



Neutral Citation Number: [2020] EWHC 2996 (Ch)

Case No: HC-2017-002379

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

Royal Courts of Justice
Rolls Building
Fetter Lane
London EC4A 1NL

Date: 09/11/2020

Before :

MR JUSTICE MILES

Between :

KINGS SECURITY SYSTEMS LIMITED

Claimant

- and -

(1) ANTHONY DOUGLAS KING
(2) STEPHEN JOHN JAMES EVANS

Defendants

Paul Downes QC (instructed by **Teacher Stern LLP**) for the **Claimant**
Robert Howe QC and Christopher Newman (instructed by **Walker Morris**) for the **First Defendant**

Hearing dates: 30 October and 2 November 2020

JUDGMENT

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10.30 am on 9 November 2020.

Mr Justice Miles :

1. This judgment concerns an issue argued at a pre-trial review for a trial to last seven sitting days with a hearing window starting in late November 2020. The issue is whether certain negotiations said by the Claimant to have been conducted without prejudice are admissible in evidence at the trial.
2. The background may be stated shortly. The Claimant provides security services. Before 2013 its parent company was owned by Mr King (the First Defendant), his parents, and a family trust. In 2013 the business required funding and an arrangement was reached with an outside investor, Primekings, to invest in the equity in the Claimant's parent company. Primekings became (eventually) a 60% shareholder in the parent.
3. In 2015 the King family sued Primekings for fraudulent misrepresentation in connection with the 2013 investment. The trial came before Marcus Smith J in May 2017. After the Kings' witnesses (including Mr King) had given evidence the solicitors for the Kings and members of his family advised them that they could not continue to act. The Kings agreed to discontinue the action and to pay Primekings' costs on the indemnity basis. They were ordered to pay £1.7 million on account of those costs. The Kings later brought a complaint before the ombudsman against their solicitors and eventually the solicitors' insurers met the £1.7 million costs order. The Kings have since brought proceedings against the solicitors.
4. Returning to 2017, Mr King left as an employee of the Claimant soon after the discontinuance of the misrepresentation case. The parties entered a settlement agreement on 19 May 2017. The Claimant agreed to make a termination payment of £70,000 and there were releases of claims.
5. The Claimant says that soon after the settlement agreement its directors discovered the existence of arrangements entered into in 2015 between Mr Evans, a director of the Claimant, and its main fleet car supplier, TCH. These concerned two top-end Range Rovers supplied by TCH to Mr King and Mr Evans for their personal use. The Claimant's case is that Mr Evans agreed in return for the supply of the Range Rovers that the Company would give up certain sums (called profit-shares) payable by TCH to the Claimant, give TCH exclusivity, and increase the hire rates for fleet cars leased by TCH to the Claimant. It alleges that Mr King authorised Mr Evans to enter these arrangements or turned a blind eye to them. It says that they amounted to a bribe or a misappropriation by Mr King and Mr Evans.
6. The Claimant issued the proceedings in August 2017 against Mr King and Mr Evans. The Claimant has since settled the claim against Mr Evans. The remaining amount claimed is in the order of £40,000. The Claimant also seeks rescission of the settlement agreement, which would put an end to its obligation to pay the £70,000 termination fee.
7. In his original Defence, Mr King denied that he authorised Mr Evans to enter into the impugned arrangements with TCH or knew about them or turned a blind eye. Mr King says that Mr Evans was the person who dealt with TCH and that he left those

dealings to him. He also alleges that other employees of the Claimant knew of the terms on which TCH had supplied the Range Rover and that nothing was hidden.

8. In August 2018 Mr King made an application to amend his Defence. There are two material amendments which have featured in the present application. By para 63(b) Mr King applied to plead this:

63(b). Further and in any event, at some time in 2017, after 25 May but before December, at a meeting attended by Bob Forsyth and Mark Pownall, TCH offered to KSSL [*sc.* the Claimant] the Profit Share in full, plus compensation, with the amount offered being in the region of £60,000-£70,000. KSSL either accepted this offer and mitigated its losses, or failed or refused to accept this offer, and KSSL has unreasonably failed to mitigate its alleged losses. Accordingly, KSSL's alleged losses, if (which is denied) they were incurred at all, fall to be reduced by the amount of this offer. Since this sum exceeds the losses pleaded, KSSL have not suffered the alleged or any recoverable loss.

9. Mr King sought, second, to amend to introduce a counterclaim under the principles in *Grainger v Hill*, alleging that the Claimant had abusively issued and pursued the proceedings for a collateral and improper purpose – i.e. to enable Primekings to obtain the shares in the Claimant's parent company held by the King family at a gross undervalue by using the proceedings to place stress, distraction and pressure on Mr King and to ruin his reputation. The matters relied on by Mr King include alleged pre-action threats, the absence of any pre-action correspondence about the claim, the disproportion between the amounts claimed in the action and the Claimant's projected costs (said to be more than £500,000), the allegation (by inference) that the Claimant had used the proceedings to bring allegations of wrongdoing to the attention of third parties, and in paragraph 83(e):

83(e). Further, Mr King has learned that when KSSL raised its concerns with TCH, TCH offered to pay a substantial sum, in the region of £60,000 to £70,000, which KSSL either accepted (but brought this claim without disclosing or giving credit for the sum received), or unreasonably failed to accept.

10. The application for permission to amend was heard by Deputy Master Arkush in November 2018. The Claimant contended that the proposed amendments at paragraphs 63(b) and 83(e) should not be allowed as the negotiations referred to were without prejudice. The Claimant also contended that, as a matter of law, the Claimant was under no duty to mitigate as the losses claimed against Mr King were the same as those claimed against TCH and the Claimant was entitled to choose which party to pursue. The Claimant contended, third, that the *Grainger v Hill* counterclaim was not properly arguable.
11. The parties served evidence for the amendment application concerning, among other things, the status of the negotiations and whether they were without prejudice.
12. Both parties were represented at the hearing of the application by counsel. Including the time needed for judgment it took almost two days. The Deputy Master directed himself by reference (among other things) to the test for summary judgment. He

concluded that the new pleadings had a realistic prospect of success and were properly arguable. He made an order on 21 November 2018 giving Mr King permission to amend.

13. The Claimant responded to para 63(b) of the Re-Amended Defence and Counterclaim as follows in para 21aa. of its Amended Reply:

21aa. As to paragraph 63b:

(1) The meeting to which paragraph 63b. appears to refer was a without prejudice meeting and its contents are thereby protected from disclosure and are inadmissible in evidence. Accordingly, save as set out below, KSSL is not able to plead to the same.

(2) For the avoidance of doubt (and without waiting the said privilege) KSSL has not entered into any agreement with TCH relating to the loss claimed in these proceedings.

(3) It is denied that KSSL has failed to mitigate its loss whether as alleged or at all.

14. The Claimant made a similar plea in relation to para 83(e) of the Amended Defence and Counterclaim.

15. More generally in response to the *Grainger v Hill* counterclaim the Claimant pleaded the following at paras 31.1 and 32.1 of the Re-Amended Reply:

31. As to paragraph 81:

31.1 It is denied that KSSL commenced and pursued these proceedings for collateral and/or improper purposes whether as alleged in paragraph 81 or at all.

31.2 In fact, the decision by KSSL to initiate and pursue these proceedings was taken:

31.2.1 by KSSL's non-executive directors, Geoffrey Zeidler, Emma Shaw, Robin Fisher and Barry Stiefel in about July 2017 with the full knowledge of the executive directors.

31.2.2 in the best interests of KSSL for the proper purposes of seeking compensation from both Defendants for the losses suffered by KSSL: vindicating KSSL's rights as against both Defendants and protecting KSSL's reputation in the security industry by publicly demonstrating that KSSL would not tolerate conduct of the kind perpetrated by the Defendants.

16. Disclosure was given by the parties in July 2020. A few days afterwards the Claimant's solicitors wrote to Mr King's solicitors saying that document no. 7912 in its list, which referred to the content of the July 2017 meeting, had been inadvertently disclosed, and sought its return. The parties' solicitors then corresponded to try to find a way of dealing with the issues raised by the disclosure of document 7912. Mr

King's solicitors agreed not to provide the document to Mr King without first notifying the Claimant's solicitors. The document was, however, later provided to Mr King by his legal team's IT providers. The Claimant's counsel accepted that that was an error and was not deliberate.

17. In the event the parties were unable to agree a regime for dealing with document no. 7912 or the wider question of the disclosability or admissibility of any without prejudice materials. Mr Downes QC criticised Mr King and his solicitors for their conduct, but I do not think either party can be held to be at fault for the impasse. On the one hand, Mr King says that Deputy Master Arkush has ruled on the admissibility of the material by allowing the amendments; on the other hand, the Claimant asserts a right to withhold the relevant documents from disclosure and the Deputy Master did not decide that question.
18. It is unfortunate that, when the Court made an order for disclosure, neither party raised the question whether documents relating to the July 2017 meeting should be provided or could properly be withheld from disclosure by the Claimant. The parties should have raised the question for decision at that stage.
19. At any rate the parties reached an impasse and on 25 September 2020 the Claimant issued an application seeking case management directions pursuant to CPR r. 3.1(2) "as to the timing and forum for determination of the issue of the status of certain discussions which the Claimant says were without prejudice". The Claimant also sought an order for the return or destruction of document 7912.
20. The application first came before me on 6 October 2020 when I directed that it should be adjourned to the PTR, with the judge conducting that hearing to decide whether the issues should be determined then or by the judge at trial. The PTR then came before me on 30 October 2020.
21. The first question is whether I should decide the issues now or should leave the issue to the trial judge. The Claimant's position is that the parties would be assisted by knowing the answer in advance of trial. The parties would know whether any remaining withheld documents should be disclosed. An early ruling would also reduce the chances of the trial being disrupted.
22. Mr King's position is that the issue should be left to the trial judge. Mr Howe QC says that the question of admissibility has already been determined by the order of Deputy Master Arkush, from which there was no appeal, and that this is an impermissible attempt to re-argue the same issues. He says that the Claimant was obliged by the Deputy Master's decision to disclose the documents concerning the July 2017 meeting and that it should also have addressed the meeting in its witness statements. He says that, had the Claimant wished, in advance of trial, to challenge the admissibility of the materials about the July meeting, it should have applied for the determination of a preliminary issue. The Court would have ordered cross examination and disclosure. But it is now too late. He also says that the issues raised by the application cannot be properly determined without the court seeing the relevant material in full.
23. I have decided that I should rule on the Claimant's application at this stage rather than leaving it to the trial judge:

- i) I do not consider that the questions concerning the status and admissibility of the relevant documents have been decided so far, or at least nor clearly decided. Though Mr King was given permission to plead the negotiations, the Claimant denied in the Reply that the relevant evidence was admissible or disclosable. There has been no further ruling on this point. It is, as I say, unfortunate that the parties did ventilate the question at the stage when disclosure was ordered.
 - ii) It would help the parties to know where they stand before the trial starts. The current position is that the Claimant has withheld some documents (I understand there are about eight). It has not served evidence concerning the substance of the negotiations.
 - iii) The trial may well be disrupted if these issues are not decided before it starts.
 - iv) I do not think that it is necessary for the court to see the full material to rule on the issues of admissibility.
 - v) The court has taken the view that the time devoted to this case at trial should be restricted. I have extended it to seven sitting days, with openings of both parties to be completed within half-a-day. There is little slack in the timetable to leave room for long arguments on admissibility. The parties took more than a day and a half arguing the points before me, and it would be a waste of the court's (and the parties') resources if I declined to rule on the arguments now.
24. Turning to the meat of the debate, there are two main questions: (a) Were the negotiations without prejudice? (b) If they were, do the contents of the negotiations (and documents relating to them) nonetheless come within an exception to the without prejudice rule?
 25. On the first question Mr Howe says that the issue was decided by Deputy Master Arkush and that it is not open to the Claimant to go behind his order. He also says that the status of the meetings is not clear on the evidence and that this issue should be decided at the trial after disclosure of the documents and cross-examination of the witnesses.
 26. Mr Downes accepts that the Deputy Master decided it was arguable as a matter of pleading that the meetings were not without prejudice, but he says that its application concerns the admissibility of the evidence and the disclosability of relevant documents before trial.
 27. I have concluded that the question of the admissibility of the evidence is not foreclosed by the order of the Deputy Master in November 2018. The order concerned only the pleading point and did not concern admissibility. It was always going to be necessary for the point to be ruled on at some point (whether by the trial judge or earlier in the proceedings).
 28. One of the reasons why the Deputy Master allowed the amendment was that there was no evidence before him from anyone who had attended the July 2017 meeting. The Claimant has now produced a witness statement from Mr Forsyth, the CEO, who was at the meeting. He confirms that, the Claimant and TCH agreed in emails before the

meeting that it would be conducted on a without prejudice basis and this is what then happened. There is some force in Mr Howe's point that this evidence could have been provided earlier, but I do not think that the Claimant should be shut out from relying on it for present purposes. The Claimant has also exhibited a recent letter from TCH confirming that the meeting was without prejudice, as agreed in the pre-meeting emails. Mr Downes also points out that the discussions took place against the background of a letter of 6 July 2017 in which the Claimant gave TCH details of its complaints and sought a meeting to discuss recompense. I consider that the court would conclude that the purpose of the meeting, viewed objectively, was to resolve a dispute and avoid litigation.

29. Mr Howe said that Mr King wished to reserve its right to argue at the trial that the July 2017 meeting was not conducted on a without prejudice basis. I do not think however that there is any realistic prospect of the trial judge concluding that the negotiations at the meeting were not without prejudice. The evidence all points one way, and Mr King was not able identify anything tangible to suggest that the negotiations were in fact conducted openly.
30. I conclude on the first question that the discussions of the Claimant and TCH at the meeting were unarguably without prejudice.
31. The second question is whether the discussions fall within any of the exceptions to the without prejudice rule.
32. It is helpful to say something at this stage about the rule and its exceptions. The authorities were carefully reviewed by Newey J in *EMW Law v Halborg* [2017] EWHC 1014 (Ch) ("*EMW*"); Fancourt J in *Briggs v Clay* [2019] EWHC 102 (Ch) ("*Briggs*"); Andrews J in *Willers v Joyce* [2019] EWHC 937 (Ch) ("*Willers*"); and Roth J in *Berkeley Square Holdings v Lancer* [2020] EWHC 1015 (Ch) ("*Berkeley*"). I shall not repeat the exercise but distil the following principles from these cases:
 - i) The without prejudice rule operates to render evidence inadmissible: *Rush & Tomkins v GLC* [1989] 1 AC 1280, 1299.
 - ii) The rule applies in two-party cases (where the parties to the negotiations are the same as the parties to the proceedings) and three-party cases (where the party seeking disclosure in the proceedings was not a party to the negotiations): *Rush & Tomkins*. In two-party cases the rule is based on contract and on the public policy of encouraging parties to settle their disputes rather than litigating them to a finish; in three-party cases it arises from the public policy in favour of settlement (*ibid.*).
 - iii) Without prejudice negotiations will normally be inadmissible in their entirety: *Unilever plc v Proctor & Gamble* [2000] 1 WLR 2436. Generally, the courts do not allow discussions to be dissected or salami-sliced into admissions on the one hand and other communications on the other: *Unilever* and *Suh v Mace (UK)* [2016] EWCA Civ 4.
 - iv) The rule applies to without prejudice negotiations even where the parties have reached a final settlement: *Rush & Tomkins*.

- v) It is not open to one party to without prejudice discussions unilaterally to waive the privilege: *Avonwick Holdings v Webinvest* [2014] EWCA 1436 at [21].
- vi) There are a number of recognised exceptions to the without prejudice rule. Robert Walker LJ listed some of the “most importance instances” in *Unilever* at pp.2444-6. For present purposes the first, fourth and sixth are material:

“(1) As Hoffmann L.J. 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 Ltd.* [1969] 1 W.L.R. 1378 is an example.

(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"

(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 L.J. treated that issue as one unconnected with the truth or falsity of anything stated in the negotiations, and as therefore falling outside the principle of public policy protecting without prejudice communications. The other members of the court agreed but would also have based their decision on waiver.”

(The reference in (1) and (6) is to the decision of the Court of Appeal in *Muller v Linsley & Mortimer* [1996] 1 PNLR 74, a case to which I shall return.)

- vii) The passage at pp.2444-6 of *Unilever* setting out the recognised exceptions has been considered without dissent or qualification by the House of Lords in *Ofulue v Bossert* [2009] 990 and the Supreme Court in *Oceanbulk Shipping and Trading SA v TMT Asia Ltd* [2010] UKSC 44. In *Oceanbulk* the Supreme Court recognised a further exception under which facts identified during without prejudice negotiations which lead to a settlement agreement of the dispute between the parties are admissible in evidence in order to ascertain the true construction of the agreement as part of its factual matrix or surrounding circumstances.
- 33. With these general principles in mind I turn to examine the exceptions relied on by Mr King.
 - 34. The first is *Unilever* exception (1). In *EMW* Newey J held that the exception was capable of applying in a three-party case (where the party seeking disclosure was not

a party to the negotiations and the question was whether the withholding party had reached a concluded agreement with someone else). At [56] he said this:

“On balance, however, I agree with the Master that the concluded agreement exception applies. In the *Tomlin* case, Danckwerts LJ observed that “it would be impossible to decide whether there was a concluded agreement or not unless one looked at the correspondence”. The same could be said in the present case. Moreover, while a party to without prejudice negotiations is entitled to assume that the negotiations will not generally be capable of being deployed in Court proceedings without his consent, he can have no absolute assurance of that. On any view, the concluded agreement exception means that he runs the risk of the correspondence becoming admissible because his opponent alleges that the negotiations resulted in an agreement. The extent of the risk arising from the exception does not seem to me to be significantly increased if it is understood as allowing not merely a party to the negotiations, but someone else with a legitimate interest in their outcome, to rely on it.”

35. Mr Howe submits that in the present case there is an issue on the pleadings whether the Claimant and TCH reached a concluded agreement as a result of the without prejudice negotiations. Mr King has pleaded that there was an agreement, while the Claimant has pleaded that it did not reach any such agreement. There are moreover some passages in documents which have been disclosed which suggest that the Claimant and TCH may have reached at least some agreement as a result of their negotiations.
36. The Claimant says that the first exception in *Unilever* does not apply in the present case. It submits, first, that the exception should be applied very carefully in a three-party case. Otherwise it would always be open to a third party to the negotiations to raise a speculative plea that an agreement was reached. The Court must give full force to the public policy in favour of settlements: if the exception is recognised too readily it will undermine the willingness of parties to negotiate frankly and fully. The Claimant says, second, that, for this reason, the test is one of necessity: would it be impossible to determine the question without the without prejudice documents and evidence? It argues that documents that have been disclosed do not suggest that any agreement was reached. But it will, it says, be open to Mr King to cross-examine the Claimant’s witness on that question. It also points out that Mr King has apparently had access to former directors of TCH (and listed one of them as a potential witness at an earlier stage) but has not sought to call them or sought third party disclosure from TCH. It says that disclosure of further material from the Claimant is not necessary to allow the Court to decide whether there was a concluded agreement.
37. The Claimant observes, third, that if there had been a concluded agreement the Claimant would have had to disclose it and it has not done so. It says, fourth, that Mr King’s pleading lacks conviction: he alleges (equivocally) that there was either an agreement or a failure to mitigate without pinning his colours to one mast or the other. The Claimant submits, fifth, that documents which have been disclosed (including no. 7912, which it says was erroneously provided) suggest that there was no concluded agreement. Sixth, it says that Mr King has said in his evidence for this application that the documents already produced show that there was an agreement. Hence on his own case the further, without prejudice, documents are not necessary. The Claimant says,

seventh, that Mr King's witness statement for the trial hardly refers to the without prejudice negotiations and this shows that the point has only peripheral relevance.

38. I have concluded that the first *Unilever* applies in the present case:.

- i) The question whether there was a concluded agreement is an issue in the pleadings. The documents I have seen show that it is realistically arguable (and I put it no higher) that some form of agreement was entered into between the Claimant and TCH as a result of their negotiations. The Claimant says that those documents, properly understood, are referring to a renegotiation of the commercial relationship between the Claimant and TCH for the period after the agreement and not to recompense or compensation for the losses suffered by the Claimant as a result of the 2015 arrangements entered into with Mr Evans. But, as Mr Howe observes, there is a number of ways that compensation for past events could have been given, including by TCH making non-contractual concessions as to the future commercial relationship of the parties. This is not something that the Court can determine without seeing all the relevant documents, including the without prejudice ones. To echo Danckwerts LJ in *Tomlin* it would be impossible to resolve whether there was a concluded agreement or the terms of any such agreement without looking at the without prejudice communications. Without the material the Court cannot decide whether the Claimant made any agreement with TCH and, if so, whether it was a way of compensating the Company (prompted by the threats of legal action) or was simply a commercial re-negotiation for the future.
- ii) The Claimant's argument that Mr King has said that the documents already disclosed show that there was an agreement does not seem to me to lead anywhere. Mr King indeed says that the documents are consistent with some form of agreement being reached, but his submission is that the Court will be unable to determine the nature and terms of that agreement without sight of the without prejudice materials. I agree with that submission. I also consider, without seeing the materials, that it is unsurprising that Mr King's pleaded case is expressed in the alternative.
- iii) I do not see any force in the point that Mr King has not sought third party disclosure from TCH. Had Mr King made that application the same issues about the without prejudice nature of the documents would still have arisen. TCH would have been able to assert the without prejudice rule and Mr King would have had to justify production by reference to the concluded compromise exception. The point therefore adds nothing.
- iv) Nor am I persuaded by the Claimant's observation that at an earlier stage in the proceedings Mr King indicated that he might call one of TCH's directors as a witness. That does not show that Mr King has access to evidence about the content of the discussions. But even if he did have access to such evidence it is likely that the Claimant would have sought to argue that it was inadmissible.
- v) There is nothing in the Claimant's observation that Mr King's witness statement does not say much about the without prejudice negotiations. He cannot give any first-hand evidence about them and anything he said would

therefore amount to improper commentary. In any event the significance of the issues in a case cannot be assessed by the volume of ink devoted to them in witness statements.

- vi) As to the weight to be given to the public policy of encouraging settlements, I agree with Newey J's comments in [56] of *EMW*: the policy must not be undermined by finding an exception too readily, but a well-informed or advised party to negotiations will understand that the rule is not absolute. In the present case it appears that TCH, which asked for the without prejudice umbrella, did so on advice.
39. I turn next to the question of mitigation, the sixth exception listed by Robert Walker LJ in *Unilever*.
40. In *Muller Hoffmann* LJ based his decision on the difference between an admission and an independent fact. The reasonableness of the negotiations was in issue and seeking to prove or disprove that the negotiations were reasonable did not involve proof of any admissions, the negotiations could be admitted. Later cases have refused to draw that distinction. As Robert Walker LJ explained in *Unilever*, negotiations are unscripted and do not follow a set sequence. The distinction between admissions and other statements is not a serviceable one in the real world.
41. The House of Lords agreed with that analysis in *Ofulue*, where there had been earlier without prejudice negotiations in the course of which party A had offered to acquire party B's property. In later proceedings where A claimed title to the property by adverse possession B sought to rely on the earlier offer amounted as an acknowledgement of its title within the relevant period. The House of Lords decided that the offer, being made as part of the without prejudice negotiations, was inadmissible. It rejected B's argument that the offer was admissible as an independent fact (an acknowledgment of title) and held that the entirety of the negotiations was inadmissible.
42. Hence the independent fact ratio of *Muller* cannot be reconciled with the later cases. In *Muller Swinton-Thomas* LJ suggested as an alternative ratio that there had been a waiver by the plaintiffs. However later cases, including *Avondale*, have held that waiver must be by both parties to the negotiations.
43. The Claimant submits that *Muller* (though not wrongly decided) should not be followed in the light of later cases including *Unilever* and *Ofulue*. Mr Downes says that Hoffmann LJ's independent fact reasoning has been disapproved and the waiver theory does not work.
44. I agree that it is difficult to discern a ratio for *Muller*, but the sixth exception as set out by Robert Walker LJ in *Unilever* has not been doubted in subsequent cases. It was referred to in *Ofulue*. In *Oceanbulk* the Supreme Court expressly approved the *Unilever* list of exceptions to the rule. In *EMW*, after a review of the authorities Newey J at [62] proceeded on the basis that *Muller* was correctly decided on its facts. I shall follow the same approach.
45. The next question is whether the present case falls within the sixth exception as described by Robert Walker LJ in *Unilever*. Mr Howe says that it does: there is an

issue on the pleadings whether the Claimant acted reasonably to mitigate its loss in the negotiations with TCH.

46. Mr Downes submits that the principles of mitigation do not apply in the present case. He says that where two debtors are liable for the same amount the creditor can seek payment in full from either of them; and one of the debtors cannot defend the claim by saying that creditor should first have recovered from the other debtor. He relies on *The Liverpool (No 2)* [1963] P 64 and later cases including *Haugesund Kommune v Depfa Bank* [2010] EWHC 227 (Comm). He says that these cases show that there is no arguable basis for applying the principles of mitigation to the present facts.
47. Mr Howe says, first, that this precise issue was argued before Deputy Master Arkush, who considered that Mr King had a realistic case of mitigation and, secondly, that the Deputy Master was correct.
48. I accept Mr Howe's submission that the question whether mitigation is an arguable defence has been determined by Deputy Master Arkush. He applied the summary judgment test and decided that Mr King had a realistic case in point of law. The Claimant did not appeal from his order. The legal principles now relied on by the Claimant are precisely the same as those raised before the Deputy Master. There has been no relevant change in the law. Mr King's objection to the point being re-opened is in my view different from its objection to the Court being asked at this stage to rule on questions of admissibility of evidence. As I said earlier, it appears to me that the Deputy Master's order did not foreclose further argument on issues of admissibility of evidence and, for the reasons already given, it makes sense as a matter of case management for these to be considered in advance of the trial. The decision on whether the mitigation point is arguable as a matter of law is different: it was reached after examining the principles of law relied on (for a second time) by the Claimant. The Claimant missed the target the first time and is seeking to have another shot. I do not consider that the Claimant can properly seek to re-open this point under the guise of seeking case management directions about the admissibility of evidence.
49. In any event, I agree with counsel for Mr King (and the decision of the Deputy Master) that the point is arguable. Issues about damages and mitigation are fact-sensitive. While it may be the case, for instance, that a creditor is not required to take active steps to recover from a co-debtor or joint tortfeasor before taking proceedings against another debtor, the position may be different where the creditor has chosen to negotiate with a solvent co-debtor and has reached agreement in principle with it before it pursues the other debtor. This is an issue to be determined at the trial.
50. For these reasons I consider that the sixth *Unilever* exception applies.
51. In the light of my decision on the first two arguments it is not strictly necessary to consider the other exceptions relied on by Mr King. However, as I heard argument on the points, I will make some brief observations.
52. The next exception was described in argument as the "justiciability" exception. It may be regarded as an extension by analogy with the facts of *Muller*. It has been considered in four first-instance decisions: *EMW*, *Briggs*, *Willers* and *Berkeley*.

53. Mr Howe relied most heavily on the most recent these, *Berkeley*. In that case the claimant alleged that the defendant had wrongly negotiated with the claimant's agent the terms of a contract which had led to the defendant being overpaid and, from the overpayment, the defendant had in turn paid sums to a company (C) owned by the agent. In earlier proceedings between the claimant and the defendant there had been a mediation which had led to a settlement agreement. The claimant asserted in the proceedings that it had only subsequently discovered that company C was owned by its agent. It sued for rescission of the settlement agreement and other relief on the basis that the defendant had dishonestly assisted the agent to defraud the claimant. The defendant pleaded that it had provided details of the agent's ownership of company C in its position paper in the earlier mediation. The issue was whether the position paper, which was part of a without prejudice mediation, was disclosable. Roth J held, first, that the case fell within another of the exceptions listed in *Unilever* (the fraud/misrepresentation exception) and, secondly, that it fell within a justiciability exception derived from *Muller*.
54. Roth J reviewed the earlier authorities. He cited this passage from the judgment of Fancourt J in *Briggs*:

“[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.”

55. Roth J then said at [83] of *Berkeley*:

“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.”

56. Mr Howe submits that, applying this approach, there are two issues which cannot be fairly tried without the without prejudice evidence. The first is whether the Claimant has reached a concluded settlement or failed to mitigate its loss. The second arises from the Claimant's pleaded case that it commenced the proceedings against Mr King for proper purposes, including to recover compensation. That case would, Mr Howe says, be very severely damaged if it turned out that TCH had already agreed to compensate the Claimant before the proceedings were commenced and cannot be fairly tried (is not justiciable) without sight of the evidence.
57. The first point adds nothing to the concluded contract and mitigation exceptions already addressed above and since I have found that the relevant exceptions apply I need say no more about it.
58. As to the second, broader, contention, I am not satisfied that this would provide a proper justification for the disclosure of the without prejudice material. 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.
59. That is shown by *Unilever* where a central issue was whether the plaintiff's patent had been threatened. The plaintiff was not allowed to prove the threat by what was said in without prejudice discussions and the case was dismissed. Again, in *Ofulue* the resisting party asserted that it had acquired title to a property by adverse possession and a question whether an offer made in earlier negotiations could be admitted to show that that party had acknowledged the other's title within the relevant statutory period. In both cases the point in issue was "central" and there was a real risk that the issue could not be fairly be tried without the relevant evidence being admitted. The evidence was nonetheless excluded because of the public policy favouring settlements. It will also be noted that in *Berkeley* the claimant (which was resisting disclosure) did not refer to the negotiations in its pleadings or otherwise put the negotiations in issue. The claimant pleaded that it only discovered the facts after the settlement agreement, and it was the defendant who pleaded the events of the mediation. I therefore consider that the formulation in [83] of *Berkeley* casts the exception too widely and that I should not follow it.
60. 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 a real risk that the case cannot be fairly determined without admission of the without prejudice evidence.
61. This way of describing the exception is consistent with the decisions of Newey J in *EMW*, Fancourt J in *Briggs* at [99] and Andrews J in *Willers* at [45]. In *Briggs* and *Willers*, the Court found for the party resisting disclosure of the without prejudice material partly on the basis that it had not put the negotiations in issue. In *EMW*, where the court made an order for disclosure of without prejudice negotiations, Newey J placed weight on the fact that the resisting party had referred to the contents of the without prejudice negotiations in his pleading (see [64](iii)).

62. The Claimant has pleaded that the proceedings were brought for proper purposes but has not thereby directly put the without prejudice materials in issue. It has indeed said nothing about the negotiations at all as part of its positive case. Mr King could doubtless say that the court would not be seeing the full picture, and that 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 (see Fancourt J in *Briggs* at [101]).
63. For these reasons I do not consider that the “justiciability” exception applies in the present case.
64. Mr Howe also submits that the case also falls within the fourth exception listed in *Unilever*. He says that it would be wrong for the Claimant to be able to run a case which is at odds with the true position as revealed by the without prejudice material. I reject this argument. It has been held in many cases that the exception only applies where there has been abuse of the without prejudice occasion itself; it is not enough to say that something said at a meeting is inconsistent with the position being taken in the proceedings: see for instance *Savings & Investment Bank v Fincken* [2003] EWCA 1630. I do not think there are any grounds for suggesting that the Claimant abused a without prejudice occasion in its negotiations with TCH.
65. Mr Howe submits finally that any without prejudice protection has been waived. He refers to evidence about a former director of the Claimant telling Mr King about the discussions and says also that a director of TCH told Mr Evans about the discussions. I reject this submission. For a waiver there would need to be a clear and unequivocal disclosure of the content of the negotiations. There is nothing to suggest that the Claimant’s former director was authorised to do this. And the information provided to Mr Evans by the representative of TCH was unclear and limited.
66. To conclude, for the reasons I have given the first and sixth exceptions listed by Robert Walker LJ in *Unilever* at pp.2444-6 apply. The negotiations are therefore admissible in evidence and the Claimant must disclose the withheld documents. It follows from this decision that the Claimant’s application to recover document no. 7912 does not arise.