What's going on with WP Privilege?

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4 February 2020

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Neil specialises in Commercial Law, Insurance/Reinsurance, and Professional Negligence. He is recognised by in the directories as a leading Silk in Insurance and in Professional Negligence. In the commercial field he focuses particularly on commercial fraud and tracing claims, including claims for misappropriation of corporate assets. In the context of insurance/reinsurance, he acts for both insurers and insureds dealing with the entire range of coverage issues. His professional negligence practice encompasses lawyers, brokers, construction professionals, surveyors and accountants. He is a very experienced trial advocate and regularly litigates in the Commercial Court and in arbitration. He has a significant appellate practice in the Court of Appeal.

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Matthew is a versatile commercial practitioner with rankings in the main legal directories as a leading junior in the fields of commercial litigation, company law and product liability law. His extensive experience as sole trial advocate marks him out from other commercial juniors of his level of call, and he often finds himself against more senior opponents in commercial trials and arbitrations. He has significant experience of conspiracy and economic tort claims and acted for the successful claimant in the widely reported recent decision in *Palmer Birch v Lloyd & Anr* [2018] 4 WLR 164. He speaks French, German and Spanish and is at ease working within a team of lawyers in substantial disputes.

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WHAT IS HAPPENING WITH WP PRIVILEGE?

Neil Hext QC and Matthew Bradley

Introduction

1. The basic principles of without prejudice privilege are well known and well understood. So much so that very often there is no dispute: once one side points out that a particular communication is covered by the privilege, the material is often kept out of court by consent. But what happens where it is not one of the parties to the communications who wants to use the material, but a third party? The rules that apply in the "three party" situation are not nearly as clear, and there is a real question as to what are the correct principles in play.

2. There are many situations in which a third party (A) has an interest in knowing, and perhaps more importantly, being able to prove, what happened in the negotiations between the two litigants (B and C). A common example is where the extent of A's liability is affected by a settlement that has taken place between B and C. So, where it is alleged that a solicitor has negligently damaged the prospects of his client's claim against another party, the solicitor will want to ensure that any settlement of that claim is on best possible terms. And where it appears that the client has accepted a low sum, the solicitor may want to explore whether there has been a failure to mitigate the loss in the negotiation of the settlement. A similar situation may arise where a broker is sued in respect of an insurance claim that has been compromised by the insured; or in another commercial sphere, where a seller's overage depends upon the level at which a deal was done between the developer and an ultimate purchaser.

3. In all these cases, A will want to look at the negotiations that took place between B and C to make sure that B was putting his best foot forward, and in due course A may want to adduce those communications as evidence to support a case that B failed in that respect.

4. The without prejudice rule can be a real problem in these circumstances. When can A get hold of the documents and use them in court, and what are the rules that apply?

The Without Prejudice Rule

5. The without prejudice rule is a rule that written or oral communications which are made for the purpose of a genuine attempt to compromise a dispute between the parties may generally not be admitted in evidence.[1] The basis for the rule appears to be in part contractual[2]: the parties to the communications agree between themselves that neither will refer to the relevant communications, and the court keeps them to that agreement. But there are some effects of the rule that cannot be explained by reference to the law of contract and there is

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1 See Hollander, *Documentary Evidence*, 13th ed., para 20-01.

2 *Unilever plc v. Procter & Gamble Co* [2000] 1 WLR 2436, 2442.

therefore an important element of public policy in play.[3]

6. The purpose of the rule is to allow the parties to speak freely in negotiations aimed at settling a dispute: "*If converting offers of compromise into admissions of acts prejudicial to the person making them were to be permitted no attempt to compromise a dispute could ever be made.*"[4]

7. There can be debate about when the rule is engaged. There normally needs to be a real dispute[5] and a genuine attempt to settle it.[6] The use of the phrase "without prejudice" is a clear pointer towards an intention to apply the rule, but it is not determinative. Sometimes the phrase is used inappropriately (e.g. by an expert in the report to the client) and the rule is not thereby made applicable.[7] Conversely, where the phrase is not used, the rule will still apply where it is clear from the surrounding circumstances that the parties were seeking to compromise the dispute.[8] Whether or not the communication is without prejudice is to be determined objectively.[9]

8. The rule is often described as a type of privilege. There are some similarities to legal privilege, but there are some differences too, chief of which is that the documents are often already in the hands of the party wishing to use them.

9. There are some exceptions to the rule. One of the most important is where there is a dispute about whether an action has actually settled.[10] But there are also exceptions relating to whether an estoppel arises, misrepresentation, impropriety and explanation for delay.[11]

<u>The Three Party Situation</u>

10. The case that is generally cited as authority for the proposition that without prejudice privilege can prevent communications from being referred to in the context of a dispute with a third party is *Rush & Tompkins Ltd v. Greater London Council.*[12] In that case, the claimant was a

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3 *Rush & Tompkins Ltd v. Greater London Council* [1989] AC 1280, 1299.

4 *Ofulue v. Bossert* [2009] 1 AC 990 at [2] *per* Lord Hope.

5 *BE v. DE* [2014] EWHC 2318 (Fam); *Avonwick Holdings Ltd v. Webinvest Ltd* [2014] EWCA Civ 1436 at [17].

6 *Rush & Tompkins* at 1299. Although it would seem that there is no reason why parties could not, for good consideration, agree between themselves that communications not be used in court even in the absence of these requirements: *Avonwick Holdings Ltd v. Webinvest Ltd* [2014] EWCA Civ 1436 at [18].

7 Although, it must be "*absolutely plain*" that this is the case if the rule is to be inapplicable: *Ofulue* at [2].

8 *Rush & Tompkins* at 1299-1300.

9 *Sang Kook Suh v. Mace (UK) Ltd* [2016] EWCA Civ 4 at [20]. But note that both parties must have realised, or must or should have realised, that the parties were seeking to compromise the dispute.

10 The settlement itself is not protected by the rule: see *BGC Brokers LP v. Tradition (UK) Ltd* [2019] EWCA Civ 1937 at [14]. Without prejudice communications can also be admissible where required to establish the factual matrix for the purposes of construing the settlement: *Oceanbulk Shipping v. TMT Asia Ltd* [2011] 1 AC 662.

11 See generally *Unilever Plc v. Procter & Gamble Co* [2000] 1 WLR 2436, 2444-5; *Ofulue* at [86]. There is also sometimes said to be an "independent fact" exception relating to matters that are in no way connected with the merits of the cause. But Lord Griffiths in *Rush & Tompkins* said that this should not be allowed to whittle down the protection given to the parties to speak freely about all issues: see at 1300. See also *Re Daintrey* [1893] 2 QB 116, a case that seems to be distinguished more than it is ever applied.

12 [1989] 1 AC 1280.

main contractor suing both its own subcontractor and its employer. The dispute was the extent to which the subcontractor was entitled to loss and expense for delay. The claimant sought to pass that claim on to the employer, but the employer did not accept it. In due course, the claimant settled its claim with the employer on a global basis. The subcontractor then sought disclosure of the negotiations between the claimant and the employer in order to understand what part of the settlement related to the subcontractor's claim for loss and expense. The House of Lords held that the privilege does not disappear once the dispute to which the communications relate is settled. Moreover, that privilege affected not just the parties to the communications:

> "*Suppose the main contractor in an attempt to settle a dispute with one subcontractor made certain admissions it is clear law that those admissions cannot be used against him if there is no settlement. The reason they are not to be used is because it would discourage settlement if he believed that the admissions might be held against him. But it would surely be equally discouraging if the main contractor knew that if he achieved a settlement those admissions could then be used against him by any other subcontractor with whom he might also be in dispute. The main contractor might well be prepared to make certain concessions to settle some modest claim which he would never make in the face of another far larger claim. It seems to me that if those admissions made to achieve settlement of a piece of minor litigation could be held against him in a subsequent major litigation it would actively discourage settlement of the minor litigation and run counter to the whole underlying purpose of the 'without prejudice' rule. I would therefore hold that as a general rule the 'without prejudice' rule renders inadmissible in any subsequent litigation connected with the same subject matter proof of any admissions made in a genuine attempt to reach a settlement.*"[13]

11. The court went on to hold that the privilege did not just prevent the material being referred to in court; it also prevented the subcontractor from seeking disclosure of it.[14]

12. On the facts of *Rush & Tompkins*, the dispute between the claimant and the subcontractor was all part of the same litigation as that between the claimant and the employer. However, Lord Griffith's reference to "*subsequent litigation*" indicates that the same principles apply where the two disputes are dealt with in separate proceedings. This appears to have been confirmed by Lord Neuberger in *Ofulue v. Bossert*[15]:

> "*In my view it is strongly arguable that the principles which govern the admissibility in subsequent proceedings, of a statement made in without prejudice negotiations to settle earlier proceedings, should be the same as those which would govern its*

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13 [1989] 1 AC 1280 at 1301 *per* Lord Griffiths.

14 [1989] 1 AC 1280 at 1305. Note that here Lord Griffiths refers to the need to protect without prejudice communications from production to other parties "*in the same litigation*." But the principle could not logically be limited to the case where all the parties were in the same litigation, and later on the same page he said that "*the general public policy that applies to protect genuine negotiations from being admissible in evidence should also be extended to protect those negotiations from being discoverable to third parties.*"

15 [2009] 1 AC 990 at [87].

admissibility in the earlier proceedings."

13. What about the Lord Griffith's stipulation that the subsequent litigation be "*connected with the same subject matter*"? That is a question that may answer itself: if one has a situation in which a third party wants to see negotiations for the purposes of some other piece of litigation, the chances are that that other piece of litigation will be regarded as sufficiently connected for the purposes of the rule. The public policy justification of allowing parties to speak freely would suggest that the courts should not take too restrictive an approach here.

Muller v. Linsley and Mortimer

14. In *Muller v. Linsley and Mortimer*,[16] the question arose as to whether solicitors could obtain and use documents relating to the negotiation of a settlement by their client in circumstances in which the client had brought proceedings against them alleging that their negligence had caused the settlement to be at a lower level than it otherwise would have been.

15. The claimant was a director and shareholder in a company. He was concerned that the board was about to dismiss him and activate a provision in the articles requiring him to sell his shares. The defendant solicitors advised him to transfer his shares to his wife, which he did. But the solicitors did not submit a properly stamped transfer to the board. The claimant was dismissed and the provision activated, forcing him to sell the shares. The transfer to his wife was rejected. He sued the other shareholders but settled for £50,000 plus the issue of some new shares in the company. He then brought a claim against the solicitors alleging that the shares, had he been able to keep them, would have been worth £4 million, and seeking the shortfall. He positively alleged, as part of his claim, that the settlement with the shareholders was a reasonable one. The solicitors sought disclosure of the documents relating to the settlement, including without prejudice material.

16. The court of appeal held that the claimant was obliged to disclose those documents. Hoffmann LJ said that, in the three party situation, the without prejudice rule depended solely on a question of public policy. That policy was designed to protect admissions made in negotiations. It was not concerned with the admissibility of statements which were relevant otherwise than as admissions, i.e. independently of the truth of the facts alleged to have been admitted.[17] The correspondence leading to the settlement was relevant in determining whether the claimant had acted reasonably in mitigating his loss; it was not sought to prove any admissions made by the claimant during the course of the negotiations.[18] Accordingly, distinguishing *Rush & Tompkins*, the without prejudice rule did not apply.

17. Leggatt LJ agreed but also put the case on the basis of waiver. He said that the claimant had himself put the settlement in issue by pleading that it was a reasonable mitigation of his loss. The claimant was not entitled both to assert the reasonableness of the settlement and claim privilege for the documents through which it was reached. He waived such privilege as there might have been, and that waiver related to all matters relevant to the issues raised by him in

16 [1996] 1 PNLR 74.
17 At 79C-D.
18 At 80B-C.

the action.[19] Swinton Thomas LJ agreed with both approaches.

18. *Muller* created a problem. It is not hard to think of situations not a million miles from the facts of *Rush & Tompkins* in which another party to the litigation could argue that it wanted to obtain and adduce without prejudice negotiations for reasons other than that they contain admissions. Had the main contractor in *Rush & Tompkins* been seeking an indemnity from the subcontractor, e.g. in relation to an alleged breach of duty by the subcontractor, for which the main contractor was also being sued by the employer, the reasonableness of a settlement with the employer would have been highly relevant to the main contractor's claim against the subcontractor. On the Hoffmann approach in *Muller*, the without prejudice communications leading to the settlement would be disclosable because of their relevance to that issue (and irrespective of whether they contained admissions). Yet, in *Rush & Tompkins*, the House of Lords had held that it would "*place a serious fetter on negotiations*" if the settling parties thought that everything that passed between them would ultimately have to be revealed to one of the other litigants.[20]

19. Moreover, the specific issue as to what to do where a communication was relevant *both* as to the fact that it was made *and* as an admission was not developed in *Muller*.[21] The difficulties to which this could give rise came into focus in the House of Lords in *Bradford & Bingley plc v. Rashid,*[22] a case about whether an acknowledgment of a debt could be rendered inadmissible if made in the course of without prejudice communications. Lord Walker in that case said that "*to say that it does not matter whether the admission is true or false… seems to me rather unreal*, and that the law would be "*complicated and distorted*" by a rule under which one and the same statement was admissible for one purpose but not as an admission against interest.[23] Lord Brown said unequivocally that if without prejudice admissions of liability are not admissible at trial as evidence of their truth, no more can they be admitted as acknowledgments for the purposes of setting time running under the Limitation Act 1980.[24] Lord Hoffmann's development of his approach in *Muller* that the without prejudice rule only prevented the admissibility of communications where they were relied upon as admissions was not supported by the other members of the House.

20. The *Muller* case was revisited in 2009 in *Ofulue v. Bossert*.[25] That case concerned again the question of whether a letter written by one party could be regarded as an acknowledgement for the purposes of section 29 of the Limitation Act 1980, thus starting time running over again. The letter in question was expressly headed "without prejudice" and contained an offer by the defendant to purchase the claimant's interest in the land that was in dispute. If it could be relied upon as an acknowledgement, the claimant's action would proceed; if it could not,

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19 At 81D-G.

20 [1989] 1 AC 1280 at 1305.

21 Hoffmann LJ's judgment was somewhat opaque on the correct approach to the situation in which the negotiations did in fact contain admissions that would be useful to the third party. On one view, even that would not give protection, at least against disclosure, so long as the negotiations could also be said to be relevant to the issue of mitigation.

22 [2006] 1 WLR 2066.

23 Para 42.

24 Para 66.

25 [2009] 1 AC 990.

the action would fail for limitation.

21. The House of Lords held that the letter could not be relied upon, and the court took an expansive view of without prejudice privilege. Lord Hope said that where appropriately headed "without prejudice" the court should be very slow to lift the umbrella unless the case for doing so was absolutely plain.[26] A common thread running through the reasoning of the majority was that attempts to separate one part of a negotiation from another, giving the protection of privilege to one but not the other, was wholly unsatisfactory. Not only would there be practical difficulties in deciding what parts of the negotiation did or did not fall within the protection, it would also fundamentally undermine the public policy that underpins the without prejudice rule.[27] If the protection exists to enable the parties to speak freely in a negotiation aimed at settlement of the dispute, that protection needs to be reasonably comprehensive:

> "*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 acknowledgement 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.*"[28]

22. As Robert Walker LJ said in *Unilever plc v. Procter & Gamble*[29]:

> "*Parties cannot speak freely at a without prejudice meeting if they must constantly monitor every sentence, with lawyers or patent agents sitting at their shoulders as minders.*"

23. As to *Muller,* Lord Rodger rejected the Hoffmann approach whereby a distinction was to be made between admissions *per se* and other statements that might be relevant for independent reasons, precisely because it would militate against the ability of the parties to speak freely.[30] Similarly, Lord Neuberger said that "*it is a distinction which is too subtle to apply in practice; I consider that its application would often risk falling foul of the problem identified by Robert Walker LJ in the passage quoted above.*"[31]

24. Where does that leave us in relation to *Muller*? It is strongly arguable that *Ofulue* is to be regarded as a rejection of the broader basis for that decision propounded by Hoffmann LJ and

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26 Para 2.

27 See e.g. Lord Hope at [7]; Lord Rodger at [39], [43]; Lord Walker at [58-59]; Lord Neuberger at [89], [98].

28 Para 12 *per* Lord Hope.

29 [2000] 1 WLR 2436, 2448-2449, a passage cited with approval by both Lord Hope and Lord Rodger.

30 Para 43.

31 Para 95. The reference to the dictum of Robert Walker LJ is to the passage in the *Unilever* case, referred to in para 22 above.

that cannot now be regarded as the law.[32] It is not consistent with the public policy that underpins the privilege that one can draw a distinction between relying upon a communication as an admission and relying upon it for some independent reason. Nor is it consistent with that policy that one can sift the content of the communications, granting protection only to "admissions" properly so called, while leaving admissible the rest. The law following *Ofulue* seems to be that, broadly speaking, if a communication can properly be regarded as without prejudice, subject to the exceptions to which reference has already been made above,[33] the protection is more or less comprehensive without an inquiry into the precise content.

25. That does not answer the question, however, as to whether there is a narrower principle in play, for example, where it can be said that the claimant himself puts the negotiations in issue. A string of recent first instance cases suggest that this is how *Muller* is now to be understood.

The Recent Cases

26. *EMW Law LLP v. Halborg*[34] concerned litigation between solicitors. EMW had been engaged by H on a conditional fee basis to act as solicitor-agents to assist him in a claim he brought against architects on behalf of his clients. The claim was settled upon the architects making a part 36 offer of £350,000 which was accepted. The usual obligations on the architects to pay the claimant's costs followed. H prepared and serve a bill of costs for £1.357 million, which perhaps unsurprisingly was disputed. That costs bill included some £124,000 for EMW's costs.

27. EMW had no direct retainer with the claimants, only with H. It received no payment of their costs, and eventually sued H, alleging that by reason of terms implied into their CFA, he was liable for a failure to recover their fees. In the course of those proceedings, H adopted the position that because negotiations as between his claimant clients and the defendant architects as to the costs of the action, which had yet to conclude, were subject to without prejudice protection. H was relying not on a privilege which vested in him, but on one belonging to his claimant clients and the defendant architects.

28. At a contested disclosure hearing before a Master, EMW sought disclosure of the following categories of documents: correspondence between H and the defendant architects relating to any settlement of the claimant clients' costs (Class A documents); documents evidencing any payments in settlement of the claimant clients' costs (Class B); documents which substantiated the agents' work for H (Class C); and correspondence between the H and his costs draftsman (Class D). The Master granted the entirety of the application, relying on the *Muller* exception as part of her reasoning.

29. H appealed. At a hearing before Newey J, he argued that the Master had erred in her approach to the without prejudice rule. Newey J set out the relevant authorities, and identified the

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32 It is correct to point out, as Charles Hollander does in his book, *Documentary Evidence*, 13th ed. (2018), para 20-17, that *Ofulue* was neither a three party case, nor indeed strictly a public policy case (because the letter in question was expressly identified as being "without prejudice"). Nevertheless the rejection of Hoffmann LJ's thesis seems reasonably clear.

33 Para 9 above.

34 [2017] EWHC 1014.

controversy concerning the *Muller* exception. He quoted Lord Neuberger's words of doubt as to Hoffmann LJ's admission-based exception, expressed in *Ofulue* as follows:

> *"Despite the very great respect I have for any view expressed by Lord Hoffmann, and the intellectual attraction of the distinction which he draws, I am inclined to think that it is a distinction which is too subtle to apply in practice …. In any event, the observation appears to be limited to the public policy reason for the rule, and says nothing about the contractual reason, which plainly applies here."*

30. He then identified that, notwithstanding those words of doubt, nobody appeared to believe that the actual result in *Muller* was wrong. He proceeded on the basis that *Muller* was correctly decided on its facts, albeit he eschewed Leggatt LJ's alternative waiver-based justification for the exception carved out in *Muller*.

31. Having closely analysed the admissions-driven justification for the exception in *Muller*, Newey J's summation of the effect of that decision was expressed in considerably broader, and opaquer, terms. He concluded:

> *"The correct inference must, in my view, be that … there is an exception to the without prejudice rule that encompasses the facts of the Muller case"*

32. Applying that interpretation of the dicta to the facts before him, he went on to hold that justice clearly demanded that an exception to the without prejudice rule should apply "*whether that encompassing the facts of the Muller case or another, comparable, exception*".

33. A key factor which underlay Newey J's decision in this respect included the fact that H had himself made reference in his defence to the costs negotiations with the defendant architects' solicitors. In particular, he relied on the fact that those solicitors had "*ascribed no value at all to [EMW's] work*". On that basis, he opined:

> *"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."*

34. That reasoning appears more aligned with the waiver-based justification for the Muller exception, which Newey J had rejected.

35. The reasoning in *EMW* is problematic. Having rejected both of the analyses adopted by the court of appeal in *Muller*, it is then difficult to discern on what basis it could be said that the *Muller* exception was applicable. However, and as with *Muller*, one's natural inclination may be to think that the result reached was the correct one, irrespective of the intellectual underpinning for that result.

36. The next case to consider the *Muller* exception was *Briggs v. Clay*,[35] a case concerning a

[35] [2019] EWHC 102.

pension scheme. The claimants were participating employer partnerships, companies and trustees of the scheme. Certain defendants (collectively "Aon") were the scheme's administrators and professional advisers. Other defendants ("the lawyer defendants") were lawyers who had acted for the claimants in Part 8 proceedings, in which the court had found that various deeds prepared by Aon for the scheme had been invalidly executed.

37. Following the decision in the Part 8 claim, without prejudice discussions took place between the lawyer defendants and those acting for Aon. The claimants eventually decided to appeal against the order in the Part 8 claim. A new set of without prejudice negotiations then took place between the claimants and the representative beneficiaries of the scheme. Two sets of without prejudice negotiations were therefore conducted simultaneously: one between the claimants and the representative beneficiaries and another between the claimants and Aon. The lawyer defendants represented the claimants in both sets of negotiations.

38. Eventually, the claimants and the representative beneficiaries compromised the appeal and a settlement was approved by the court. However, no agreement was reached between the claimants and Aon, and so the claimants issued a further claim, seeking compensation for losses arising from Aon's alleged breaches of duty.

39. Aon raised a defence to the effect that the lawyer defendants had been negligent during the Part 8 claim and in the negotiations which gave rise to the approved settlement, because they failed to raise an argument that certain employees had never become part of the scheme. They maintained that this gave rise to an intervening act, breaking the chain of causation between any liability of Aon and the losses incurred by the claimants.

40. The claimants consequently adopted Aon's case in this regard, and included the lawyer defendants in the proceedings. The lawyer defendants served defences, pleading reliance on substantial parts of the without prejudice communications between Aon's lawyers and those acting for the claimants. The claimants similarly referred to the without prejudice material in their reply.

41. Aon sought a declaration to the effect that the without prejudice communications between its lawyers and those acting for the claimants was inadmissible. The lawyer defendants argued that they were entitled to rely on the *Muller* exception, a submission which Fancourt J ultimately rejected.

42. In the course of his judgment, Fancourt J noted that the decision in *EMW* was not necessarily wholly compatible with *Muller*, holding that it:

> *"arguably extends the Muller exception in some degree to a case where the negotiations have not concluded, and so the legitimate interests of the owners of the privilege are greater than in circumstances where the negotiations have concluded. The court recognised the need to protect the legitimate interests of the parties to the negotiations, but nevertheless held that there had to be an exception to the without prejudice rule where in other proceedings the content or effect of the negotiations has been legitimately put in issue and the proceedings would not be justiciable without*

being able to refer to them. In that case, the effect or content of the negotiations had arguably been put in issue by both EMW and Mr Halborg, but Newey J considered that it was material that Mr Halborg was seeking to rely on them too."

43. He nonetheless cast no doubt upon the decision in *EMW,* and appeared to accept its rationale, to the effect that the "putting in issue" of without prejudice communications justified an exception to the otherwise stringent application of the without prejudice rule.

44. However, he held that on any view, the *Muller* exception could not be applied so as to justify disclosure of the without prejudice communications between Aon's lawyers and those acting for the claimants.

45. True it was that closely related without prejudice communications between the claimants and the representative beneficiaries would be in evidence at trial. The claimants had waived privilege by suing their former solicitors and counsel in relation to the conduct of that line of negotiations, and the representative beneficiaries had confirmed their agreement to those negotiations being disclosed.

46. However, Aon had not referred to the contents of their without prejudice negotiations with the claimants, or sought to rely upon them in their pleadings. These questions were integral to Fancourt J's reasoning in respect of the *Muller* exception, but he also adopted a test of "justiciability" – namely whether or not an issue was justiciable only if the without prejudice communications could be admitted.

47. Whilst Aon had alleged that the settlement approved by the court was too low, the only without prejudice communications placed in issue by that allegation were the negotiations as between the claimants and the representative beneficiaries. The negotiations to which Aon was a party were not relevant to that inquiry. The without prejudice communications were not necessary to render this aspect of the case "justiciable".

48. As to the allegation that the lawyers' alleged negligence was so grave as to break the chain of causation, Fancourt J held that the evidence of Aon's participation in without prejudice communications could be relevant. Nonetheless, they were again not essential to the fair determination of this issue. Merely by pleading reliance on a new intervening act defence, Aon had not disentitled itself to rely on the privilege attaching to the contents of its without prejudice communications and nor had they placed those contents in issue at all.

49. For those essential reasons, Fancourt J upheld Aon's rights under the without prejudice rule, and in so doing introduced a new "justiciability" twist to the reasoning underling the application of the *Muller* exception.

50. The final recent decision is that of Andrews J in *Willers v. Joyce*.[36] It marks a further stepping away from Hoffman LJ's admissions-based justification for the exception.

51. Executors of a deceased's estate applied for permission to rely on certain letters marked

[36] [2019] EWHC 937.

without prejudice save as to costs for the purpose of costs proceedings against lawyers.

52. The lawyers had represented the claimant in a malicious prosecution action against the deceased. The claim was dismissed, the claimant being ordered to pay the executors' costs.

53. The claimant was impecunious and so the claimant's lawyers were joined to the proceedings for the purposes of a costs application against them personally. In that application, the executors wished to rely on four letters that were marked without prejudice as to costs, which referred to without prejudice settlement negotiations in a mediation which took place during the malicious prosecution claim.

54. The executors argued that the without prejudice rule did not apply to the letters, and relied on various arguments in that regard, including the *Muller* exception. But if it did, the case fell within the exception for statements wholly unconnected with the issues between the parties to the proceedings (the independent fact exception) because they established the extent of influence or control that the lawyers had over the fate of the malicious prosecution action. Further, they argued that on a proper analysis of the letters the without prejudice rule had been waived for the purpose of costs arguments.

55. Having referred to *Briggs v Clay,* Andrews J summarised the justification for the exception as follows:

> *"As Fancourt J observed in a later passage of his judgment dealing with the potential application of that exception to the facts of the case before him, in Muller itself, and in other cases in which the Muller exception has been applied, such as EMW v Halborg, the other party has raised an issue that would not be justiciable without disclosure of the negotiations. In Muller that issue was the reasonableness of the settlement. A claimant (or defendant) cannot at one and the same time raise an issue to be tried and rely on the "without prejudice" rule to prevent the court from seeing the evidence that is necessary to decide it. I respectfully agree that this provides a cogent rationale for the exception which is in keeping with the policy behind the rule."*

56. The reliance in this case on the *Muller* exception was not the heaviest, it being recognised by the applicant that the case did *"not fall within the recognised parameters of the Muller exception, i.e. the exception based on Hoffmann LJ's second reason, because the Contested Material is not vital evidence without which the Executors cannot advance their claim for costs against the Lawyers"*.

57. She went on to reject the application, holding:

> *"I take the view that the evidence falls on the wrong side of the dividing line articulated by Fancourt J in Briggs v Clay. Mr Mitchell contended that the "independent fact" which the evidence establishes is the extent of influence or control that the Lawyers had over the fate of the Malicious Prosecution Action, but I cannot see how that could properly be segregated from the content of the settlement negotiations themselves. To admit the evidence for this purpose would undermine the policy underlying the rule. How could the lawyers acting for one of the parties speak freely about their client's*

wish to achieve a settlement figure net of his costs, for example, if they thought that information could later be deployed in costs proceedings against them?"

Conclusion

58. The more recent cases demonstrate that Hoffmann LJ's admissions-based approach to without prejudice privilege in *Muller* can no longer be regarded as persuasive. But nevertheless, *Muller* remains an exception that can be relied upon in appropriate circumstances. The justification for the exception is based upon the alternative reasoning adopted by Leggatt LJ in *Muller*, namely that the party to the settlement negotiations has put those negotiations in issue in the subsequent proceedings, such that he cannot then say that they should be excluded.

59. This was referred to in *Muller* itself as a type of waiver, but as the recent cases have pointed out, that cannot truly be the relevant justification, because without prejudice privilege is a joint privilege between the two sides to the negotiation, and can therefore only be waived jointly. Perhaps what the judges are really saying in these recent cases is that "*putting the negotiations in issue*" trumps the other public policy reasons for keeping the material out.

60. That still leaves open the question as to what "*putting the negotiations in issue*" means: in *Muller* it was said to have occurred because the claimant positively pleaded that he had mitigated his loss. But, as is pointed out by Charles Hollander,[37] the burden in relation to mitigation is normally on the defendant. Would putting in a reply disputing an allegation of failure to mitigate be enough? And to the extent to which it applies where one is simply being reactive to what the other side has said, why should one lose the privilege? Even this narrower exception imports the risk that a third party can force another party to concede the privilege, simply by obliging it to respond to an issue that they had raised.[38] Could it not be said that that itself offends against the policy that underpins the privilege.

61. In short, a truly cogent intellectual justification for the exception in *Muller* remains as elusive as ever. Until clearer principles emerge, the limits to the circumstances in which a party can fairly be regarded as having lost the privilege in a three party case will remain unclear.

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37 *Documentary Evidence*, para 20-18.

38 A tactic that was attempted in *Hunt v. Caddick (Mill Harbour) Ltd* [2019] EWHC 2933. The application failed for other reasons.