



**IN THE GRAND COURT OF THE CAYMAN ISLANDS  
FINANCIAL SERVICES DIVISION**

**CAUSE No.: FSD 115 OF 2019 (RPJ)**

**IN THE MATTER OF THE COMPANIES LAW (2018 REVISION)  
AND IN THE MATTER OF EHI CAR SERVICES LIMITED**

**IN CHAMBERS**

**Appearances:** Ms Caroline Moran and Mr Daniel Mills of Maples and Calder (Cayman) LLP on behalf of the Company.

Mr Robert Levy QC, and Mr Rupert Bell and Mr Patrick McConvey of Walkers (Cayman) LLP, on behalf of the Walkers Dissenters

Mr Gary Smith of Loeb Smith on behalf of the Heng Ren Silk Road Investments LLC

**Before:** The Hon. Justice Parker

**Heard:** 12<sup>th</sup> July 2021

**Draft Judgment  
Circulated:** 23<sup>rd</sup> July 2021

**Judgment Delivered:** 2<sup>nd</sup> August 2021

**HEADNOTE**

*Section 238 Companies Law-fair value of dissenters' shares-discovery-without prejudice privileged material relevant to fair value mistakenly disclosed-whether material has been waived by inadvertent disclosure and after inspection –shareholders' claim to without prejudice privileged material from the company -joint privilege and the interests of third parties-waiver.*

**JUDGMENT**

**Introduction**

1. By a summons dated 20 May 2021 (the "Summons") the Walkers Dissenters (the "Dissenters") seek a declaration that the without prejudice privilege claimed in respect of certain emails



uploaded to the electronic data room and subsequently removed from the data room by the Company on 23 September 2020 (the "Emails"), has been waived; alternatively, an order that the Company discover the Emails by uploading them to the data room pursuant to Order 24, rule 13 of the Grand Court Rules (as revised) (the "GCR").

2. The Dissenters<sup>1</sup> contend that the Company, by inadvertently uploading to the data room four documents (comprising a single email chain) which are arguably subject to without prejudice privilege (i.e. the Emails), has thereby waived such privilege.
3. The Company's argues that the relief sought has no reasonable justification in law or in fact. The Company argues that the Dissenters are simply seeking to gain some perceived advantage from an administrative error which is ordinarily (and should, in this instance, have been) resolved amicably and professionally between parties' lawyers in keeping with the prevailing common-sense approach taken in modern discovery exercises to such matters.
4. The matter arose in the following way. On 23 September 2020, Maples who represent the Company wrote to Walkers to bring to their attention the fact that privileged material had inadvertently been uploaded to the data room as a result of erroneous electronic tagging. As explained in the First Affidavit of Allegra Crawford ("Crawford 1"), a reviewer had not followed instructions to tag the documents as privileged.<sup>2</sup>
5. The Emails are four separate documents, all from the same email thread, with the subject line "*Confidential Follow-up Discussion*". This email thread, dated in October 2018, is said to comprise:
  - a) Confidential without-prejudice emails between representatives of Ctrip and Ocean Link on one side, and Ray Zhang ("Mr Zhang") and Greg Stubblefield of Crawford/Enterprise, who was also a director of the Company ("Mr Stubblefield") on the other side, as representatives of the Company and members of the Buyer Group, which included Crawford/Enterprise. The first email in these discussions from Ctrip is headed (capitalised, within the body of the email) "*CONFIDENTIAL AND WITHOUT PREJUDICE*", and reflected the commercial basis upon which Ctrip initially indicated it was prepared to settle with the Company and Crawford;<sup>3</sup> and

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<sup>1</sup> Maso Capital Investments Limited, Maso Capital Arbitrage Fund Limited, Blackwell Partners LLC – Series A and Star V Partners LLC. The Summons is supported by Heng Ren Silk Road Investments LLC.

<sup>2</sup> Crawford 1 § 11

<sup>3</sup> pp 55-56 of AMC-1.



- b) Confidential internal discussions, between Mr Zhang, Mr Stubblefield, Chris Hsu of Kilometre (as the Company's agent), and other individuals from the Company, Kilometre, and Enterprise/Crawford, which followed on from, considered and revealed the content of the ongoing without prejudice negotiations.
6. These confidential without prejudice settlement discussions related to the ongoing litigation and arbitration between Ctrip, CDH Car, the Company, and Enterprise/Crawford (the "Ctrip Litigation"), as described in the Proxy Statement and in the First Affirmation of Mr Zhang sworn on 4 January 2021 (the "Zhang Affirmation"). The Ctrip Litigation included winding up proceedings in the Cayman Islands against the Company and arbitrations in Hong Kong. A point taken by Ctrip in the Cayman Islands winding up proceedings was that the merger was not in the interests of the Company and that the merger consideration did not represent fair value.<sup>4</sup>
7. Maples' letter of 23 September 2020 said there was no intention to waive, nor actual waiver of, privilege over the Emails by their inadvertent disclosure.
8. Accordingly, Maples requested that Walkers: (i) destroy all copies of, and notes regarding, the Emails; (ii) confirm whether the Emails had been shared with any other parties; (iii) to the extent that the Emails had been so shared or notes by any such parties taken in relation to them, request the destruction thereof; and (iv) provide an undertaking that they would refrain from using any knowledge gained from review of the Emails.
9. On 5 October 2020, Walkers responded to Maples. Walkers refused Maples' requests, noting that the Dissenters' expert and his team had, prior to receipt of Maples letter, variously already reviewed, downloaded and saved the Emails, as had certain representatives of the Dissenters. Walkers went on to state that "*the attorneys representing the Dissenters will be reviewing the Emails for the limited purpose of advising the Dissenters as to whether the Emails are privileged*". Walkers further requested the Company confirm the basis for its asserted privilege.
10. On 7 October 2020, Maples replied stating that the basis upon which privilege was asserted over the Emails was that they comprised confidential without prejudice discussions as detailed above. Maples expressed surprise that it had been assumed by the Dissenters that they had been properly disclosed.

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<sup>4</sup> Ctrip Winding Up Petition §§ 57 and 58.



11. Ms Moran, who appeared for the Company, submitted that the Company's position is and always has been, that:
- a) The Emails are covered by without prejudice privilege.
  - b) The mistaken disclosure of the Emails in the data room did not result in a waiver of that privilege.
  - c) Even if the mistaken disclosure amounted to a prima facie waiver of privilege (which is denied), then it was in any case an obvious mistake, and the Dissenters' attorneys should have cooperated with Maples to put matters right.
12. Mr Levy QC for the Dissenters submits it is common ground that the Emails are "*relevant*"; the Company admits as much in Maples' letter of 23 April 2021. Given that there is only one issue in appraisal proceedings, namely the fair value of the Company's shares, it follows that the Emails are relevant to valuation. Therefore, the issue is whether the Company is, in the circumstances, entitled to withhold this relevant material from the Dissenters and the Court.
13. In support of the application he submitted:
- a) access to the data room was made in the ordinary way.
  - b) there is no reason in law or practice why, before giving a client or its representatives access to documents discovered by the other side, those documents should first have been checked by the receiving parties' attorneys to double check that the disclosing party had not erred in disclosing its documents – it was for the Company to get its discovery correct, and the receiving parties could quite legitimately assume that it had performed a proper discovery exercise and that they were perfectly entitled to look at, and rely upon, all and any discovered documents.
  - c) it is standard practice in section 238 cases for those with access to the data room simply to access documents directly. There is no "*attorney filter*" and neither should there be.
  - d) the without prejudice rule, even when it applies, is not an immutable rule against ever disclosing documents that were, when created, properly covered by the privilege. Documents that were so covered can cease to be so in a very wide variety of cases.<sup>5</sup>

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<sup>5</sup> Cf the list of such circumstances in *Hollander's Documentary Evidence* 13th Ed. at 20-09 ('Hollander').

- e) the Company had failed to accurately describe the Emails.<sup>6</sup> There is no detailed explanation in the Company's evidence of what the Emails were about or why they are protected by any form of privilege. In the circumstances there should have been a proper and full explanation of exactly why privilege is said to attach to the Emails. The correspondence offers no proper explanation and neither does Crawford 1. Furthermore, in so far as the Emails represent discussions between individuals in different capacities (so it is noted that Messrs Zhang and Stubblefield were apparently acting as representatives of the Company and the buyer group) there is no explanation as to how privilege can attach to a conversation between the same people wearing different hats.
- f) the description of the Emails in the Company's List of Documents is plainly inadequate (as is any subsequent attempt to explain why they are privileged). The purpose of the rule needs to be properly understood.<sup>7</sup> Oliver LJ in *Cutts v Head* explained the purpose of the rule thus:

*"... parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should ..... be encouraged fully and frankly to put their cards on the table. .... The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability".*

- g) The Company offers no, let alone any full, explanation of precisely how the Emails attract privilege in connection with the supposed disputes (some of which appeared to have concluded by that time). It is not the case that everything said between disputants attracts without prejudice privilege, and a claim to privilege can be made.
- h) Accordingly, at the very least, if, contrary to the Dissenters' case, without prejudice privilege does apply to the Emails (and has not been waived), the Company must file an affidavit explaining the full circumstances said to give rise to the without prejudice privilege. Such an order has been made in a number of cases.<sup>8</sup>

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<sup>6</sup> See Maples letter of 7 October 2020.

<sup>7</sup> *Cutts v Head* [1984] Ch 290 at § 306. See too *Hollander* at paragraph 20-04.

<sup>8</sup> Cf. *Tchenguiz Imerman v Imerman* [2012] EWHC 4047 (Fam) and *Astex Therapeutics Ltd v Astrazeneca AB* [2016] EWHC 2759 (Ch); and the commentary in *Hollander* paragraph 15-07 and 15-08.



- i) Alternatively, the Court should make an order under GCR Order 24, rule 13, which provides that, "*at any stage of the proceedings in any cause or matter the Court may, subject to rule 14(1), order any party to produce to the Court any document in his possession, custody or power relating to any matter in question in the cause or matter and the Court may deal with the document when produced in such manner as it thinks fit*". In view of the Company's admission that the Emails are relevant, i.e. they plainly give a view of the Company/buyer group's view of fair value, such a consideration and determination by the Court of the claim to privilege is entirely proper; in short the claim to privilege should be tested.
14. Mr Levy QC made a number of additional points. He submitted that the Emails were not privileged as against the Dissenters who were shareholders or former shareholders in the company. He relied on a passage from *Hollander* which dealt with legal opinions obtained by a company which could not be privileged against a shareholder, unless obtained for the purpose of litigation against that shareholder.<sup>9</sup>
15. Although we are admittedly dealing with without prejudice privilege, not legal professional privilege in this application, there would have been no public policy basis for saying that the Dissenters could not have seen the Emails. There is no new public policy which prevents a person seeing documents that it once had a right to see.
16. Moreover he submitted that discussions between the Company and its agent (in this case a strategic advisor engaged solely to advise on the merger transaction) regarding a settlement proposal made by Ctrip do not fall within the scope of the without prejudice rule since those communications (presumably) were commercial discussions of some description, not negotiations aimed at settlement between the Company and its agent.
17. Further even if the documents are covered wholly or partially by without prejudice privilege, any such privilege has been waived since there is no public policy justification for asserting that without prejudice privilege subsists. The Emails were discovered, offered for inspection and properly inspected (and there was no obvious mistake), before any assertion of privilege was made.

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<sup>9</sup> 5-02 of *Hollander and CAS (Nominees) Ltd v Nottingham Forest Plc & Ors* [2001] 1 All ER 954 and *Arrow Trading and Investments Est 1920 & Anor v Edwardian Group Ltd & Ors* [2005] 1 BCLC 696.



18. Furthermore the Company itself has put in issue the fair value of the shares in the Company (it is the petitioner). In the Petition the Company referred to its offer to acquire the Dissenters shares under section 238(8) of the Companies Act. It did not need to refer to its section 238(8) offer.<sup>10</sup> The Company in its own Petition explains what its section 238(8) fair value offer was. That is the only issue in the proceedings. The Company chose to plead its own offer and it cannot on the one hand rely on its own assessment of the fair value of the shares (such that it considered it necessary to plead that in the Petition), whilst asserting some public policy based privilege in relation to that very point and thereby avoid informing the Court of its views of what it considered the shares to be worth (which is assumed is discussed in the contents of the Emails).
19. Maples has explained that the Emails contain the commercial basis upon which Ctrip initially indicated it was prepared to settle and subsequent discussions involving the Company. Adopting the approach in *Muller v Linsley & Mortimer* [1996] PNLR 74, the Company has waived such privilege as there was in the Emails. The fact that the Dissenters and Professor Zmijewski have been permitted to inspect the Emails means that any privilege in the Emails has clearly been waived.
20. It would be wholly artificial for the Company to rely on the distinction between itself and the buyer group to withhold the Emails from the Dissenters. In substance, the section 238 procedure is intended to protect minority shareholders from the faction of controlling shareholders who have forcibly taken their shares. A company in such proceedings is not entitled to withhold its books and records as against the Dissenters in discovery. This avoids the Dissenters being unfairly disadvantaged by the fact of their exclusion from the company. The importance of discovery by companies in section 238 proceedings has repeatedly been emphasised by numerous Judges of the Court and the Cayman Islands Court of Appeal.
21. In such circumstances, it would undermine the rationale of the section 238 procedure if a company were permitted to rely on the technical distinction between itself and its new shareholders to withhold documents from the Dissenters on the grounds of without prejudice privilege. This would provide a mechanism by which a company could selectively disclose information relevant to the valuation issue by communicating sensitive matters to its buyers prior to a consolidation or merger and then asserting without prejudice privilege over them.

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<sup>10</sup> *Muller v Linsley & Mortimer* [1996] PNLR 74.



22. In this case the artificiality of the distinction sought to be made is brought home by the Company's admission that, in relation to the Emails: "*Ray Zhang and Greg Stubblefield were the directors of the Company included in this email chain, and were acting as representatives of the Company, and also representing the buyer group*".
23. Even if the Emails are privileged, they were uploaded to the data room voluntarily and the Company was entitled to share them with the Dissenters.<sup>11</sup> There was certainly a legitimate reason for so doing: the Emails are admitted to be relevant to the issue in these proceedings.
24. To the extent that Ctrip or any other party is the beneficiary of privilege in the Emails, this is adequately safeguarded by the strict confidentiality protections embodied in the Non-Disclosure Agreement the Dissenters and Professor Zmijewski and his team were required to execute in order to access the data room (and the implied undertaking that relates to discovered documents).

## **Decision**

### **Were the Emails privileged and were they disclosed by mistake?**

25. I accept the Company's explanation that the emails were disclosed by mistake because a reviewer had failed to follow instructions.<sup>12</sup> This was an inadvertent disclosure, not a voluntary disclosure and was promptly pointed out.
26. I also accept that *prima facie* without prejudice privilege applies to the Emails. At the time when the Emails were sent, there was litigation ongoing and disputes between Ctrip, CDH Car, Enterprise, and the Company. Having reviewed the relevant evidence I do not accept Mr Levy QC's submissions that no comprehensible claim to privilege was made by Maples or that the documents were misdescribed.
27. I accept the Company's explanation given in correspondence, upon affidavit and by Ms Moran, that the chain of emails (four versions of a single thread) comprised a confidential without prejudice discussion between Ctrip, Ocean, and Enterprise on one side, and the Company on the other, regarding a settlement proposal from Ctrip and subsequent confidential internal discussions between Enterprise the Company (and its agent Kilometre) which reflected the

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<sup>11</sup> *EMW Law LLP v Halborg* [2017] 3 Costs L.O. 281

<sup>12</sup> Crawford 1 § 11.

contents of the settlement proposal. The emails were to and/or from various individuals including Chris Hsu and Yvonne Yan of Kilometre, Mr Zhang, Colin Sung and Greg Stubblefield from the Company, and representatives from Ctrip and Ocean.<sup>13</sup> The content of the emails reflected discussions seeking to settle the ongoing litigation and arbitration between the parties. The arbitration was in Hong Kong between the company and Ctrip and went to the validity of the shares Ctrip had purchased and the company. The litigation was the winding up proceedings in the Cayman Islands that Ctrip had filed on a just and equitable basis, arguing among other things that the merger should not proceed and that the merger consideration did not represent fair value.<sup>14</sup> Kawaley J dismissed the petition and an appeal from that decision was pending at the time of the Emails' chain.

28. I accept Ms Moran's submission that these negotiations represented a genuine attempt to settle the Ctrip Litigation. As Mr Zhang explains at para 285 of the Zhang Affirmation, the Company was trying to settle to avoid further harm to its operations. Further, the Ctrip Litigation was in fact settled soon after the date of the Emails.<sup>15</sup>
29. The negotiations were also headed "CONFIDENTIAL AND WITHOUT PREJUDICE" reflecting the parties' intention to engage in without prejudice settlement negotiations. Since the negotiations with Ctrip and Ocean Link are themselves covered by without prejudice privilege, so too are any documents which reveal the content of those negotiations. Therefore, it follows that without prejudice privilege also attaches to the later emails in the Emails' chain comprising discussions between the Company, Kilometre (as agent for the Company)<sup>16</sup> and Enterprise/Crawford, which refer to, consider and reveal, the content of the ongoing without prejudice negotiations with Ctrip and Ocean Link.

### **Purpose of the without prejudice privilege rule**

30. The primary purpose of the public policy behind the rule as stated by Oliver LJ<sup>17</sup> is to encourage parties to disputes to settle their differences.<sup>18</sup> It operates to exclude from evidence admissions against interest made by a party in the course of negotiations in order to promote frank and open settlement negotiations.

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<sup>13</sup> Crawford 1 §8.

<sup>14</sup> Zhang Affirmation §266.

<sup>15</sup> The email chain is dated in October 2018. The Parties to the Dispute entered into a global settlement agreement on 18 February 2019, see para 302 of the Zhang Affirmation.

<sup>16</sup> *Tom Jones Intl Ltd v Att Gen* [2010] 2 CILR Note 3 (Unreported, Grand Court, 16 August 2010), at § 39.

<sup>17</sup> *Cutts v Head* *ibid*.

<sup>18</sup> See *Avonwick* *ibid* per Lewison LJ at § 17.

31. As a matter of public policy there is protection from disclosure of without prejudice communications from being disclosed to third parties on a compulsory basis.<sup>19</sup> In practice the rule prevents the use in evidence of all communications (whether written or oral) which are part of the continuum of negotiations between the parties.<sup>20</sup> The practical difficulties caused by parties attempting to dissect out identifiable admissions and withhold protection from the rest of without prejudice communications would be unworkable and contrary to the underlying objective of giving protection to parties to speak freely about all issues in the litigation, both factual and legal, when seeking compromise and for the purpose of establishing a basis of compromise, admitting certain facts.<sup>21</sup> Part of the rule is also said to be based in contract, as a notional implied agreement between the parties that what is said in negotiations will not be relied upon later.<sup>22</sup> If parties seeking to compromise litigation and arbitration with the Company, as in this case, were at risk of having those settlement negotiations discovered in other proceedings, the purpose of the rule would be removed.

### **Are the emails privileged as against the Dissenters?**

32. I do not accept Mr Levy QC's forceful submissions that as shareholders or former shareholders the Dissenters enjoyed the same right to the information as the Company in the without prejudice negotiations. There is a well-known rule which allows a shareholder to obtain the production of documents at a company in which he holds shares, which documents would otherwise be protected by legal professional privilege.<sup>23</sup> That is because the shareholder has a common interest in the property of the company and can be said to have paid for the legal advice indirectly. This rationale has no application to without prejudice communications involving third parties. It provides a solid reason why there is a distinction between communications covered by legal professional privilege and without prejudice privilege as regards a shareholder's entitlement.
33. In this regard I respectfully adopt the reasoning of Nugee J in relation to whether a company can claim privilege against its own shareholders (except in relation to litigation between itself and its shareholders) in respect of confidential legal advice, by analogy to the position of a trustee as against beneficiaries:

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<sup>19</sup> *Rush & Tompkins* [1989] 1 AC 1280 at § 1299 as applied in *Tom Jones* *ibid.* per Henderson J at § 35.

<sup>20</sup> *Unilever* [2001] 1 All ER 783 at § 791.

<sup>21</sup> *Unilever* §§796-800 per Robert Walker LJ *ibid.*

<sup>22</sup> *Stax* [2007] EWHC 1153 at § 13 Warren J.

<sup>23</sup> *CAS (Nominees) v Nottingham Forest* [2001] 1 All ER 954.



“... A company taking advice on the running of the company's affairs and paying for it out of the company's assets cannot assert a privilege against the shareholders who, similarly, have indirectly paid for it.”<sup>24</sup>

There is no such entitlement available to the Dissenters in this case in relation to third party settlement negotiations with the Company which attract without prejudice privilege.

### **Waiver**

34. The principles of inadvertent disclosure are not applicable to without prejudice privilege, which does not rely upon the protection of confidentiality as between litigants.<sup>25</sup> Without prejudice privilege is generally a rule of admissibility, whereas legal professional privilege is a substantive right that can be waived at the behest of the party entitled to it. The important difference is that without prejudice privilege can only normally be waived with the consent of parties to the correspondence.<sup>26</sup> In this case there is a joint privilege between the Company and Ctrip in relation to the Emails and the Company's inadvertent disclosure cannot have waived it.
35. There is also a further distinction between legal professional privilege and without prejudice privilege. Whilst legal professional privilege can be waived and can thereby become admissible in proceedings, without prejudice privilege material remains inadmissible regardless of whether or not the opposing party in the case has possession of the material.<sup>27</sup> It follows that whether or not the Dissenters and their expert have the contents of the material recorded in some form they cannot make use of it.
36. The cases on inadvertent disclosure have no application to the waiver of without prejudice privilege. They are based upon legal professional privilege where confidentiality is an essential element.
37. Neither can without prejudice privilege be waived unilaterally by one party, because it is a joint privilege unlike other forms of privilege<sup>28</sup>. It matters not that there are confidentiality protections and an implied undertaking in the discovered material in these proceedings.

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<sup>24</sup> *Sharp v Banking Group* [2015] EWHC 2681 9 Ch at §9, as applied by McMillan J in *Re Torchlight* 6 April 2016 § 42.

<sup>25</sup> *Phipson on Evidence* 19<sup>th</sup> edn 2017, §24-33.

<sup>26</sup> *Ibid* at 24-14.

<sup>27</sup> *Forster v Friedland* CA unreported 10 November 1992; *Galliford v Mott* [2008] EWHC 603.

<sup>28</sup> *Phipson* §§24-33 and 24-14 and *Avonwick v Webinvest* [2014] EWCA Civ 1436 at § 21.

## Exceptions

38. Notwithstanding its clear purpose, there are exceptions to the rule against disclosure of without prejudice privilege communications in certain well-defined cases including that of *Muller*<sup>29</sup> which is relied upon by the Dissenters. By its letter of 22 May 2019, Maples on behalf of the Company offered to purchase all of the Dissenters' shares in the Company for the price of US\$6.125, being the price that the Company had determined was the fair value of the shares. This is repeated at paragraph 14 of the Petition dated 24 June 2019 which pleads that the offer, which was the same amount as the merger consideration was not accepted and accordingly the Court's determination of the fair value of the shares of the Dissenters was sought.
39. This procedure and pleading in accordance with section 238 of the Companies Act does not in my view displace the privilege in without prejudice communications in accordance with the policy principles behind it, as a result of the so-called *Muller* exception. *Muller* was a case in which an assertion was made by the plaintiff in proceedings against his former solicitors that his conduct was reasonable in concluding a settlement which had been made with a software company and its other shareholders. The plaintiff said this was a reasonable attempt to mitigate his loss and put the matter in issue to show that he had acted reasonably in mitigating loss, not to prove any admissions made during the course of the negotiations. The solicitors disputed that there had been a reasonable attempt to mitigate loss and sought discovery of all the documents relating to the settlement. The English Court of Appeal ordered disclosure. Hoffman LJ treated the issue as unconnected with the truth or falsity of anything stated in the negotiations and therefore which fell outside the principle of public policy protecting without prejudice communications. The other members of the court agreed but would have based their decision on waiver by the plaintiff. The relevant authorities which have followed *Muller* have been recently considered by the English Court of Appeal again.<sup>30</sup> Doubt was expressed<sup>31</sup> as to the reasoning in *Muller* (*but not the outcome on its facts*) and also as to widening the exception any further. The English Court of Appeal in *Berkeley v Lancer* [2021] EWCA Civ 551 declined to decide upon widening the exception and indicated that there would need to be a careful consideration of whether that would involve an unacceptable interference with the public policy of encouraging compromises, which is the reason for the without prejudice rule<sup>32</sup>.

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<sup>29</sup> *Unilever* pp 791 and 792.

<sup>30</sup> *Berkeley v Lancer* [2021] EWCA Civ 551 per Richards LJ.

<sup>31</sup> Doubt had been expressed by the House of Lords earlier in *Ofulue* [2009] UKHL 16 per Lord Neuberger at §95 (with whom the other members of the court agreed).

<sup>32</sup> *Ibid* § 89.



40. The situation in section 238 proceedings, where a company pleads in the petition that an offer was made to and not accepted by certain shareholders and asks the court to determine the matter, does not in my view provide a legitimate basis for making an exception to the without prejudice rule. There is no waiver of privilege over without prejudice discussions with third parties about the value of shares.
41. It does not follow that because the company contends that US\$6.125 reflecting the merger consideration (or something less) is the fair value of the shares that without prejudice negotiations to settle disputes with third parties are to be admitted and used. The Company is not advancing a positive case about its negotiations with the relevant counterparties who are entitled to the protection of the without prejudice rule. It may well be the case that valuations of the Company's shares were exchanged by the parties to the Email exchange and to that extent are relevant. Nevertheless, the strength of the policy reasons for the without prejudice rule is clear from the authorities.<sup>33</sup>
42. There is in my view no unfairness to the Dissenters which demands an exception be made to the without prejudice rule in this case. The company has not waived or directly put the contents of the without prejudice negotiations in issue in this proceeding by way of the Petition. There is no risk in my judgment that the case cannot be fairly determined without admission of the without prejudice evidence.
43. I have carefully considered Mr Levy QC's submission that these proceedings to determine the fair value of the Dissenters shares where the Emails are admittedly relevant should provide a further exception so that the without prejudice material is admissible. It is the case that the exceptions set out in *Unilever* are not closed, but it does not seem to me that the material in this case is likely to be sufficiently important or probative to justify making any principled exception or any kind of discretionary exception on the merits.
44. Neither is a more general exception justified because the acknowledged disparity of information between the company and dissenting shareholders in section 238 cases should thereby displace the privilege in without prejudice communications.
45. Discovery as is well known in section 238 cases, places a burden on a company of considerable proportions. In our electronic age with huge quantities of documentary material uploaded for

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<sup>33</sup> *Savings & Investment v Fincken* [2004] 1 WLR 667 at § 62 per Rix LJ.

inspection to data rooms, with the help of sophisticated software, mistakes sometimes happen. They often happen as a result of human error, as in this case.

46. It is not necessary to make a determination as to whether the mistake was obvious (subjectively to the attorneys or objectively) in this case. It was promptly pointed out as an error and in those circumstances the Court expects the attorneys on both sides to cooperate to put matters right as soon as possible. Even where one party takes the position that the claim to privilege has not been properly explained or was inaccurate in some way, the matter should be capable of resolution by sensible communication between the attorneys. This did not happen and instead, in keeping with other interlocutory battles in this case, adversarial correspondence and entrenched positions were taken. The tactics behind such litigation is not lost on the Court and I have already reminded the attorneys in other related judgments of the importance of the Overriding Objective.
47. It should not be necessary for either the parties or the Court to devote their resources to resolving disputes involving a single email chain in the context of the volume of relevant information in a case like this.<sup>34</sup>
48. For all these reasons I refuse the application for a declaration and discovery from the Company by the Dissenters or to make an order under GCR Order 24, rule 13.



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**THE HON. JUSTICE PARKER  
JUDGE OF THE GRAND COURT**

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<sup>34</sup> *Atlantisrealm v Intelligent* [2017] EWCA Civ 1029 at § 55 Jackson LJ.