



Neutral Citation Number: [2019] EWHC 937 (Ch)

Case No: HC-2014-001272

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
BUSINESS LIST (Ch D)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 April 2019

Before :

THE HONOURABLE MRS JUSTICE ANDREWS DBE

Between :

PETER WILLERS

Claimant

- and -

(1) ELENA JOYCE

(2) JOHN NUGENT

(Executors of ALBERT GUBAY, Deceased)

**Defendants/
Applicants**

-and-

(1) DE CRUZ SOLICITORS (A FIRM)

(2) DE CRUZ SOLICITORS LIMITED

(3) HUGO PAGE QC

(4) ADAM CHICHESTER-CLARK

Respondents

Paul Mitchell QC and Tom Shepherd (instructed by Laytons LLP) for the Applicants

Jamie Carpenter (instructed by RPC) for the First and Second Respondents

Patrick Lawrence QC (instructed by Kennedys) for the Third and Fourth Respondents

Hearing dates: 26 and 27 March 2019

Approved Judgment

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

.....

Approved Judgment

Mrs Justice Andrews:

INTRODUCTION

1. This is an application to determine the admissibility of evidence (“the Contested Material”) on which the applicants, the executors of the late Albert Gubay (“the Executors”), wish to rely in an application for costs against the respondents under s.51 of the Senior Courts Act 1981. The Contested Material comprises references made in the course of inter-solicitor correspondence in September 2018 marked “Without Prejudice Save As to Costs” (“WPSAC”) to what was said and done in the course of settlement discussions at and shortly after a mediation in February 2017, which were agreed at the time to be “Without Prejudice”.
2. The issues that I have to consider are (i) whether the “Without Prejudice” rule applies on the facts of the present case; (ii) if it does, whether the circumstances fall within a recognised exception to the rule or give rise to a principled and incremental extension of such an exception; and (iii) whether there has been a waiver which precludes an objection from being taken to the Contested Material being used in evidence in the costs application.
3. I have had the advantage of receiving cogent skeleton arguments that were developed in oral submissions by counsel. I have taken all their submissions, for which I am grateful, into account in reaching my decision. However, I did not find it necessary to rehearse all the arguments in this judgment.

BACKGROUND

4. The respondents (collectively, “the Lawyers”) are the solicitors (“De Cruz”) and leading and junior counsel (“the Barristers”) who represented the claimant, Mr Willers, in these proceedings against Mr Gubay, and subsequently his estate, for malicious prosecution and abuse of process (“the Malicious Prosecution action”). This was the first action of its kind to go to trial in this jurisdiction. Indeed, the existence of a cause of action for malicious prosecution of *civil* proceedings was only established when the case went to the Supreme Court on appeal from an order striking out Mr Willers’ claim: see *Willers v Joyce and another* [2016] UKSC 43 [2018] AC 779.
5. The underlying action which was alleged to have been brought maliciously was a claim against Mr Willers by a company called Langstone Leisure Ltd (“the Langstone action”), which was a member of the Anglo Group of companies through which Mr Gubay’s businesses were operated (as more particularly described in the judgment of Rose J in these proceedings [2018] EWHC 3424 (Ch)).
6. The Lawyers had also represented Mr Willers in the Langstone action. They did so under conditional fee agreements (CFAs). Langstone Leisure Ltd discontinued that claim and was ordered to pay Mr Willers’ costs. However, at the detailed assessment in November 2014 the costs judge ruled that the total costs expended by Mr Willers (just over £3.4 million, including the agreed uplift under the CFAs) were disproportionate, and that various elements of the costs he was claiming should be disallowed or reduced. Following that ruling, the claim for costs was settled for £1,450,000, which (subject to possible arguments about the terms of the CFA) left Mr

Approved Judgment

Willers liable for a shortfall of at least £2 million net of any interest in respect of the Lawyers' fees and disbursements.

7. In the Malicious Prosecution action, Mr Willers was seeking to recover the shortfall as damages from Mr Gubay's estate, though he also claimed damages under other heads.
8. The Lawyers who represented Mr Willers in the Malicious Prosecution action had a substantial financial interest in its outcome. That interest went beyond the realistic prospect faced by any lawyers acting for an impecunious client that they would not be paid their fees incurred in that action unless their client succeeded and recovered them pursuant to an order for costs against the Executors, or else reached a settlement that was large enough to enable him to pay them. They had a direct interest in the damages, to the extent that they comprised the indebtedness which their client had already incurred in respect of their fees in the Langstone action, and which he was clearly unable to pay from his own existing limited resources.
9. The amount claimed in the Malicious Prosecution action as damages in respect of Mr Willers' pre-existing indebtedness to the Lawyers was approximately £3.5 million. In the course of the hearing before me, counsel for De Cruz, Mr Carpenter, on instructions, volunteered a breakdown of that figure in order to correct what he said was a mistaken inference drawn by the Executors' legal representatives that the difference between that figure and the shortfall figure comprised interest. The information given to the court by Mr Carpenter on instructions was set out in a witness statement from Mr De Cruz which was served on 27 March 2019. I had directed the service of that witness statement in order to ensure that there was an accurate contemporaneous record of that information.
10. Unfortunately, that set a hare running. Evidence in response was served by the Executors' solicitor, Mr Thomas of Laytons, which challenged the accuracy of Mr De Cruz's evidence by reference to what was said in statements of case, correspondence and fee notes at earlier stages of the history of this complex litigation. This in turn gave rise to a flurry of post-hearing evidence, arguments and counter-arguments, none of which I had invited, and to which I eventually had to put a stop. Whilst the accuracy of Mr De Cruz's evidence may be the proper subject of argument on some future occasion, the exact composition of the £3.5 million has no bearing on the admissibility of the Contested Material. I will therefore say nothing further about it.
11. The parties to the Malicious Prosecution action engaged in mediation in February 2017 and again in 2018 shortly before the trial, which began in October that year, but they were unable to reach agreement on settlement.
12. In a long and comprehensive judgment handed down on 13 December 2018, [2018] EWHC 3424 (Ch), Mrs Justice Rose dismissed Mr Willers' claims in the Malicious Prosecution action. She ordered Mr Willers to pay the Executors' costs, to be the subject of detailed assessment on the standard basis unless agreed. She directed him to make a payment on account of those costs in the sum of £1 million by 31 January 2019.
13. Mr Willers was subsequently refused permission to appeal and a stay of execution by the Court of Appeal. He has not complied with the order for an interim payment. He

Approved Judgment

does not have the means to do so, and never had. At the time when he commenced the Malicious Prosecution action, his only asset of any value (apart from claims for damages against Mr Gubay/Mr Gubay's estate in this jurisdiction and in the Isle of Man) was his share of the equity in his home, which was heavily mortgaged. It now appears that at some juncture that was charged in favour of De Cruz.

14. There was a hearing before Rose J on 20 December 2018 to consider an application made by the Executors to join the Lawyers as parties under CPR 46.2 for the purposes of making a claim for costs against them. The application was supported by a witness statement of Mr Thomas dated 14 December 2018. It was the 11th witness statement that he had made in the Malicious Prosecution action. In paragraph 41 of that statement Mr Thomas explained that his clients were seeking an order for their costs to be paid on the indemnity basis by the Lawyers because they had a direct personal interest in the outcome of the proceedings and were in a position to influence that outcome, despite ostensibly being cloaked in the neutral garb of officers of the court.
15. The Executors' case, as summarised by Mr Mitchell QC and Mr Shepherd, is that the Lawyers each:
 1. had a direct personal financial interest in the outcome of the malicious prosecution action;
 2. provided substantial financial support to Mr Willers in the conduct of the Malicious Prosecution action by (i) failing to enforce payment of the sums allegedly due to them under the CFAs in connection with the Langstone action, and (ii) continuing to provide legal services to Mr Willers in connection with the Malicious Prosecution action without requiring [staged] payment or entering into any agreements regarding the late payments of their fees, or into any further CFAs; and
 3. had a very significant influence over the strategy for the conduct of the litigation and, significantly, had a large amount of control over their client's ability to settle the Malicious Prosecution action and the terms on which he could do so.
16. The facts relied on in respect of each of these limbs of the argument were addressed in earlier passages in Mr Thomas's 11th witness statement. Some days after that statement was served, the legal representatives of the Lawyers expressed the view that some parts of the material on which he sought to rely was subject to the "Without Prejudice" rule, and therefore inadmissible in evidence. The pragmatic view was taken that Mr Thomas's statement and its exhibits would be redacted to remove any references to such material, pending an application in due course to determine whether the Executors could rely upon it.
17. Rose J therefore determined the joinder application without seeing the Contested Material. Having heard the legal arguments, she made an order joining the Lawyers as parties for the purposes of costs only in accordance with CPR rule 46.2 (1) (a). She also gave detailed directions regarding the application against them, including directions relating to the hearing of any application relating to the admissibility of the Contested Material.

Approved Judgment

18. The substantive costs application is due to be heard by Rose LJ (as she now is) sometime after Easter, although I understand that the date has not yet been fixed. In determining this application, I have taken care to express no views about the merits of that application.

THE CONTESTED MATERIAL

19. The Contested Material comprises the contents of:

1. a letter dated 11 September 2018 from De Cruz to Laytons;
2. a letter from Laytons in response to that letter dated 14 September 2018;
3. the response to that letter sent by De Cruz on 17 September 2018;
4. a letter from Laytons to De Cruz dated 24 September 2018,

all of which letters were marked “WPSAC”; and paragraphs 34 to 35 of Mr Thomas’s 11th witness statement, which makes reference to aspects of what was said in that correspondence.

20. The first letter in this sequence was written in the context of discussions between the respective parties’ solicitors about whether there was any purpose to be served by engaging in a second mediation. By the time that the correspondence took place, apart from a residual matter which still remains to be determined, Mr Willers had lost the proceedings in the Isle of Man. On the basis of the evidence before me, at least, (though the Lawyers’ evidence in the substantive costs application has not yet been served, and thus the evidential position may change) everyone concerned appeared to be aware that there was no realistic prospect of his being able to afford to pay the Executors’ costs of the Malicious Prosecution action if he lost. Indeed, the Executors had put the Lawyers expressly on notice of their intention to claim their costs against them in the event that they were unable to recover them from Mr Willers.
21. In an open letter dated 16 August 2018, Laytons indicated that the Executors were ready in principle to attend a second mediation, but that before any arrangements were made in that regard it would be helpful for the parties to indicate on a “without prejudice” basis whether there had been any shift in their respective positions since the last mediation. They repeated that request in a further open letter of 7 September 2018, stating that if it transpired that Mr Willers’ position had not changed in any material respect, they did not see that any useful purpose could be served by mediating.
22. The open response to that letter sent by De Cruz on 11 September 2018 was to the effect that since both parties had indicated they were willing to mediate without any preconditions, no further response was appropriate. De Cruz’s second letter of 11 September, the first in the sequence of Contested Material, took a different stance. They said that at the first mediation the negotiations hardly got off the ground, and that they did not recall any offers being made until what they characterised as an “*absurd offer made right at the end of the day*”. They then mentioned a comparatively modest figure which they said had been offered by the Executors “*in full and final settlement of the action*”.

Approved Judgment

23. That letter was marked WPSAC, not “without prejudice” as Laytons had invited. It thereby signified an intention on the part of Mr Willers and his legal team to refer to the allegedly derisory last minute offer by the Executors at some future stage in an argument about costs, despite the fact that any such offer was made “without prejudice” and could not be referred to in evidence for that or any other purpose without the assent of the Executors. The most obvious circumstances in which they might wish to deploy the information in an argument about costs would be if the Executors succeeded in the action, and someone who would or might otherwise be liable to pay their costs (including, in these circumstances, the Lawyers) wished to argue that the Executors had behaved unreasonably with regard to attempts to settle the matter in February 2017 and should therefore not recover the full amount of their claimed costs.
24. It would have been open to the Executors to have said that they did not consent to the lifting of the prohibition on use of “without prejudice” material in evidence, even for the purposes of a future argument on costs. However, the Executors’ position was that what de Cruz had said in their letter was a mischaracterisation of what had happened in the 2017 settlement discussions, and that it needed to be corrected.
25. In their response on 14 September 2018, which was also marked WPSAC, Laytons began by stating that the 11 September WPSAC letter completely misrepresented the position, and that it purported to contain information from a strictly without prejudice mediation which would, if true, remain privileged in all circumstances including on questions of costs. However, they then went on to say that they were writing back to set the record straight “*on the same WPSAC basis*”. They said that at the mediation they had insisted that, in order for there to be settlement, Mr Willers’ lawyers would need to budge on the quantum of their stake in the action, but they had refused point-blank to do so. They then set out their account of the various offers that the Executors had made, and of the final position adopted by Mr Willers at the mediation (mentioning the figure he had demanded). They added that, in particular, Mr Willers’ legal team insisted on payment for them of £3.5 million. Laytons commented that unless Mr Willers’ legal team had budged on what they hoped to recover, there really was no point in having the mediation. Finally, they said they reserved the right to refer to that letter on any question of costs.
26. Pausing there, Laytons were indicating that they were prepared to condone De Cruz referring to what was said and done during the settlement discussions in 2017 at a future costs hearing in which the parties’ behaviour with regard to settlement might be relevant to the exercise of the court’s discretion, but the quid pro quo of that relaxation of the rule would be that they, Laytons, would also be entitled to put forward their version of events in that context for the same purpose, and to correct what they said was De Cruz’s inaccurate account.
27. The next letter in the sequence, also written WPSAC, was the letter sent by De Cruz on 17 September. It began by thanking Laytons for their letter of 14 September. It then stated that Laytons’ note of the various offers and counter offers made by their respective clients at the mediation last year “*does not accord with ours.*” It did not explain in what respects there is a divergence between Laytons’ note and De Cruz’s note. On the face of it, therefore, it appeared that De Cruz were joining issue with everything that Laytons had said, including their account of the attitude that had been adopted by the Lawyers, and were maintaining their account of the derisory last-

Approved Judgment

minute offer. That letter did not join issue with Laytons' express reservation of the right to rely on their letter of 14 September at a future hearing on costs.

28. De Cruz's refusal to accept their account of the sequence of offers and counter-offers prompted Laytons to write the letter of 24 September, which is really the key document in this chain of correspondence so far as the current application is concerned. It expressed surprise at De Cruz's suggestion that their note did not accord with Laytons' note. Mr Thomas, the author of the letter, reminded Mr De Cruz that they spoke shortly after the mediation on 14 February 2017 (4 days later, including the weekend of 11-12 February). He then quoted verbatim from his attendance note of that conversation, which records an express agreement between the parties to it that they were speaking "without prejudice".
29. The attendance note lends support to Laytons' recollection, as articulated in their earlier correspondence, of the stance adopted by Mr Willers and his legal team in the settlement negotiations at the time of the mediation. It contains an explanation by Mr De Cruz of the figure that Laytons had already referred to in their letter of 14 September 2018 as representing Mr Willers' final position at the mediation, and a breakdown of that figure which includes references to the £3.5 million owed by Mr Willers to the Lawyers, in terms that are consistent with what was said in that letter. Mr Thomas concluded the letter of 24 September 2018 by asking Mr De Cruz, so that there was no misunderstanding between them, to set out what he believed the parties' positions were at the end of the previous mediation.
30. The letter of 24 September 2018 is the last of the documents within the Contested Material, but it is relevant to mention two more letters that were sent thereafter. On 26 September 2018 De Cruz wrote back, again WPSAC. They said that the letter of 24 September, though marked WPSAC referred to a without prejudice communication between Mr Thomas and Mr De Cruz and continued: "*if you would care to send us a letter marked appropriately, we shall respond to the content of your letter.*" At no stage thereafter have De Cruz ever joined issue with the content of or challenged the accuracy of Mr Thomas's attendance note of 14 February 2017.
31. Laytons responded, again under the rubric WPSAC, on 27 September. They said: "*if, having indicated that our note of the parties' positions at the mediation 18 months ago does not accord with yours, you do not want to tell us where you consider the parties ended up, then that is entirely a matter for you*". They added: "*we remind you that you first opened up the strictly without prejudice communications at the mediation in your without prejudice save as to costs letter dated 11 September 2018. We have merely sought to correct the record.*"

THE "WITHOUT PREJUDICE" RULE

32. There was very little dispute between the parties as to the nature and scope of the rule, the jurisprudential basis for it, and the established exceptions to it. A detailed discussion of the relevant authorities and the principles to be derived from them is to be found in the recent decision of Fancourt J in *Briggs v Clay* [2019] EWHC 102 (Ch) at [42] to [74]. I gratefully adopt his masterly analysis without repeating it. For the purposes of this application the following summary should suffice:

Approved Judgment

1. The “without prejudice” rule is a rule governing the admissibility of evidence. It is separate from, and independent of the rules relating to legal professional privilege. Although “without prejudice” negotiations have sometimes been referred to in the authorities as “privileged”, that is simply shorthand for the protection afforded them, which is similar to the protection afforded to privileged communications.
2. The rule is founded partly in public policy (the encouragement of parties to speak freely with a view to promoting settlement) and partly in the agreement of the parties: *Unilever plc v The Proctor & Gamble Co* [2000] 1 WLR 2436 per Robert Walker LJ at 2442.
3. It applies to render inadmissible evidence of what was said and/or done during the course of negotiations genuinely aimed at settlement: see *Rush & Tompkins Ltd v GLC* [1989] AC 1280 per Lord Griffiths at 1299-1300.
4. It is not limited to admissions made against a party’s interest, although the protection of admissions against interest is its most important practical effect: *Unilever* per Robert Walker LJ at 2443-2444. Thus, “without prejudice” negotiations will normally be inadmissible in their entirety.
5. The rule is not limited to statements made in the course of settlement negotiations with the other party to those negotiations. It protects statements that were made to reach settlement with a different party within the same litigation, irrespective of whether settlement was achieved: *Rush & Tompkins Ltd* per Lord Griffiths at 1301.
6. The rule also extends to:
 - a) statements made in settlement negotiations in earlier proceedings between the same parties concerning a matter that remains in issue between them: *Ofulue v Bossert* [2009] AC 990;
 - b) proceedings between one of the parties to the negotiations and a third party concerning the same subject-matter as the proceedings in respect of which the settlement negotiation took place: *Rush & Tompkins Ltd* per Lord Griffiths at 1301.
7. The rule is an important one whose boundaries should not be lightly eroded. The protection afforded by the rule should be enforced unless it can be shown that there is a good reason for not doing so (or, as it is sometimes put, “justice clearly demands it”): see *Oceanbulk Shipping SA v TMT Ltd* [2011] 1 AC 662 per Lord Clarke, reviewing observations to that effect made in earlier authorities at [28]-[29].
8. Insofar as the rule depends on the agreement of the parties as well as on policy considerations, there is no reason why the parties cannot enter into an agreement varying its effect (by, for example, broadening or narrowing its scope): see the observations of Lord Rodger and Lord Walker in *Ofulue* at [37] and [55], and of Lewison LJ in *Avonwick Holdings Ltd v Webinvest Ltd and another* [2014] EWCA Civ 1436 at [17].

Approved Judgment

9. It is not open to one party to “without prejudice” negotiations to waive the protection afforded by the rule unilaterally: see *Avonwick Holdings Ltd* at [21]. The other party may expressly or implicitly consent to the deployment of the “without prejudice” material in evidence or, as Clarke LJ put it in *Somatra Ltd v Sinclair Roche & Temperley (No 1)* [2000] 1 WLR 2436 at [38] they may accept a repudiatory breach of the implied contract that neither party will rely on what was said and done in the negotiations as bringing that contract to an end, freeing them to deploy the previously protected evidence themselves.
10. The rule is not an absolute one and there are several recognised exceptions to it.
33. In *Unilever* Robert Walker LJ set out a list of “the most important” eight categories of exception at pages 2444-2445, but it has been recognised in numerous authorities that those categories are not closed. For example, in *Oceanbulk* the Supreme Court held that facts communicated between the parties in the course of “without prejudice” negotiations, which would have been admissible in order to explain the factual matrix or surrounding circumstances to the Court but for the rule, should be admissible in evidence for the purpose of determining how the terms of an ensuing settlement agreement should be construed.
34. As Lord Clarke pointed out at [42] no sensible line could be drawn between admitting “without prejudice” communications in order to resolve the issue whether they have resulted in a concluded compromise agreement (the first in the list of Robert Walker LJ’s recognised exceptions in *Unilever*) and admitting them in order to resolve the issue what that agreement was. In the same case, the Supreme Court accepted that evidence pertaining to “without prejudice” discussions may also be admissible for the purposes of a claim for rectification of the settlement agreement.
35. References in the authorities to exceptions arising “*where the justice of the case demands it*” (or similar expressions) do not mean that the Court has a general discretion to disapply the rule in any particular case if it considers it is just and equitable to do so (see in this regard the observations of Lord Neuberger in *Ofulue* at [103]). On the contrary, there must be a principled basis for the exception, preferably one which is consistent with the policy justification for the rule.
36. However, an exception may be justified on the basis of an inconsistent, but overriding, public policy principle. Perhaps the best example of this is the exception that allows the evidence to be used to prove perjury, blackmail or other unambiguous impropriety (e.g. fraudulent misrepresentation), the fourth in Robert Walker LJ’s list in *Unilever*. The prospect of being sued or prosecuted might be regarded as a considerable disincentive to speak freely. However, in cases where this exception applies, the general protection afforded to the parties in order to encourage them to settle gives way to the higher public interest in ensuring that the rule is not used as a vehicle to work injustice by precluding the calling of evidence that would prove impropriety.
37. In *Single Buoy Moorings Inc v Aspen Insurance UK Ltd* [2018] EWHC 1763 (Comm) Teare J expressed the view at [54] that an exception can only be allowed where it is of the same character as one already established, or where it is an incremental but principled extension of an existing exception, as it was in *Oceanbulk*. Whilst I can

Approved Judgment

appreciate why he took that view, I would not myself subscribe to that approach, which is not articulated in any of the higher authorities and may prove unduly restrictive. I cannot rule out the possibility that circumstances may arise in which a new, principled exception is justified in the overall interests of justice, and yet that exception would fall outside the narrow parameters articulated by Teare J.

38. However, it does appear plain, not least from the judgments of Lord Griffiths in *Rush & Tompkins Ltd* and of Lord Rodger, Lord Walker and Lord Neuberger in *Ofulue*, that the Court should be astute to avoid extensions of the existing categories of exception which might have the impact of undermining the rule or the policy behind it. To that extent I agree with Fancourt J's observation in *Briggs v Clay* at [64] that: "*the general tenor of the speeches [in Ofulue] is that exceptions to the rule should be strictly limited, in order to uphold the policy underlying the rule.*"
39. One of the most controversial of the established exceptions is the one that was applied in *Muller v Linsley & Mortimer* [1996] 1 PNLR 74. The case was decided prior to *Unilever* at a time when there was still debate as to whether the protection afforded by the "without prejudice" rule only extended to admissions against interest, as the speeches in *Rush & Tompkins Ltd* appeared to suggest, or whether was wider in scope, as was finally put beyond doubt in *Ofulue*.
40. *Muller* was a claim for professional negligence brought against a firm of solicitors by their former client. He claimed that he had taken reasonable steps to mitigate the loss arising from their negligence, by compromising other legal proceedings that he had brought against third parties. The solicitors disputed the reasonableness of that settlement and sought disclosure of the negotiations leading to the settlement agreement. The Court of Appeal ordered disclosure, but the reasons of the three members of the Court differed. It now appears to be widely accepted that one of the grounds adopted by Leggatt LJ and Swinton Thomas LJ, waiver, was not in fact established on the facts: see e.g. the observations of Newey J in *EMW Law LLP v Halborg* [2017] EWHC 1014 (Ch) at [62].
41. Hoffmann LJ, having analysed Lord Griffiths' speech in *Rush & Tompkins Ltd*, gave two reasons for allowing disclosure. The first, which has since been at least partially disavowed, (beginning with Robert Walker LJ's judgment in *Unilever*, and culminating in *Ofulue*) was that the "without prejudice" rule exists only to protect admissions and not facts that are relevant independent of their truth or falsity. This reasoning drew on the observation by Lord Griffiths in *Rush & Tompkins Ltd* at 1300 that:

"There is also authority for the proposition that the admission of an "independent fact" in no way connected with the merits of the cause is admissible even if made in the course of negotiations for a settlement. Thus an admission that a document was in the handwriting of one of the parties was received in evidence in Waldridge v Kennison (1794) 1 Esp 142."

Lord Griffiths went on in the same passage to describe this as an exceptional case, and warned that it should not be allowed to whittle down the protection given to the parties to speak freely about all issues in the litigation in the course of negotiations for settlement.

Approved Judgment

42. The second of Hoffmann LJ's reasons was that, as the claimant himself had put in issue the reasonableness of the settlement negotiations, that issue could not be determined fairly without reference to those negotiations. The public policy underlying the rule was not infringed by ordering disclosure for the purpose of the claim for professional negligence (in which the other parties to the settlement of the earlier proceedings were not involved).
43. As Fancourt J observed in *Briggs v Clay* at [53], the case of *Muller* is generally accepted to have been rightly decided as an exception to the "without prejudice" rule; the difficulty lies in deciding the true ratio of the decision and the extent of the exception thereby established.
44. After considering observations made by some of the members of the House of Lords in *Ofulue*, particularly Lord Neuberger, about the first rationale given by Hoffmann LJ for the exception in *Muller*, Fancourt J said at [64] that:
- "it is clear that when leaving open the question of whether a statement "in no way connected" with the issues in the case might be admissible, Lord Neuberger is referring to the very limited exception identified by Lord Griffiths, namely that in certain cases "an independent fact in no way connected with the merits of the cause" is admissible: see the expression "wholly unconnected with the issues between the parties to the proceedings" in para [91] of Lord Neuberger's speech. That is clearly not to be equated with proof of a statement that did relate to the issues between the parties, but which is being relied upon to prove a fact other than the truth or falsity of the statement."*
45. 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.
46. Fancourt J concluded at [100] that there were a number of facets to the *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. He said that was 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. That appeared to him 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.

IS THE CONTESTED MATERIAL ADMISSIBLE?

47. On behalf of the Executors, Mr Mitchell QC made three main submissions:
1. The rule does not apply at all;

Approved Judgment

2. If it does apply, the case falls within the exception for statements wholly unconnected with the issues between the parties to the proceedings recognized by Lord Griffiths in *Rush & Tompkins Ltd*, applied by Hoffmann LJ in his first line of reasoning in *Muller* and left open by Lord Neuberger in *Ofulue*, or else it falls within a principled and incremental extension of the different exception which prevents “without prejudice” negotiations being used as a cloak for impropriety;
 3. On a proper analysis of the “WPSAC” correspondence in 2018 there was a waiver of the right to rely on what was said during “without prejudice” settlement negotiations in February 2017 for the purposes of argument about costs.
48. It seems to me that the first two propositions can be tested by asking what the position would have been if the “WPSAC” correspondence in September 2018 had not been sent, and the Executors had sought to adduce evidence as to the position adopted at the mediation by De Cruz and Mr Willers and/or the contents of the “without prejudice” telephone discussion between Mr Thomas and Mr De Cruz on 14 February 2017, which was a continuation of the same settlement discussions, in the costs proceedings against the Lawyers. In my judgment, the evidence would have been inadmissible.
49. Mr Mitchell contended that statements made in negotiations which are not admissions against interest, and which are unconnected with the subject-matter of the dispute in the course of which the negotiations took place, do not need to be, and are not, protected in litigation which is not connected with the earlier litigation. It is unnecessary for me to decide whether that general proposition is a sound one; that debate is best reserved for a case in which the issue directly arises. The short answer to that submission is that even if the claim for costs against the Lawyers were to be treated as litigation independent of the Malicious Prosecution action, (notwithstanding that the claim for costs is brought in that action and the Lawyers have been joined as parties to that action) it is intimately connected with it.
50. I cannot accept that in principle the “without prejudice” protection afforded to Mr Willers cannot be relied on by his legal representatives in a subsequent application for the costs of the same action, made against them personally. In *Briggs v Clay* it was the legal representatives for one of the negotiating parties who wished to deploy the protected material in a claim made against them and against Aon, the other party to the settlement negotiations, by their former clients. Fancourt J held that in the absence of waiver or an applicable exception, the lawyers were bound by the “without prejudice” rule. The situation in the present case is very similar.
51. It was accepted by Mr Mitchell that this case does 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. I can foresee circumstances in which that exception might apply in the context of a claim for costs against a non-party, for example, if the only evidence that X has been funding the claim is evidence that emerged in the course of settlement negotiations. Mr Carpenter rightly pointed out that there are procedures available under the CPR for a party to litigation to be interrogated about the identity of any funders, but if that course is not

Approved Judgment

open, for some reason, or if the interrogated party lies, or refuses to answer, it is conceivable that an application for permission to refer to the information given about the funder's identity would find favour with the Court. But that is not this case.

52. Turning to the principal exception relied on by Mr Mitchell, namely, the "independent fact" exception, what was said by Mr De Cruz in order to justify a particular negotiating stance adopted by his client cannot be described as "*wholly unconnected with the issues between the parties to the proceedings*" simply because it did not directly address the legal merits of the claim. It was plainly connected to issues concerning the quantum of the claim and the recoverable heads of damages.
53. 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?
54. I appreciate that this case has the additional extraordinary feature of the Lawyers having a personal stake in the damages, but that does not affect the character of the evidence that the Executors wish to deploy. If the first part of Hoffmann LJ's reasoning in *Muller* did not operate to allow the use of the protected evidence in *Ofulue* – an implicit acknowledgment of pre-existing indebtedness - for the purpose of starting time running afresh under the Limitation Act, it cannot apply in a case such as the present to allow evidence of an alleged acknowledgment of influence or control to be adduced.
55. I would add that, if and to the extent that what was said is capable of being characterised as an acknowledgment by the Lawyers that they had a significant influence over the terms of any settlement, or were exerting a measure of control over their client's ability to settle the litigation (a contentious matter on which I deliberately express no opinion), it could be characterised as an admission against interest or something closely akin to it.
56. As for the impropriety exception, as Robert Walker LJ said in *Unilever* at 2444H, the exception should be applied only in the clearest cases of abuse of a privileged occasion. It does not apply here. That exception has not been extended generally to cover cases where the conduct of a party or his lawyers in the settlement negotiations has been put in issue. Cases involving the admission of evidence to support or rebut allegations of professional negligence in the conduct of settlement negotiations either fall within the recognised parameters of the *Muller* exception, or possibly, depending on how one characterises the decision in *EMW Law*, a principled and incremental extension of it.
57. That leaves the question of waiver, or agreement that the "without prejudice" material can be deployed. It has been established in the authorities that waiver must be mutual and that it is not to be lightly inferred. However, the parties may expressly agree that

Approved Judgment

communications are “*without prejudice save as to costs*”. As Robert Walker LJ said in *Unilever*, when discussing this subject, item 7 on his list, at p.2445C-D:

“*[This exception or apparent exception] stands apart from the principle of public policy (a point emphasised by the importance which the new Civil Procedure Rules Part 44.3(4) attach to the conduct of the parties in deciding questions of costs).*”

He added:

“*There seems to be no reason in principle why parties to without prejudice negotiations should not expressly or impliedly agree to vary the application of the public policy rule in other respects, either by extending or by limiting its reach*”.

58. As the case of *Somatra Ltd v Sinclair Roche & Temperley (No 1)* [2000] 1 WLR 2453 exemplifies, once the protection of the “without prejudice” rule has been waived, the waiver covers the whole of the without prejudice communications and not just those aspects of them that one of the parties has sought to deploy. In that case, one of the parties to the negotiations deployed protected material in evidence on an application for a freezing injunction, and it was held by the Court of Appeal that the other party was free to refer to the whole of the settlement negotiations at trial.
59. Clarke LJ provided two different justifications for admitting the evidence, the narrower of which was that the second party was entitled to use the “without prejudice” material to correct a misleading impression created by the affidavit of the opposing party sworn in support of the freezing order: see [18] – [20]. However, he went on to explain the justification in wider terms which made it clear that the use of the material by the second party was completely unfettered.
60. At [36]-[40] he analysed the position by reference to the two underlying reasons for the “without prejudice” rule, implied agreement and public policy. At [37]-[38] he analysed the first party’s deployment of the material as a repudiatory breach of the agreement by each party not to rely in evidence on anything said or written by the other party in the course of “without prejudice” communications. The second party was entitled to accept the repudiation or hold the first party to its promise. Then at [39] he said that the matter could not be analysed in wholly contractual terms because of the element of public policy recognised in the cases. He described the essential point as being that, in a case such as *Somatra*, it would be unjust to allow one party to deploy the material for its benefit on the merits in one part of the litigation without allowing the other to do so too in another.
61. The present case is not one in which Mr Willers, or the Lawyers, have actually deployed “without prejudice” material, even though they indicated an unequivocal intention to do so in the relevant correspondence. To that extent *Somatra* is not directly analogous; but the approach adopted by Clarke LJ is helpful in considering the interpretation of communications that have been labelled “WPSAC”, which are specifically amenable to the contractual interpretation analysis.
62. I have already set out the chain of correspondence in September 2018. It is an important part of the factual matrix that all parties were well aware by then that Mr Willers was a “man of straw” and that the Executors, if they won, would be looking to the Lawyers to pay their costs. By marking the correspondence “WPSAC” I cannot

Approved Judgment

accept that De Cruz were confining the scope of proposed relaxation of the “without prejudice” rule to the hearing of an application for costs against their client. Objectively construed, the initial letter in the run of Contested Material sent by De Cruz on 11 September was intended to be for the benefit of the Lawyers as well as their client Mr Willers. It evinced a clear intention to use evidence about what was said and done during the “without prejudice” settlement negotiations in February 2017 at a future costs hearing (and/or in written costs submissions). This could be viewed as an anticipatory repudiatory breach of the existing “without prejudice” agreement covering the settlement negotiations in February 2017, but in my judgment, it is better characterised as an offer to vary its terms.

63. That offer was accepted by Laytons on behalf of the Executors in their response, which made it clear that both parties would be able to deploy the offers and counter-offers and what was said at the mediation for the purposes of argument about costs. I cannot construe Laytons’ response as being dependent upon De Cruz actually putting the Executors’ behaviour in issue at a costs hearing or being the first party to deploy such material. It assumes that De Cruz and Mr Willers wish to be able to deploy “without prejudice” material in connection with submissions on costs, and assents to that course, on the basis that Laytons can and will also be free to deploy such material in evidence in connection with such submissions. In essence, the parties (including the Lawyers) have agreed to treat the settlement negotiations in February 2017 as if they had always been conducted WPSAC.
64. Although Laytons specifically referred to correcting inaccuracies in De Cruz’s version of events set out in the letter of 11 September, that was the justification given for their clients’ agreement to relax the rule, not a contractual limit being set on the purposes for which the material could be used. If and insofar as Laytons’ letter constituted a counter-offer, that offer was accepted when De Cruz responded in the terms they did on 17 September, again under the express rubric WPSAC, putting Laytons’ version of events squarely in issue for the purposes of a costs hearing without explaining the areas of factual disagreement. There was no objection taken to Laytons’ reservation of the right to deploy the contents of their letter of 14 September at a future costs hearing. By then, there was clearly an issue between the parties as to what offers had been made, when, and why, which the Court dealing with costs would probably have to resolve.
65. At that stage, the parties had agreed that everything said and done at the mediation by or on behalf of either party (including, significantly, Laytons’ version of the final offer made by Mr Willers and the reasons given for it set out in their WPSAC letter of 14 September) could be referred to at a future costs hearing.
66. Mr Carpenter, and Mr Lawrence QC, on behalf of the Barristers, contended that even if there was an agreement (or a mutual waiver) the agreed purpose for which the “without prejudice” material was to be deployed was to demonstrate the reasonableness or otherwise of the level of any offers made and the behaviour of the parties, and there was no agreement that it could be used for some collateral purpose. I do not regard the variation of the underlying express or implied agreement to negotiate “without prejudice” as confining the purposes for which the material was to be deployed or the nature of the material that could be deployed, apart from the fact that it could only be deployed in argument about costs.

Approved Judgment

67. However, even if the agreement had been limited to matters concerning the level of any offer or the behaviour of the parties (and by necessary extension their legal representatives) it is impossible to segregate an insistence on payment of the £3.5 million and what was allegedly said about its importance as a component in the Willers offer, and treat those aspects of the negotiations as falling outside the scope of the agreement on admissibility. The effect of the agreement is that everything said and done in the context of the mediation is admissible for the purposes of argument on costs.
68. So far as the “without prejudice” conversation between the two solicitors after the mediation is concerned, Mr Carpenter and Mr Lawrence submitted that it was not the subject of the agreement or waiver even if such an agreement existed. It was an entirely separate matter, and when Laytons evinced an intention to refer to that conversation, De Cruz immediately made it clear that they did not agree to this. Mr Lawrence submitted that this was a conversation about what it would take to settle the litigation in future and shed no light on what happened at the mediation or on the attitude towards settlement displayed at the mediation by the parties to it (or their lawyers).
69. If the conversation had taken place weeks or months later, this submission might have had greater force. However, as I have already pointed out, it took place on Tuesday 14 February 2017, only 4 days after the mediation, 2 of which were the intervening weekend. It is also important to consider the context and content of the conversation. It began with Mr De Cruz asking for clarification of the final offer made at the mediation on the previous Friday by the Executors, and then confirming that the offer was rejected. It continued with Mr De Cruz explaining what any settlement agreement would have to include, in the course of which he expressly referred to the amount of an offer to settle which had already been made on behalf of Mr Willers. In context, that can only be a reference to an offer made at the mediation. The figure he mentioned is the same figure as is mentioned towards the end of Laytons’ letter of 14 September 2018. In this respect, and in others, the contemporaneous file note supports Laytons’ version of what happened at the mediation, as set out in that letter. It would help to resolve the dispute about that which had arisen in the course of the WPSAC inter-solicitor correspondence in September 2018.
70. Mr De Cruz also gave a breakdown of that figure which included, as a distinct element, the sum of £3.5 million said to be owed to the Lawyers. What Mr De Cruz is recorded in the attendance note as saying by way of explanation of why the settlement would need to include that £3.5 million, is a repetition of what Laytons said in their letter of 14 September 2018 about the stance adopted by De Cruz/Mr Willers at the mediation. To that extent also it is contemporaneous evidence which is capable of supporting the truth, or accuracy, of the Executors’ version of what was said and done at the mediation. That was, of course, the very reason why Mr Thomas was referring to it in the WPSAC run of correspondence. In the note of the conversation, Mr Thomas responded by setting out his clients’ attitude at the end of the mediation. The conversation then went back to the subject of the importance of the amount of any settlement including the £3.5 million.
71. In my judgment it would be wholly artificial to treat the conversation between the solicitors on 14 February 2017 as anything other than a direct continuation of the settlement negotiations that took place during the mediation the previous week. The

Approved Judgment

agreement to vary the “without prejudice” status of the settlement negotiations in February 2017 to WPSAC so that both parties would be able to deploy arguments at a future costs hearing about each other’s behaviour during those negotiations encompassed this discussion as much as it encompassed the discussions that took place at the mediation itself. It would make no sense to treat those aspects of the conversation that referred back to what was said or offered at the mediation as falling within the varied agreement, but those aspects which sought to explain why Mr Willers had taken that position in the negotiations and was maintaining it after the mediation failed, as falling outside it.

72. De Cruz’s belated realisation that its decision to open up the without prejudice discussions for the purposes of a costs hearing potentially allowed material to be deployed by the other party that it did not wish to be used came too late. The letter of 26 September 2018 was ineffective to limit the scope of the agreement that had already been reached.

CONCLUSION

73. It follows from the above analysis that I accept Mr Mitchell’s submission that the Contested Material is admissible, but solely on the basis of an agreement, binding on the Lawyers as much as on Mr Willers, that what was said and done in the context of “without prejudice” discussions about settlement in February 2017 could be deployed in the context of an argument about costs.
74. The application is therefore allowed.