210

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
Mr Justice Roth
[2020] EWHC 1015 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/04/2021

Before:

LORD JUSTICE DAVID RICHARDS
LORD JUSTICE HENDERSON
and
LORD JUSTICE POPPLEWELL

- -

Between:

BERKELEY SQUARE HOLDINGS LIMITED & OTHERS	**Appellants**
- and -	
LANCER PROPERTY ASSET MANAGEMENT LIMITED & OTHERS	**Respondent**

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David Quest QC and George McPherson (instructed by **Eversheds Sutherland (International) LLP**) for the **Appellants**
Adrian Beltrami QC and Richard Mott (instructed by **Reynolds Porter Chamberlain LLP**) for the **Respondents**

Hearing dates: 17 December 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to Bailii. The date for hand-down is deemed to be on 15th April 2021.

Lord Justice David Richards:

Introduction

1. The parties have been informed of our decision to dismiss this appeal. In this judgment, I give my reasons for that decision.

2. This is an appeal against an order of Roth J, dismissing the claimants' application to strike out certain paragraphs of the defence. The grounds of the application were that those paragraphs pleaded statements made without prejudice in a mediation between the parties which were therefore inadmissible. It was and remains common ground that, unless falling within an exception to the without prejudice principle, the statements were inadmissible. Roth J held that they did fall within exceptions to the principle. He granted permission to appeal.

Facts

3. The twenty-four claimant companies own a portfolio of properties in London with an estimated value of about £5 billion. The companies are beneficially owned by Sheikh Khalifa bin Zayed Al Nahyan, the Emir of Abu Dhabi and President of the United Arab Emirates, or in one case by his daughter.

4. From 2004 to 2017 the properties were managed by the first defendant Lancer Property Asset Management Limited (Lancer). The other defendants are its holding company and some or all of Lancer's directors at the material times.

5. Sheikh Khalifa's agent and representative in respect of the companies and their properties was, from a date before Lancer's engagement until September 2015, Dr Mubarak Al Ahbabi. He held powers of attorney for each of the claimant companies. Until his removal in May 2015, he was chairman of the Department of Presidential Affairs in Abu Dhabi, which had responsibility for the management of Sheikh Khalifa's private assets.

6. By an agreement dated 18 November 2005 (the 2005 agreement), Lancer was appointed to act as asset manager of the portfolio owned by the first to fourteenth claimants. The management of the properties owned by the other companies subsequently became subject to the terms of the agreement. Under the 2005 agreement, Lancer was entitled to fees for particular management services and to a performance fee of 10% of the excess of the net proceeds of sale of any property above specified values.

7. By a side letter dated 18 November 2005 but signed in or about April 2006, (the side letter), the fees payable to Lancer were increased and amended in a number of respects, which included the introduction of a "capital performance fee" if "as a direct result of the actions of Lancer, the capital value of a property has been increased". The fee was a sum equal to 10% of the difference between the original purchase price and the resultant increased value, after deduction of an amount for inflation and certain fees.

8. By a deed of variation to the 2005 agreement, executed in March 2011, it was agreed that Dr Al Ahbabi had authority to direct Lancer and its holding company to make

payments to third parties, including Becker Services Limited (Becker), a company incorporated in the British Virgin Islands. The deed also ratified all earlier payments made by Lancer, at Dr Al Ahbabi's direction, to Becker and other third parties.

9. Becker was at all material times beneficially owned by Dr Al Ahbabi. A large part of the fees paid to Lancer under the side letter were paid on by it to Becker and, to a much lesser extent, to another BVI company owned by Dr Al Ahbabi, Reilly Consultants Limited (Reilly). The claimants allege that between 2005 and 2015 Lancer made payments totalling about £26.48 million to Becker, for which Becker provided no services.

10. By early 2012, a dispute had developed as to the amount of Lancer's entitlement to the capital performance bonus under the side letter. The parties agreed to a mediation under the auspices of the Centre for Effective Dispute Resolution (CEDR). Both parties signed the CEDR Model Mediation Agreement (13th ed.) containing the following provision:

> "4. Every person involved in the Mediation –
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> 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 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
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> 4.2 acknowledges that all such information passing between the Parties, the Mediator and/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."

11. Position papers, all marked "without prejudice", were exchanged before the mediation. The essential issues identified by the parties were the proper interpretation of the relevant provisions of the side letter, the determination of the specific actions of Lancer on specific properties as a basis for payment of capital performance bonuses, and the quantum of Lancer's claim. The claimants expressly reserved their right to dispute the legality of the side letter but agreed not to take that point in the mediation.

12. Lancer's position paper dated 5 September 2012 contained the following:

> "15. On 14 March 2005, AL [Andrew Lax, a director of Lancer and the fourth defendant] met with HE Mubarak and Ismail [Mohammed Ismael, the financial controller of the Department of the President's Affairs] at the Owners' London office at 5 Tilney Street. HE Mubarak said that Sheikh Khalifa had become the President of the United Arab Emirates in November 2004. He said that, as a result, his own responsibilities had increased, and that he had received Sheikh

> Khalifa's specific approval to receive fees relating to the asset management of the Portfolio, which would be payable under the new management agreement to be entered into with Lancer. This meant that the fees payable overall would need to be increased to facilitate these payments. During the course of this meeting, the parties also discussed the capital uplift bonus to which Lancer was to be entitled. It was agreed in principle that Lancer would be entitled to a capital uplift bonus and it was understood by Lancer that this bonus would be incorporated within the main body of the new management agreement.
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> 17. At a meeting on 31 August 2005 attended by AL, Ismail and HE Mubarak, HE Mubarak and Ismail stated that HE Mubarak's entitlement to fees would be contained in a side letter to the main agreement and paid to his BVI registered company. It was also proposed that Lancer's capital uplift bonus be included in this side letter, which was to be dated at the same date as the new management agreement.
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> 25. On 4 April 2006, the parties signed the Side Letter. By this time, agreement had been reached as to the nature of the "actions" which would qualify for a capital uplift bonus. In addition to the wording of the Capital Uplift Bonus, the Side Letter also records the uplift in the 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."

13. In its position paper dated 17 September 2012 in response to the claimants' position paper, Lancer stated that a total of £27.04 million had been paid pursuant to the side letter, all of which had been paid to Becker.

14. The mediation took place on 24 September 2012. It was attended on the claimants' side by Dr Al Ahbabi, Mr Ismail, representatives of Eversheds, the solicitors acting then as now for the claimants, and Dr Elgaili Abbas. The defendants allege, but the claimants dispute, that Dr Abbas was Sheikh Khalifa's personal lawyer. A compromise was reached shortly afterwards, on terms which included agreement by the claimants to pay £30 million to Lancer, which was approved in writing by Sheikh Khalifa on about 3 October 2012. The terms of settlement were set out in two deeds dated 28 November 2012 (the settlement deeds), a deed of settlement and a deed of variation which, among other things, revoked the side letter.

15. The defendants say that Sheikh Khalifa suffered a stroke in January 2014. As noted above, Dr Al Ahbabi was removed as chairman of the Department of Presidential Affairs in May 2015 and as the owner's representative under the 2005 agreement in September 2015. Lancer's appointment as the claimants' asset managers terminated in September 2017 on notice given by the claimants a year earlier.

The proceedings

16. In September 2018, the claimants issued the present proceedings. They allege that the arrangements under the side letter and the settlement deeds were means by which Dr Al Ahbabi, in breach of his fiduciary duties, misappropriated over £26 million from the companies. Neither Lancer nor Becker provided any services in return for these sums which were paid to Lancer and then on to Becker and, to a much smaller extent, to Reilly. They allege that the defendants knew or suspected that Dr Al Ahbabi was acting in breach of duty in committing the claimants to the side letter and to the settlement deeds, and had no authority to do so, and in causing the payments under them to be made, through Lancer, to Becker and Reilly.

17. The claimants allege that, in consequence, Dr Al Ahbabi had neither actual nor ostensible authority to commit the claimants to the side letter and the settlement deeds, all of which are void or, alternatively, voidable (and are avoided by service of the particulars of claim). They claim restitution of all sums paid by the claimants under the side letter and the settlement deeds, and other relief.

18. The claimants plead that they discovered the alleged fraud after service in September 2016 of the notice of termination of Lancer's appointment as their asset manager.

19. In their defence, the defendants allege that Sheikh Khalifa approved the payments to Becker in a document which pre-dated the 2005 agreement. They further plead as follows:

> "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:
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> (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:
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> (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
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> (2) Subsequently, with the 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 Claimant's current solicitors), the

> Claimants proceeded to enter into the November 2012 Deed of Settlement.
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> (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."

20. The defendants plead as a conclusion that "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".

21. It is these and similar allegations in the defence that the claimants applied to strike out on the grounds that the position papers for the mediation and the proceedings at the mediation (the mediation statements) were, as a matter of both the general law and contract, privileged as being without prejudice and inadmissible in evidence.

22. Roth J refused the claimants' application, holding that the mediation statements fell within two of the exceptions to the without prejudice rule set out by Robert Walker LJ in *Unilever plc v The Proctor & Gamble Co* [2000] 1 WLR 2436 (*Unilever*).

The without prejudice rule

23. The existence of the "without prejudice" rule, and the policy reasons for it, are well-known and well-established. In *Rush & Tompkins Limited v GLC* [1989] AC 1280, Lord Griffiths, with whom the other members of the House of Lords agreed, approved Oliver J's statement in *Cutts v Head* [1984] Ch 290 at 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 as 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."

24. In *Ofulue v Bossert* [2009] UKHL 16, [2009] 1 AC 990 Lord Hope said at [12]:

> "I think that the public policy basis for not allowing anything said in the letter to be used later to her prejudice provides Ms Bossert with all she needs to defeat the argument that the implied admission that it contains can be used as an acknowledgment against her in these proceedings. The essence

> of it 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."

25. The strength of the policy reasons for the "without prejudice" rule is demonstrated by the decision of this court in *Savings & Investment Bank Ltd v Fincken* [2003] EWCA Civ 1630, [2004] 1 WLR 667. The claimant sought to amend its particulars of claim to refer to statements made by the defendant at a without prejudice meeting, which showed that he lied in an earlier affidavit of means, which was itself the central issue in the claim. This court, reversing the decision below, refused to permit the amendment. The without prejudice statement did not fall within any exception to the general exclusionary rule. Rix LJ, with whom Carnwath LJ agreed, said 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."

26. It should be noted that the last line of that passage is not a comprehensive statement of the exceptions to the without prejudice rule, but reflects the exception relied on in that case.

Exceptions to the without prejudice rule

27. Exceptions to the without prejudice rule have developed over the years in a piecemeal fashion, not reflecting any single underlying principle. In a passage subsequently approved by the Supreme Court, Robert Walker LJ stated the position in his judgment in *Unilever*, reflecting the exceptions which had at that time been established. He said ([2000] 1 WLR 2436 at 2444-45):

> "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.
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> (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."

28. Robert Walker LJ listed two further exceptions, concerning communications made "without prejudice save as to costs" and communications received in confidence with a view to matrimonial conciliation.

29. Before the judge, the defendants relied on the exceptions in paragraphs (2), (3) and (6). The judge rejected exception (3) as a ground for permitting reliance on the mediation statements but held that the exceptions (2) and (6) were applicable in this case. The claimants appeal as regards both of those exceptions and the defendants seek to support the judge's decision on the basis that ground (3) is also applicable. I will take each of these in turn.

Exception (2)

30. The judge dealt with this exception in his judgment at [49]-[54]. He correctly noted at [49] that, while it does not appear that the exception has been applied in any reported English case, its formulation has been repeatedly approved by the appellate courts. Neither side suggested before the judge, or before us, that the exception does not exist. The judge gave his reasons for concluding that it applied in the present case as follows:

> "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
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> > "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".
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> 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.
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> 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."

31. In challenging this conclusion, Mr Quest QC on behalf of the claimants first submitted that this was, as the judge accepted it might be, an extension of exception (2). The defendants are not seeking to set aside the settlement deeds, but are seeking to uphold them, by reference to the mediation statements which, they say, show that the claimants knew before those deeds were made that the excess sums payable under the side letter had been routed via Lancer to Dr Al Ahbabi's companies. Mr Quest pointed out that while the categories of exception are not closed, and that they had indeed been extended by the Supreme Court in *Oceanbulk Shipping and Trading SA v TMT Asia Ltd* [2010] UKSC 44, [2011] 1 AC 662 (*Oceanbulk*), the courts must be cautious in doing so. The House of Lords declined to do so in *Ofulue v Bossert*, considering that it was inappropriate for reasons of legal and practical certainty: see Lord Neuberger at [98].

32. Mr Quest submitted that an extension must represent a principled, incremental development by reference to existing exceptions. It is not a question of asking whether an extension is justified on the facts of a particular case. Regard must be had to its wider legal and commercial consequences. In particular, any exception must be sufficiently certain to be readily applied by practitioners engaged in without prejudice communications and discussions: see Robert Walker LJ in *Unilever* at pp. 2443-44 and Lord Hope in *Ofulue v Bossert* at [12] in the passage quoted above. Mr Quest further submitted that, because exception (2) has not been applied in any English case and there is therefore no factual frame of reference available for it, the court should be especially slow to extend it and should do so only if it is truly analogous to an existing (different) category which has been recognised in an English case.

33. I pause here to say that I agree with much of these submissions. In two respects, however, I consider that Mr Quest seeks to set boundaries to the court's approach which are too narrow. First, although it has no relevance in the present case, I do not accept that any extension must be an incremental development by reference to existing exceptions. New factual circumstances may arise, or conditions or attitudes may change, and the common law must retain the ability to meet them. Second, I cannot see any principled basis for saying that an extension to exception (2), because it has not apparently been applied to date in an English case, must be analogous to an existing but different category of exception. Mr Quest's further qualification that it

must be analogous to a different category which has been recognised in an English case is, in my judgment, too parochial an approach.

34. Moving to the substance of his challenge to the judge's reasons, Mr Quest made five principal criticisms.

35. First, the judge was wrong to say that the defendants were seeking to "disprove a misrepresentation". The claimants do not allege any misrepresentation by the defendants. Their case is that the side letter and the settlement deeds were unauthorised and made in breach of fiduciary duty, and it is the defendants who seek to rebut these allegations by reference to knowledge which they say was acquired by the claimants from the mediation statements.

36. Second, it is not illogical to limit the exception, as it is formulated by Robert Walker LJ, to cases of rescission of a settlement agreement on the basis of a misrepresentation, fraud or undue influence in the antecedent without prejudice negotiations. Mr Quest submitted that the rationale for the exception is that it is an abuse for a party to make a wrongful or actionable statement under the cloak of without prejudice privilege in order to induce a settlement. This is illustrated by the case cited in this context by Robert Walker LJ, *Underwood v Cox* [1912] 4 DLR 66, a decision of the Ontario Divisional Court in which a letter, marked "without prejudice" and containing a threat to disclose a "family secret" if the recipient did not sign a settlement agreement, was not covered by without prejudice privilege. In the present case, it is not alleged that anything wrongful or actionable was said or done in the mediation. Instead, this is simply a case where the claimants' assertion of a lack of knowledge is said to be contradicted by the mediation statements**.** This is a commonplace occurrence which has never been held to justify an exception to the exclusionary rule, as was made clear in *Savings & Investment Bank Ltd v Fincken.*

37. Third, the extension of the exceptions to include evidence of the factual matrix for the purposes of construction of a settlement agreement and to include evidence relevant to a claim for rectification of a settlement agreement, both approved by the Supreme Court in *Oceanbulk*, are principled extensions of the exception (1).

38. Fourth, the judge's reliance on the fact that the defendants were seeking to adduce evidence of what they had said, not of anything said by the claimants, was misplaced. The exclusion of without prejudice material is not confined to particular categories of statements but applies to everything that is communicated in the course of without prejudice communications or negotiations. It is a joint privilege which can be waived only with the consent of all parties.

39. Fifth, the judge's approach leaves an unprincipled and undesirable asymmetry in the rule. Lancer chose to make statements, without prejudice, about payments to Dr Al Ahbabi's companies. Those are statements which the claimants are not permitted to use against the defendants, and it cannot be right that the defendants should be free to use them when they choose.

40. I should say at once that I accept the fourth of these criticisms, for the reasons that Mr Quest gave. In many cases, it is very difficult to extract particular statements from their context and much more than the particular statements may need to be admitted in evidence to ensure that those statements do not give a misleading impression. This is

especially true of oral discussions, but it is true also of documents. It would introduce the practical difficulties for participants in without prejudice negotiations and undermine the underlying objective of without prejudice privilege, as discussed by Robert Walker LJ in *Unilever* at pp.2448-49. The distinction drawn by the judge is redolent of the approach of Hoffmann LJ in *Muller v Linsley and Mortimer* [1996] PNLR 74 that the without prejudice rule applies only to admissions, which was rejected by the House of Lords in *Ofulue v Bossert*.

41. I am not, however, persuaded by Mr Quest's second submission, that the purpose of exception (2) is to prevent a party from abusing the cloak of without prejudice privilege by making a wrongful or actionable statement so as to induce a settlement. This would make exception (2) indistinguishable from exception (4), which permits evidence of without prejudice negotiations to be given "if the exclusion of the evidence would act as a cloak for perjury, blackmail or other "unambiguous impropriety"". It is fair to observe, as Mr Quest does, that the example of *Underwood v Cox* given by Robert Walker LJ as an instance of exception (2) involved a grossly improper letter, which appears to have been a form of blackmail. The Ontario Divisional Court, on appeal, held that the trial judge would have been bound to find that the defendant had been overborne by her brother, the plaintiff, into agreeing to the supposed compromise agreement which he was seeking to enforce, if the judge had not excluded the brother's letter which had been marked "without prejudice". The letter should not have been excluded because it contained only "threats not written for the purpose of a bona fide offer of compromise" (per Boyd C. at p.75).

42. Exception (2) is directed not to the abuse of the cloak of privilege but in terms to setting aside "an agreement apparently concluded between the parties during the negotiations".

43. Exceptions (1) and (2), unlike the other exceptions, are directed to the contract concluded during or as a result of without prejudice negotiations. Taken together, they are concerned with whether a contract has been made, its terms, its construction and whether, although apparently made, the contract should be set aside.

44. Exception (1) is expressed in terms which are limited to the question whether a compromise agreement has been made at all. However, even if it is common ground that an agreement has been made, evidence of the without prejudice negotiations will be admissible to determine the terms of the agreement, if any of them are disputed. Further, as the Supreme Court held in *Oceanbulk* at [33], evidence of the negotiations will be admissible to determine a claim for rectification of a written agreement. It was, Lord Clarke said, "scarcely distinguishable from the first exception". He explained: "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 to resolve the issue of what that agreement was".

45. The issue in *Oceanbulk* was whether evidence of without prejudice negotiations was admissible not to determine the terms of the agreement but to interpret them. While evidence of any negotiations, whether or not without prejudice, leading to a contract are not generally admissible for the purpose of construction of the contract, they are generally admissible for the purpose of establishing the factual matrix known to the parties against which the contract falls to be construed: *Chartbrook Ltd v Persimmon*

Homes Ltd [2009] UKHL 38, [2009] AC 1101. The Supreme Court concluded that there was no reason why an agreement resulting from without prejudice negotiations should, in this respect, be in any different position from any other agreement. Lord Clarke said:

> "40. In these circumstances, I see no reason why the ordinary principles governing the interpretation of a settlement agreement should be any different regardless of whether the negotiations which led to it were without prejudice. The language should be construed in the same way and the question posed by Lord Hoffmann should be the same, namely what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. That background knowledge may well include objective facts communicated by one party to the other in the course of the negotiations. As I see it, the process of interpretation should in principle be the same, whether the negotiations were without prejudice or not. In both cases the evidence is admitted in order to enable the court to make an objective assessment of the parties' intentions.
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> 41. The parties entering into such negotiations would surely expect the agreement to mean the same in both cases. I would not accept the submission that to hold that the process of interpretation should be the same in both cases would be to offend against the principle underlying the without prejudice rule. The underlying principle, whether based in public policy or contract, is to encourage parties to speak frankly and thus to promote settlement. As I see it, the application in both cases of the same principle, namely to admit evidence of objective facts, Page 17 albeit based on what was said in the course of negotiations, is likely to engender settlement and not the reverse. I would accept the submission made on behalf of TMT that, if a party to negotiations knows that, in the event of a dispute about what a settlement contract means, objective facts which emerge during negotiations will be admitted in order to assist the court to interpret the agreement in accordance with the parties' true intentions, settlement is likely to be encouraged not discouraged. Moreover this approach is the only way in which the modern principles of construction of contracts can properly be respected."

46. At [46], Lord Clarke said that he would hold that this should be recognised as an exception to the without prejudice rule "because I am persuaded that, in the words of Robert Walker LJ in the *Ofulue* case [2009] AC 990, para 57, justice clearly demands it"."

47. While exception (1) is directed to the existence, terms and meaning of an agreement, allowing the admission of evidence of without prejudice negotiations in order to resolve any of those issues, exception (2) is directed to the related issue as to whether an apparent agreement has been made with the necessary consent of the parties to it. The particular matters referred to by Robert Walker LJ all go to whether the consent of a party may be vitiated by "misrepresentation, fraud or undue influence". Mr Quest accepted that this is not an exhaustive list; duress would certainly also qualify. There was discussion as to whether Simon J was right in *Jefferies Group Inc v Kvaerner International Ltd* [2007] EWHC 87 (Comm) to hold that exception (2) did not extend to a negligent misrepresentation. I am far from sure that Simon J was correct, given that, subject to section 2 of the Misrepresentation Act 1967, rescission is as much a remedy for non-fraudulent misrepresentation as for deceit and given also that Robert Walker LJ distinguishes between misrepresentation and fraud. However, as was agreed in submissions, this is not an issue which requires decision in the present case.

48. Lack of consent to an apparent contract may arise in other ways. In particular, it may arise because one party asserts that its agent lacked authority to make the contract. This is the claimants' case in the present proceedings. I have earlier summarised the relevant parts of their particulars of claim. They assert that because Dr Al Ahbabi had his own very substantial personal interest in the side letter and the settlement deeds, which he had not disclosed to the claimants, he had no authority to commit the claimants to the settlement deeds. On that ground, they seek to set aside the settlement deeds. Their knowledge, or lack of it, is central to this issue.

49. The without prejudice mediation statements are directly relevant to this issue. If they disclosed facts which showed that Dr Al Ahbabi lacked authority to make the deeds on behalf of the claimants, and the claimants applied to set aside the deeds, evidence of those statements would be admissible. The claimants contend, however, that the statements are not admissible because they would be relied on, not to set aside the deeds, but to defeat a claim to set them aside.

50. I am unable to see any principled ground for this distinction, which appears to me to be contrary to the principle underlying exception (2). Mr Quest did not advance any principled ground, relying instead on the precise terms in which Robert Walker LJ had expressed exception (2) and on an argument that the courts have only very circumscribed power to move outside the precise terms of the exceptions as stated in *Unilever*. It was this approach that led Mr Quest to submit that where A sought to set aside a compromise agreement on the grounds of misrepresentation, B was prevented by the without prejudice rule from adducing evidence of without prejudice negotiations to disprove the alleged misrepresentation. So, if in open negotiations B made a misrepresentation but the negotiations were continued on a without prejudice basis and in the course of those negotiations B corrected the misrepresentation, Mr Quest submitted that B would not be permitted to adduce evidence of the correction. If all the negotiations were without prejudice, and at the first meeting B made a misrepresentation which was corrected at a subsequent meeting before the compromise agreement was made, the logic of the claimants' position would seem to be that A could adduce evidence of the first meeting, but B could not adduce evidence of the subsequent meeting.

51. The error, as I see it, in this approach is in failing to give full weight to the nature and purpose of exception (2). Just as exception (1) is expressly directed to whether a

contract has been made at all, and has been expanded as discussed above, so exception (2) is directed to the closely-linked question as to whether the contract as made is binding on the parties. It will not be binding if it was made without authority (as the claimants allege in this case) or if it is liable to be set aside on well-established legal grounds.

52. There is nothing surprising about this. The purpose of without prejudice negotiations is to arrive at a compromise of the dispute. If a compromise is reached, a contract will be made. It is no different from any other contract. All the familiar issues as to its terms, meaning and validity may arise. Where without prejudice negotiations have achieved their purpose, there is no principled basis for excluding the content of those negotiations in resolving those issues. It would put such contracts into a special category. This was the result rejected by the Supreme Court in *Oceanbulk* for the reasons explained by Lord Clarke in the passage quoted above.

53. This is not to undermine the without prejudice rule. Exceptions (1) and (2) do not affect the principle that, outside very limited exceptions, evidence of without prejudice negotiations may not be adduced in existing or future proceedings, even if such evidence undermines a case run by one of the parties. It does not affect the position as stated in *Savings & Investment Bank Ltd v Fincken*.

54. Mr Quest submitted that the decision in *Oceanbulk* was a principled extension of exception (1). If it was an extension, rather than an elucidation, then I agree it was a principled one. Likewise, in my judgment, if the present case amounts to an extension of exception (2), it is a principled extension. Contrary to Mr Quest's fifth submission, it does not leave an unprincipled and undesirable asymmetry in the rule. The purpose for which the defendants may adduce evidence of the mediation statements is to determine the authority of Dr Al Ahbabi, which goes to the validity of the settlement deeds put in issue by the claimants. Just as the claimants could adduce such evidence for that purpose, so can the defendants. It is the claimants' submission which would lead to an unprincipled asymmetry.

55. For these reasons, I would dismiss the appeal and hold that evidence of the mediation statements is admissible.

Exception (6)

56. The judge also held that the mediation statements were admissible under exception (6). Robert Walker LJ based this exception on the decision of this court in *Muller v Linsley and Mortimer* (*Muller*). In that case, the claimant had brought proceedings against third parties which, as a result of without prejudice negotiations, were settled. The claimant then sued his former solicitors for damages for negligent advice. He alleged that he had reasonably mitigated his loss by agreeing the settlement. The former solicitors disputed the allegation and sought disclosure of documents relating to the without prejudice negotiations. This court held that he was entitled to disclosure of the documents.

57. For convenience, I repeat Robert Walker LJ's statement of exception (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."

58. This exception is troublesome, because neither of the bases on which this court reached its decision in *Muller* can now stand. The analysis developed by Hoffmann LJ, that the exclusion of without prejudice communications is restricted to admissions against interest, was rejected by the House of Lords in *Ofulue v Bossert*. Reliance on waiver was misplaced because the privilege belongs to both (or all) parties to the communications and, in *Muller*, only the claimant could be said to have waived the privilege: see *Avonwick Holdings Ltd v Webinvest Ltd* [2014] EWCA Civ 1436.

59. Nonetheless, the decision in *Muller*, as opposed to its reasoning, has not been overruled and has been treated as correct. I accept that the court must proceed on this basis, although for my own part I think it unhelpful to attempt to retrofit a ratio to a decision which was not considered by the court in its judgments. When a decision has no visible means of support, it may be better to start again on the facts of a new case.

60. Newey J considered this problem in *EMW Law LLP v Halborg* [2017] EWHC 1014 (Ch), [2017] 3 Costs LO 281 (*EMW Law*). He took the view at [62] that there is an exception to the without prejudice rule that encompasses the facts of *Muller*. He held that the claimant was entitled to rely on evidence of without prejudice negotiations between two parties, neither of whom were parties to the proceedings before him. This involved a step beyond the facts of *Muller* because the claimant in *Muller* had been a party to the without prejudice negotiations, but it was a very modest step. There was a very close connection between the defendant and one of the parties to the without prejudice negotiations. The particular facts were such that, in the judge's view, "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".

61. Newey J reached his conclusion on the basis of seven specific reasons, some of which reflected the unusual facts of the case, stated at [64]. As I read Newey J's judgment, his decision is based on the combination of all those reasons. It is not legitimate to extract one and say that it was the decisive factor. Nonetheless, in view of the potential significance of the points in the present case, I will mention that the reasons included, first, that the defendant had himself made reference in his defence to the negotiations and, second, that: "It is hard to see how EMW's claim would be justiciable without disclosure" of the privileged documents.

62. Leaving aside the point that the defendant had not actually been a party to the without prejudice negotiations, the decision in *EMW Law* is an application of the decision in *Muller* to analogous facts. The essential point in both cases, in my judgment, is that the claimant in *Muller* and the defendant in *EMW Law* had in their pleaded cases

waived their right to without prejudice privilege. The issue was whether, in the circumstances of both cases, an exception to the rule existed that overrode the right of the other party to the negotiations.

63. Exception (6) arose for consideration in *Briggs v Clay* [2019] EWHC 102 (Ch). The without prejudice negotiations in question had taken place between the claimants and some of the defendants (Aon). Other defendants (the lawyer defendants), who had taken part in the negotiations but only as solicitors and counsel for the claimants and were not therefore parties to the negotiations, argued that they were entitled to adduce evidence of the negotiations on the basis of exceptions which included exception (6). The claimants expressly waived their privilege, but Aon did not do so and resisted the lawyer defendants' claim to adduce evidence of the negotiations.

64. The lawyer defendants argued, first, that Aon had impliedly waived their privilege by allegations made by them in their pleaded case. Having examined authorities on waiver, Fancourt J concluded that Aon had not waived privilege. He said at [86] that it followed that if the lawyer defendants were to succeed, "it can only be on the basis of a *Muller*-type exception to the without prejudice rule". He summarised the lawyer defendants' submission on this exception at [39] as being that "in order to be able fairly to address the allegations made by the Claimants and Aon, it would be unjust to require them to face these allegations at trial without being allowed to deploy material that may enable them to answer them". It was submitted that this exception was established by *Muller* or was a principled, incremental development of that exception or a comparable exception.

65. Fancourt J stated an exception to the without prejudice rule in the following terms:

> "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…".

66. At [102] he said that he "must therefore consider whether it is necessary to admit without prejudice communications in order to make the issues raised by Aon justiciable and whether it is appropriate to do so". He concluded that it was not necessary to do so and that therefore evidence of the without prejudice negotiations was not admissible.

67. That was the state of the authorities when Roth J decided the present case. Having reviewed these authorities in detail, he said

> "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."

68. Unlike *Muller*, *EMW Law* and *Briggs v Clay*, the parties to the litigation and the parties to the negotiations in the present case were the same. In the convenient shorthand that has been used, this is a two-party case, not a three-party case. The judge rejected a submission that exception (6) applies only in a three-party case, saying that the justification for it "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 a waiver".

69. He concluded that exception (6) should apply in the present case. The claimants have alleged that the defendants are complicit in a substantial fraud and have alleged that they did not know the scale of the payments being made or Dr Al Ahbabi's interest in Becker as the recipient of the payments. Their knowledge of these matters before the settlement deeds were made is a central issue. This issue, raised by the claimants, "is not fairly justiciable" if the defendants cannot put the mediation statements in evidence.

70. Before coming to the challenge to the judge's acceptance that exception (6) applied, I will mention Miles J's judgment in *Kings Security Systems Ltd v King* [2020] EWHC 2996 (Ch) (*King*), given after the Roth J's decision under appeal.

71. The claimant company in that case brought proceedings against a former director for relief in respect of an allegedly fraudulent arrangement with a third party supplier to the company. In his defence, the defendant alleged facts relating to negotiations and a possible settlement between the company and the supplier, as relevant to (i) the claimant's duty to mitigate its loss, and (ii) a counterclaim alleging that the claimant had issued the proceedings for a collateral and improper purpose. The admissibility of documents relating to the negotiations came before Miles J for decision on a pre-trial review. He held that the negotiations had been without prejudice and the issue was therefore whether any of the exceptions to the without prejudice rule applied.

72. Miles J held that exceptions (1) and (6) applied. As regards exception (6), he held that the circumstances of the case were substantially the same as in *Muller*: the claimant was (arguably) under a duty to mitigate its loss; there was an issue on the pleadings whether it satisfied that duty; the negotiations with a third party, the supplier, were relevant to that issue; the claimant had therefore put those negotiations in issue.

73. Miles J went on to consider a further ground which had been advanced by the defendant in relation to the counterclaim. This was described in argument as the "justiciability" exception, by way of extension to *Muller* by analogy with the facts of that case. Reliance was placed on the judgment in the present case, particularly on what Roth J said at [83]. At [58], Miles J said:

> "I do not think that the way the exception has been expressed in paragraph [83] of *Berkeley* can be correct. It seems to me that an exception of that width would be in danger of consuming the without prejudice rule itself. It appears to turn on the degree of relevance of the evidence to any issue raised by the resisting party and the resulting risk of injustice. But the without prejudice rule cannot to my mind depend on shades of relevance or centrality."

At [60], Miles J said:

> "Any justiciability exception must, as I see it, be confined to cases where the resisting party has directly put the contents of the without prejudice negotiations in issue in the proceedings

> and there is real risk that the case cannot be fairly determined without admission of the without prejudice evidence."

74. In the case before Miles J, the claimant had not directly put the without prejudice negotiations in issue as regards the counterclaim. It had said nothing at all about them as part of its positive case. He said that the defendant "could doubtless say that the court would not be seeing the full picture, and there is therefore a risk of injustice, but that is the consequence of the without prejudice rule which is based on a broad public policy in favour of settlements".

75. In challenging Roth J's decision on exception (6), Mr Quest repeated the criticisms made by Miles J. The core of the judge's reasoning was in [83] where he said evidence of without prejudice negotiations is admissible where it "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". Mr Quest submitted that this was an entirely new and broadly phrased exception to the without prejudice rule. He challenged two features of this proposition. First, it was not just "an issue" raised by the party resisting disclosure which could bring exception (6) into play. In *Muller* and *EMW Law*, it was the without prejudice negotiations themselves that had been specifically put in issue. Second, the use of words such as "central", "serious" and "fair" introduce value judgments, bringing it very close to saying that there is an exception to the without prejudice rule where justice requires it, an approach which has been disavowed by the English courts. This would make operation of the without prejudice rule uncertain generally, and unpredictable to participants in mediations and other without prejudice negotiations, thereby reducing the value and purpose of the rule.

76. A further challenge made by Mr Quest is that Roth J applied exception (6) to a two-party case. In *Muller*, and the other cases, waiver was not possible. In contrast, in a two-party case, if one party puts without prejudice negotiations in issue, that party is taken to have waived privilege and the other party has the option of waiving it also. It is clear that Leggatt LJ and Swinton Thomas LJ in *Muller* saw the case in these terms, without, it appears, fully appreciating that waiver was not available without the separate consent of the defendants in the claimant's original proceedings. Mr Quest submitted that the decision in *Muller*, and exception (6), is properly analysed as a solution to the three-party case where waiver is not available. If the party resisting disclosure or use of the without prejudice materials has introduced allegations which amount to a waiver of its without prejudice privilege, the absence of a waiver by the third party can in appropriate cases be overridden. In the present case, the only question would be whether the claimants, by pleading a lack of knowledge until 2017, have waived privilege in the mediation, including the mediation statements. However, the defendants had not put their case on the basis of waiver, either before Roth J or before us.

77. Mr Beltrami supported the judge's approach and conclusion, and also that of Fancourt J in *Briggs v Clay* at [99]-[100]. He submitted that there is an exception to the without prejudice rule where the party relying on the rule put matters in issue which cannot properly be determined without reference to the without prejudice material. It was not dependent on an express reference to the without prejudice negotiations in the resisting party's pleading. Although, in the present case, the claimants' pleading alleged only that they did not know of Dr Al Ahbabi's involvement in Becker and

Reilly until 2017, it necessarily involved an allegation that they were not told of his involvement at any time prior to 2017, including during the mediation. The claimants thereby put the contents of the mediation in issue. This led Roth J to say:

> "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."

78. In my judgment, both in *Briggs v Clay* and more particularly in the present case, the analysis of exception (6) has moved a long way from the facts of *Muller*. The majority in *Muller* treated it as a case of waiver. They considered that, by relying on the letter before action and the settlement agreement as evidence that they had discharged their duty of mitigation, the plaintiffs necessarily put the without prejudice negotiations that led to the settlement in issue, and thereby waived their right to without prejudice privilege in the negotiations. As Leggatt LJ put it at p.81, "the plaintiffs cannot both assert the reasonableness of the settlement and claim privilege for the documents through which it was reached".

79. In line with treating the decision in *Muller* as establishing an exception that encompasses the facts of *Muller*, Newey J applied it to the facts of *EMW Law*, where likewise the defendant had put the without prejudice negotiations in issue, thereby waiving his right to privilege in respect of them. In my judgment, Newey J was right to treat exception (6) in this way. It is apparent from the judgment of Miles J in *King* at [60], where he says that the exception is "confined to cases where the resisting party has directly put the contents of the without prejudice negotiations in issue", that he would apply it in the same way.

80. In *Briggs v Clay*, Fancourt J held that the claimants and Aon had not by their pleaded allegations waived privilege in the without prejudice negotiations. Nonetheless, he held at [99] that by reason of exception (6), which he described as "the so-called *Muller* exception", a party "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".

81. In the present case, Roth J took this exception further and held that it was applicable in a two-party case and, as the claimants submit, watered down the requirement that the evidence of without prejudice negotiations is "needed" to decide the issue.

82. In my judgment, the exceptions developed by Fancourt J and Roth J cannot be considered to be based on the decision in *Muller* or to fall within exception (6). *Muller* proceeds on the basis that there has been a waiver of privilege. In the case of a two-party case, no further issue arises. The other party can elect whether to treat the privilege as waived. This cannot apply in a three-party case. The question left unanswered in *Muller*, because its significance was not seemingly appreciated, is whether anything further is required before the third party's right to without prejudice privilege is overridden. It is in this context that the reference by Swinton Thomas LJ to the allegation not being "justiciable" has assumed significance. I refer to this further below.

83. My conclusion, therefore, is that reliance on exception (6) was misplaced in this case and in *Briggs* v *Clay*. It was misplaced in the latter case because Fancourt J held that the claimants and Aon had not waived privilege. It was misplaced in the present case because it has no application in a two-party case. The relevant question in the present case is whether the claimants had, by their pleading of a lack of knowledge, waived privilege in the mediation statements. That question, however, was not raised before the judge nor before us. It would require submissions and an examination of the applicable authorities before it could be decided. In fact, the defendants made clear that they did not rely on waiver.

84. In truth, a new exception was developed by Fancourt J and Roth J. The exception would apply where one party raises an issue which cannot, or cannot fairly, be decided without recourse to evidence of without prejudice negotiations or communications but the party raising the issue resists disclosure or use of such evidence.

85. Stated in such broad terms, the suggested exception is open to the objections raised by Miles J in *King* at [58]. In his submissions before us, Mr Beltrami sought to meet the objection that this exception would largely consume the rule itself, by limiting it to cases where what was said or done without prejudice is itself part of the issue raised by the resisting party. In this case, it is said that by pleading a lack of knowledge the claimants are necessarily alleging that they were not told the relevant facts at any time before 2017, including at the mediation.

86. Even with that qualification, issues remain. One issue is whether the exception would apply if it was not the allegation but the other party's answer to it which could not be determined, or fairly determined, without recourse to the without prejudice evidence and that other party objected to its disclosure or use.

87. There is also uncertainty as to the test for the importance of the evidence to the determination of the issue before the suggested exception would apply. The use of the word "justiciable", which is conventionally used to describe an issue which, by virtue of its subject matter, the court will not entertain, suggests that it must be impossible to determine the issue without recourse to the without prejudice evidence. That would be the case if the issue was what was said or done in without prejudice negotiations or communications, but Roth J appears to have set the bar lower, by reference to being

able fairly to determine an issue and to the centrality of the evidence. In *King*, Miles J criticised at [58] a test which turned on "the degree of relevance of the evidence to any issue raised by the resisting party and the resulting risk of injustice", and he suggested at [60] that there must be "a real risk that the case cannot be fairly be determined without admission of the without prejudice evidence".

88. A further issue is whether an exception along these lines is to be available in both two-party cases and three-party cases. If it is available where the person resisting disclosure or admission has not waived privilege, it would logically appear to be as applicable in a two-party case as in a three-party case.

89. Above all, there would need to be careful consideration of whether this exception would involve an unacceptable interference with the public policy of encouraging compromises which is the reason for the without prejudice rule.

90. I have come to the conclusion that this is not the case to decide whether a new exception of this type exists. It is not necessary to the resolution of this appeal, because we have decided that evidence of the mediation, including the mediation statements, is in any event admissible under exception (2). A decision whether a new exception exists, and if so its terms, should be undertaken in a case where it is a decisive issue and in which it can be developed in submissions unhindered by an attempt to fit it within *Muller* or exception (6).

The respondent's notice

91. The defendants seek to uphold the judge's decision on two further grounds, one of which they argued before the judge.

92. First, the defendants submitted to the judge that, by not responding to the disclosure made in the mediation statements, the claimants represented that Dr Al Ahbabi and Becker were authorised to receive the payments and that the side letter was authorised and approved, or that this reflected the shared assumption of the parties. The defendants said that they reasonably relied on such representation or assumption to their detriment by not seeking a formal ratification from the claimants. In those circumstances, the claimants were estopped from resiling from such representation or assumption and evidence of the mediation was therefore admissible.

93. Roth J rejected this submission. He said that the basis of exception (3), as explained in the case on which it is based, is that a party should not be able to make an unambiguous statement in without prejudice negotiations with the intention that the other party should rely on it, but then prevent the other party giving evidence of it in subsequent litigation when he has relied on it to his detriment. The defendants were seeking to put in evidence statements made by themselves, not by the claimants, and silence by the claimants as regards the mediation statements, which were not relevant to the issues in dispute in the mediation, could not amount to the clear and unambiguous statement required by the exception.

94. The defendants challenge Roth J's rejection of this submission. Before us, they largely accepted that they could not bring themselves within the express terms of exception (3) as formulated by Robert Walker LJ. There was indeed no clear and unambiguous statement by the claimants. They submitted that the exception for

estoppel goes beyond what Robert Walker LJ said and extends to any form of estoppel. This submission, like those advanced under the heading of exception (6), raises issues of some difficulty which again, in my judgment, should be decided in a case turning on such issues. In view of our decision on exception (2), this is not the case to decide them.

95. Second, the defendants argued that the relevant statements come within the category of "independent facts" which permits the admission of evidence of without prejudice communications. In *Waldridge v Kennison* (1794) 1 Esp 142, a without prejudice letter was admitted solely as evidence of the writer's handwriting. In *Rush & Tomkins Ltd v GLC*, Lord Griffiths regarded 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…". In *Ofulue v Bossert*, Lord Rodger at [39] spoke of the significant danger in allowing in evidence of admissions of "independent facts" and Lord Neuberger left open whether any exception for statements "in no way connected with the issues in the case the subject of the negotiations" existed.

96. Assuming some such exception does exist, I am very doubtful whether it could apply to the relevant statements in this case, which are not in the least analogous to a person's handwriting. In any event, despite Roth J raising the point below, he records that the defendants did not advance their case on this basis and he did not think it necessary or appropriate to determine whether the exception exists. I do not think that it is a point which the defendants should now be permitted to run before us, and in any event it is unnecessary for them to do so.

Conclusion

97. For the reasons given above, which relate to the second exception to the without prejudice rule set out by Robert Walker LJ in *Unilever v Proctor & Gamble*, I concluded that the appeal should be dismissed.

Lord Justice Henderson:

98. I agree.

Lord Justice Popplewell:

99. I also agree.