SOME "EXCEPTIONS" TO THE WITHOUT PREJUDICE RULE

Berkeley Square Holdings & ors v Lancer Property Asset Management Limited & ors [2020] EWHC 1015 (Ch)

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Introduction

1. In this recent judgment, Roth J has provided some clarification of the scope of 3 important exceptions to the without prejudice rule: (1) the misrepresentation/ fraud/undue influence exception; (2) the estoppel exception; and (3) the *Muller* exception. This article summarises and discusses key elements of the decision. It goes without saying, however, that the case itself is a "must-read" for all legal practitioners.

2. Of particular interest is that this is the first reported case in England in which the first exception has been applied. Roth J also provided an illuminating discussion of the "problematic" *Muller* exception – an exception which has long been considered to have come out of a case that was, in large part, wrongly reasoned.

3. It is also suggested in this article that additional "exceptions" to the without prejudice rule should be recognised, in certain circumstances, in respect of communications which go to the availability or otherwise of equitable and statutory bars to actions. Such "exceptions" may, however, be equally (or better) rationalised as instances where the privilege does not actually attach. The question is also asked: whether the without prejudice privilege/rule in fact had *no* application to, at least some of, the relevant communications

in *Berkeley Square Holdings* – and accordingly whether, in truth, no "exceptions" to the WP Rule fell to be applied in respect of those communications?

The Without Prejudice Rule

4. Before a consideration and analysis of the *Berkeley Square Holdings* case, it is first worth briefly outlining the WP Rule itself[1].

- The WP Rule governs the admissibility of certain communications into evidence. Generally, it renders inadmissible (and privileged from disclosure) evidence of any statement made in negotiations in a genuine attempt to reach a settlement.

- The WP Rule is based, in part, upon the public policy of encouraging litigants to settle their differences rather than litigate them to a finish (*Rush & Tompkins Ltd v GLC* [1989] AC 1280 per Lord Griffiths at 1299). That public policy objective is furthered by a rule of evidence which protects negotiating parties from the risk of being embarrassed or prejudiced at trial by reason of certain statements or admissions made, in the context of those negotiations, in a genuine attempt to facilitate a settlement of a disput about a set of issues. As Oliver LJ said in *Cutts v Head* [1984] Ch 290 at 306: "*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 liability or quantum. In *Rush & Tompkins*, it was said that the objective of the rule is to give the parties the protection needed "*to speak freely about all issues in the litigation both factual and legal when seeking compromise…".*

- The WP Rule has also equally been justified by reference to express or implied agreement between the parties that statements made in the course of their negotiations and aimed at the settlement of a dispute should not be admissible (that being the commonly-understood consequence of offering or agreeing to negotiate "without prejudice": *Muller v Linsley and Mortimer* [1996] PNLR 74 at 77; *Unilever Plc v Proctor and Gamble Co* [2000] 1 WLR 2436 at 2442D).

[1] For fuller discussion, see [39]-[42] of Roth J's judgment.

- The WP Rule therefore confers a privilege which, unlike legal professional privilege, is a *joint* privilege: it cannot be waived unilaterally by only one party to the negotiations (see, in particular, *Avonwick Holdings Ltd v Webinvest Ltd* [2014] EWCA Civ 1436 per Lewison LJ [21]).

- In *Ofulue v Bossart* [2009] UKHL 16, at [12] Lord Hope said: "*The essence of* [the WP Rule] *lies in the nature of the protection that is given to parties when they are attempting to negotiate a compromise. It is the ability to speak freely that indicates where the limits of the rule should lie. Far from being mechanistic, the rule is generous in its application. It recognises that unseen dangers may lurk behind things said or written during this period, and it removes the inhibiting effect that this may have in the interests of promoting attempts to achieve a settlement.*"

- The White Book 2020 commentary (at 31.3.39) usefully summarises that "*The purpose of the rule is to protect a litigant from being embarrassed by any admission or acknowledgment made purely in an attempt to achieve a settlement. There must be a dispute which is under settlement discussion…*"

- Importantly, in *Framlington Group Ltd v Barneston* [2007] EWCA Civ 502 it was said that whether the crucial consideration on the question of whether WP privilege applies depends on "*whether in the course of negotiations the parties contemplated or might reasonably have contemplated litigation* [about the dispute or issue to be resolved] *if they could not agree".* Whether there was a dispute or issue to be resolved is to be determined objectively[2].

- The privilege afforded by the WP Rule is not absolute. There are several recognised exceptions to the privilege, certain of which are discussed below.

Berkeley Square Holdings **– factual background**

5. The case concerns a London property portfolio worth in the region of £5 billion. The Claimants, who together own the properties in the portfolio, are 24 companies

[2] Also see *Avonwick* at [17]

incorporated in the BVI. The properties, for the most part, are beneficially owned by Sheikh Khalifa bin Zayed Al Nahyan, the President of the UAE and Emir of Abu Dhabi.

6. From around 2004-2017, the Defendants were the asset managers of the properties in the portfolio. Dr Mubarak Al Ahbabi (the chairman of the Department of Presidential Affairs in Abu Dhabi) represented the Claimants, and dealt with the Defendants.

7. Pursuant to a management agreement dated 2005, D1 was to be paid fees in respect of its asset management services, and a specified "performance fee" (10% of the excess of the net proceeds of sale of any individual property in the portfolio above its value at purchase, after allowing for annual RPI increases). A side letter also provided for substantial bonuses to be payable in certain circumstances.

8. The Claimants allege that between 2005 and 2015 D1 made regular payments (amounting to c.£26.48 million) to a BVI company, "Becker", which was ultimately beneficially owned by Dr Al Ahbabi, but that Becker did not provide any services in relation to the portfolio. It is in dispute whether those payments were authorised by, or known to, the Claimants or Sheikh Khalifa at the time they were made.

9. In early 2012 a dispute arose regarding D1's management fees, in particular in relation to its bonus under the side letter. D1 claimed it was due £75.5 million. This dispute was then submitted to mediation which was held on 24 September 2012. This led to a settlement deed which was concluded shortly after the mediation, and to a variation of the 2005 agreement.

10. D1, in its mediation position statement, referred – as part of the background to the dispute being mediated – to the payments that had been made by them to Dr Al Ahbabi's company.

11. In January 2014, Sheikh Khalifa reportedly suffered a stroke. In May 2015, Dr Al Ahbabi was removed from his office and replaced. In September 2017, the Defendants' appointment as the portfolio's asset managers was terminated.

12. The Claimants argue that they subsequently discovered that the Defendants had been complicit in a fraud on the Claimants perpetrated by Dr Al Ahbabi, who had himself

dishonestly breached his fiduciary duties to the Claimants. In September 2018, the Claimants issued proceedings against the Defendants, alleging fraud, bribery, conspiracy, knowing receipt, dishonest assistance, and breach of fiduciary duty/contract. The side letter was described as the main instrument for the fraud, which was used as a mechanism to generate improper profits for Dr Al Ahbabi and D1. The Claimants claim that, as a result, the various agreements (including the settlement reached post-mediation in 2012) are void. They claim restitution, and various other forms of equitable relief, in respect of the extremely large sums paid under the side letter and under the settlement deed.

13. The Defendants' main defence is that the payments, the arrangements pursuant to which the payments were made, and Dr Al Ahbabi's interest in Becker, were all known to and approved by Sheikh Khalifa. Amongst other things, they placed reliance on D1 having informed the Claimants' representatives (including certain of their lawyers) of certain key facts in its mediation position papers in 2012. They accordingly pleaded that "*the fundamental premise for this substantial claim – the allegation of fraud that lay undiscovered until recently – is, as the Claimants must know, misplaced and wrong.*"

14. The Defendants sought permission to amend their defence to include a plea of estoppel by representation or convention. They say that prior to the 2012 mediation, in the position papers, the Claimants were informed in writing of key facts going to issues in the present action. They argued that a reasonable party in D1's position could expect the Claimants, if acting honestly and responsibly, to inform them, in response to that position statement, if the Claimants' position was that Dr Ahbabi/Becker was not authorised to receive certain payments. The Defendants argued that the Claimants represented, by their silence on the point, that Dr Al Ahbabi/Becker *were* authorised to receive the payments and that the side letter was thus valid – or at least that there was a shared assumption by the parties to that effect. They sought permission to plead that the Defendants relied on that representation to their detriment, by (*inter alia*) refraining from seeking formal written ratification from the Claimants, or continuing to make payments to Becker and/or deal with Dr Al Ahbabi. In those circumstances, they argue that it would be inequitable to allow the Claimants to resile from that representation; as such that the Claimants should be estopped on the claims.

15. The Defendants also sought permission to amend their defence to include a plea – in response to the Claimants' allegation that 2012 deeds (entered into post-mediation) were only in D1's and Dr Al Ahbabi's interests and contrary to the Claimants' interests – that the Claimants knew or believed the substantial payments made to Becker were legitimate and appropriate, and that there were no apparent indications of any breach of trust or fiduciary duty by Dr Al Ahbabi.

16. On the other hand, the Claimants applied to strike out as an abuse of process the parts of the Defendants' defence which referred to the without prejudice mediation statements, and they resisted the Defendants' amendment application. They relied on the WP Rule.

17. It was common ground between the parties that the statements that the Defendants were relying upon, and seeking to rely upon, came within the WP Rule[3]. The documents in which the statements were found were expressly marked "without prejudice". The general context was a mediation, genuinely aimed at settling a dispute. The question to be determined by Roth J was whether the Defendants should be precluded from relying on these statements, or whether they fell within an exception to the WP Rule and would thus be admissible in evidence and would not an abuse to plead reliance upon.

Exceptions to the WP Rule

18. There are a number of recognised exceptions to the WP Rule. The rationale for, and scope of, a few of them is controversial (e.g. the *Muller* exception). In *Unilever*, Robert Walker LJ at 2444-2446 provided a non-exhaustive list of some of the most important exceptions to the WP Rule. In summary –

    (1) when the issue is whether WP communications have resulted in a compromise agreement being reached[4];

[3] although even this may, quite properly, be questioned (see the final section of this article)

[4] E.g. *Tomlin v Standard Telephones and Cables* [1969] 1 WLR 1378

(2) when the issue is whether the agreement apparently concluded as a result of the WP negations should be set aside on the ground of misrepresentation, fraud or undue influence[5];

(3) when the issue is whether an estoppel has arisen due to a clear statement which was made by one party to the WP negotiations and on which the other party is intended to rely or act, and does in fact rely or act, to their detriment (even where no concluded settlement arises)[6];

(4) a party may be allowed to give evidence of what the other said or wrote in WP negotiations if the WP Rule which excludes said evidence would act as a cloak for perjury, blackmail or other "unambiguous impropriety"[7] – in the clearest cases of abuse of the privilege[8];

(5) evidence of negotiations may be given in order to explain delay or apparent acquiescence;

(6) *Muller's* case: an issue between claimant and 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 other proceedings. Hoffmann LJ treated that issue as one unconnected with the truth or falsity of anything stated in the negotiations: Hoffman LJ thus considered that the relevant documents fell outside the principle of public policy protecting WP communications. The other members of the court agreed but would also have based their decision on waiver;

(7) offers made "without prejudice except as to costs"[9];

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[5] E.g. *Underwood v Cox* (1912) 4 DLR 66 – an Ontario decision

[6] E.g. *Hodgkinson & Corby v Wards Mobility Services* [1997] FSR 178 at 191 (point not disapproved on appeal)

[7] E.g. *Foster v Friedland* 10 November 1992, CAT 1052

[8] *Foster v Friedland*; *Fazil-Alizadeh v Nikbin* 1993 CAT 205

[9] *Cutts v Head* [1984] Ch 290; *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280

(8) a distinct form of the privilege in matrimonial cases which extends to communications received in confidence with a view to matrimonial conciliation (*In re D (Minors) (Conciliation: Disclosure of Information)* [1993] Fam 231).

19. More recently, in *Oceanbulk Shipping SA v TMT Ltd* [2010] UKSC 44, Lord Clarke recognised another exception: WP communications would be admissible on the issue of rectification of a settlement agreement made pursuant to WP negotiations. This was said to be directly related to exception (1) above: "*No sensible line can be drawn between admitting without prejudice communications in order to resolve the issue of whether they have resulted in a concluded compromise agreement and admitting them in order to resolve the issue of what that agreement as.*" Lord Clarke also said that "*justice clearly demands*" an "interpretation exception" to the WP Rule: to admit objective facts which emerge during the course of WP negotiations which form part of the factual matrix relevant to the correct interpretation of a contract.

20. In *Berkeley Square Holdings*, the Defendants sought to rely upon:

(1) The second *Unilever* exception: whether a contract could be set aside for misrepresentation, fraud or undue influence;

(2) The third *Unilever* exception: estoppel;

(3) The sixth *Unilever* exception: *Muller*.

21. Roth J held that the Defendants could rely on the second and sixth *Unilever* exceptions, but that they failed to make out the third. The exceptions will be considered in that order.

The Misrepresentation/Fraud/Undue Influence Exception

22. Interestingly, prior to *Berkeley Square Holdings*, there was no reported English case where this exception has been applied. No party took issue with the existence of the exception. The exception has long been recognised in the literature, has been applied in other jurisdictions, and it has never been suggested that it would be an unprincipled exception.

23. In the present case, the Defendants, who were trying to invoke the exception, are not trying to set aside or impugn any agreements; their objective is to have certain agreements upheld as genuine. The Claimants seek to impugn the agreements, and were here seeking to rely on the WP Rule to prevent the mediation statements being referred-to at all.

24. The Claimants argued that the exception should only be applicable in circumstances where a party is trying to rely on the WP communications in order to set aside an agreement. They submitted that to apply this exception at the instance of the Defendants (who are trying to uphold the agreements) would be to "*turn an existing exception…on its head: the evidence would be adduced to defend a fraud rather than pursue it*."

25. Quite apart from the question-begging that is perhaps inherent in that argument (given that the ultimate issue is whether there was a fraud at all), it is hard to see how one could possibly rationalise, in a principled manner, basing the availability of an exception to the WP Rule on a party's status as claimant or defendant, or as "agreement-impugner" or "agreement-upholder". Indeed, Roth J said that trying to maintain such a distinction would be unjustified. At [52] His Lordship said "*if you can use the antecedent negotiations to prove a misrepresentation and thereby rescind an agreement, it is illogical to say that you cannot use them to disprove a misrepresentation and thereby uphold an agreement."*

26. The Defendants therefore successfully argued that the exception was applicable on the facts of the case. A central issue in the claim is: "can certain agreements be set aside as a result of essentially fraudulent conduct?" The Defendants want to point to WP material speaking to that precise issue, which tended to undermine the Claimants' case about the underlying fraud allegedly perpetrated on them – in particular going to the issue of whether the Claimants knew about the payments or about Dr Al Ahbabi's interest in Becker. The Defendants' argument was summarised at [51]:

> *"Since a party to a concluded agreement can rely on the preceding WP discussions to show that the agreement was reached following a fraudulent misrepresentation by the other party which undermined the agreement, so also should a party to a concluded agreement be able to rely on the preceding WP discussions to show that the agreement was reached following a representation which shows that there was no fraud on the other party as alleged which would undermine the agreement. The Defendants stated in their skeleton argument:* "It cannot be right

that without prejudice communications can be referred to in order to undermine an apparently valid compromise, but not to uphold it.""

27. It would be odd indeed if defendants were to be prevented from defending allegations of fraud by seeking to uphold a set of agreements by reference to WP material where, if the claimants had similarly been seeking to rely on other WP statements made by the Defendants in the context of mediation to bolster their case for setting aside those agreements (e.g. on the basis that the Defendants had committed fraud, misrepresented the position), they would have been permitted to do so under this very exception.

28. Roth J accordingly held at [52] that "*the statements here are admissible either under this exception, properly interpreted, or by reason of a small and principled extension of it to serve the interests of justice. If Lancer [D1] had misled the Claimants by misrepresentation in the mediation, then the Claimants could rely on that in challenging the 2012 Deeds. It seems to me contrary to principle to hold that where Lancer was truthful in the mediation, their statement cannot be admitted to rebut a case that the Claimants were deceived by Lancer as to the true state of affairs*."

29. His Lordship concluded: "*There is no conflict here with the fundamental principle that parties should be encouraged to speak freely in negotiations, without concern that what they say may be used against them in litigation. The Defendants are seeking to adduce evidence of what was said by the 1st Defendant, not of anything said by the Claimants*."

30. The author would respectfully suggest that this last point does not of itself provide any substantive reason in favour of finding that the exception should be applied: indeed, if, for the sake of argument, the Defendants had sought to rely on statements made *by the Claimants* within the mediation in question which, for example, tended to show that the Claimants were in fact positively aware of the payments being made to Becker and/or instigated or approved of them, *that* would have provided an even stronger justification for applying this exception the WP Rule and for admitting those statements. It would be unjust to allow a party to advance a case based on fraud and dishonesty without permitting into evidence material (whether WP or not) which indicates that its case is misconceived and/or misleading, in the sense that there exists evidence that that party's cause of action is quite possibly unfounded or defeasible. Accordingly, the question of who made the

relevant statement in the mediation was, quite likely, not important. The question was whether the communications went to the issue of whether the relevant agreement(s) can or should be vitiated for fraud *on the particular bases set out in the Claimants' statement of case*. They did in this case.[10]

31. This point says something deeper about the rationale for this exception to the WP Rule (and possibly for other exceptions), which, it is submitted, goes to avoiding, insofar as is appropriate, real risks that the Court would be misled on fundamental aspects of the case presented by a party were it not to have the benefit of seeing the relevant material (at least in circumstances where the issue about which the Court may be misled is not at the forefront of the WP negotiations and/or was not reasonably contemplated as attracting the protection of the joint privilege).

32. Roth J's finding on this exception's application was sufficient to dispose of the applications before him; however, he went on to address the other exceptions in light of the full argument they received at the hearing.

The *Muller* Exception

33. At [63] of the judgment, Roth J squarely acknowledged that "*The so-called* Muller *exception is problematic.*" It is problematic because the reasoning of the judges in the *Muller* case[11] has been disavowed at the highest level, yet the case has not been overruled and has continued to be recognised as containing an exception to the WP Rule.

34. In *Muller*, the claimants had previously sued a company about the dismissal of Mr Muller as director of a company, and the loss suffered by the compulsory acquisition of his

[10] Even more importantly, the statements were not made in the context of a mediation which was aimed at settling a dispute that existed between the parties, as at that time, *about the fraud in question*. As oft-recognised by Roth J in the judgment, most of the statements in question – and, indeed, the issue (which is now the central question in these proceedings) of whether or not the claimants knew about Dr Al Ahbabi's interest in Becker, and of the payments – had nothing to do with the issues that were then being mediated. However, had those particular issues *themselves* been the subject of a WP mediation, and had relevant statements/admissions been made by the parties during a mediation about *those* issues, with the genuine aim of reaching a settlement, WP privilege would, the author imagines, have applied to those communications, in the conventional way, for all the usual reasons. It may be, therefore, that the "exception" identified and relied upon here was not required – rather, it may well be an instance of the WP privilege (properly understood) not in fact applying to the communications in the first place.

[11] *Muller v Linsley and Mortimer* [1996] PNLR 74

shareholding. Those proceedings were settled, and the Mullers then sued their solicitors for allegedly providing negligent services due to failing to present a properly stamped transfer of the shares from Mr Muller to his wife, which the Mullers claimed would have avoided the loss. The Mullers gave credit in their claim against the solicitors for the amount they received in the settlement with the company, which they pleaded constituted reasonable mitigation. The solicitors, in their defence, argued that the conduct and settlement of the earlier action against the company was not reasonable mitigation. The Mullers disclosed the writ, statement of claim and letter before action, and the final settlement agreement with the company. The solicitors sought disclosure of all the negotiation communications with the company. The Mullers claimed this was privileged under the WP Rule.

35. The Master and, subsequently, a High Court Judge refused to order disclosure on the basis of the WP Rule. The Court of Appeal, however, allowed the appeal.

36. Hoffmann LJ effectively stated that the WP privilege (itself based on public policy and contractual justifications) operates as an exception to the general rule that a statement or conduct of party is always admissible against him to prove any fact which is expressly or impliedly asserted or admitted. He considered that the WP correspondence in the *Muller* case fell outside the scope of the WP Rule because the communications did not contain any "admissions"; the WP correspondence rather went to the issue of whether the settlement was done in reasonable mitigation, and would not go to establishing the truth or any express or implied admissions or assertions set out within them. Accordingly, Hoffmann LJ considered that the disclosure order should be made.

37. Leggatt LJ agreed that the correspondence in question was not privileged under the WP Rule, but also said that if it was privileged, it should be disclosed on the basis of implied waiver (in that the Mullers had waived privilege in all documents concerning the settlement by producing the letter before action and compromise agreement). He said that, because the Mullers put the reasonableness of their conduct in issue by pleading that they made a reasonable attempt to mitigate their loss by entering the settlement, that allegation "*would in reality not be justiciable without the court having sight of the Without Prejudice negotiations and correspondence. By bringing their conduct into the arena, and putting it*

in issue, the plaintiffs have…waived any privilege attached to the Without Prejudice negotiations and correspondence."

38. As pointed out by Roth J at [69], a waiver analysis is unattractive because it ignores the joint nature of the WP privilege – i.e. that it cannot be unilaterally waived.

39. Roth J made the following important points on the *Muller* exception. He set out how Hoffmann LJ's analysis of the WP Rule, as concerned principally with admissions, has been doubted in *Unilever,* and indeed positively disavowed by the majority of the House of Lords in *Ofuloe*. It is now, therefore, clear that the ambit of the WP Rule is indeed wider than Hoffmann LJ proposed. However, *Muller* has not been overruled: the Supreme Court in *Ofuloe* nevertheless endorsed Robert Walker LJ's statement in *Unilever* of the exceptions to the WP Rule which included the *Muller* exception. Accordingly, Roth J considered that the "*difficulty…is to determine the ambit of the* Muller *exception, given that much of the reasoning of all three judges who decided that case cannot stand."*

40. Roth J then discussed the two recent cases of *EMW Law v Halborg* [2017] EWHC 1014 (Ch), and *Briggs v Clay* [2019] 102 (Ch), both of which engaged with the *Muller* exception and with these difficulties. His Lordship noted that –

    (1) In *EMW Law*, Newey J considered that there must be a *Muller*-like exception to the WP Rule – i.e. that a core rationale that could be distilled from that case justifying an exception to the rule. An issue in *EMW Law* was the extent to which the defendant had made reasonable efforts to recover the claimant's costs in negotiations with a third party (which were covered by WP privilege). The defendant in *EMW Law* had one the one hand referred to the privileged negotiations in his defence, but on the other sought to withhold disclosure of the WP correspondence and notes relating to those negotiations. Newey J said it was "*hard to see how EMW's claim would be justiciable without disclosure"* of the WP documents in question.

    (2) In *Briggs*, Fancourt J said that all the Lord Justices in *Muller* considered it to be material that the claimant had put in issue the reasonableness of his WP negotiations, and the all appeared of the view that the issue of reasonableness of those negotiations would not be properly justiciable without disclosure of the negotiations. A similar point was made in *EMW Law*, as discussed directly above. Accordingly, Fancourt J said: "*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… A [party] cannot at one and the same time raise an issue to be tried and rely on without prejudice privilege to prevent the court from seeing the evidence that is needed to decide it." Still, Fancourt J recognised that in most cases some relevant material is excluded from evidence as it is privileged, but that does not mean the matter is not properly justiciable.

41. Accordingly, it would appear that the justiciability of an issue, of itself, is not the touchstone. Roth J then, it seems, introduced a gloss to the justiciability question – asking himself, what is meant by "fairly justiciable"? It would appear that Roth J considered that whether a *Muller*-like exception should apply depends on whether the issue (itself put in issue by the party seeking to rely on the WP Rule) would be "fairly justiciable" without sight of the WP material. His Lordship's answer to the question of what is meant by "fairly justiciable"? was: "*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 fair trial if that evidence is excluded."* Applying this to the *Muller* facts, Roth J noted that the issue of reasonable mitigation *could* have been determined without seeing the content of the WP negotiations (since the court could see the letter before action, pleadings and the terms of settlement) – "*[b]ut to reach a fair decision, the court would need to see the WP negotiations which led to the settlement."*

42. Turning to the facts of *Berkeley Square Holdings*, Roth J held the *Muller* exception should apply in respect of the communications in questions, bearing in mind the following factors:

(1) the Claimants allege the Defendants were complicit in a substantial fraud perpetrated by Dr Al Ahbabi concerning very for very large sums;

(2) the fundamental allegation is that the Claimants did not know about the payments or Dr Al Ahbabi's interest in Becker, and they plead they only discovered this after D1's appointment was terminated, and that they could not with reasonable diligence have discovered it earlier;

(3) the fundamental issue is one of dishonesty, and much will turn on the Claimants' awareness or otherwise of key facts and the timing of any such awareness;

(4) as the Claimants rely on their lack of knowledge, this is a critical issue raised by them; he considered the issue would not be fairly justiciable if the Defendants could not put in evidence of what D1 told the Claimants in its mediation statements: "*I do not see that the Claimants can fairly advance a case based on their ignorance until May 2017 of certain key facts while excluding evidence that they were told those facts some five years earlier";*

(5) Roth J also took account of the facts that –

(a) no admission *by the Claimants* was being sought to be admitted, but rather it was a statement of the Defendants,

(b) the information in the position statement was background and largely irrelevant to the dispute that was being mediated,

(c) if the material was not admitted, there would be a serious risk that the court would be misled.

43. It might be said that basing an exception to the WP Rule on whether an issue is "fairly justiciable" without sight of the WP material does not provide a great deal of clarification or certainty regarding the exception's limits. It might also be said that defining or explaining the notion of "fair justiciability" by reference to the concept of a "fair trial" is tautologous. Further, some might argue that "fairness" of a trial and "justiciability" of an issue are incommensurable and ought not to be elided; whether the trial is fair/unfair with or without certain evidence does not affect the justiciability of the question. In any case, when considering the *Muller* exception in future cases, in practice, much may be left to individual judges' interpretation of what order would be "fair to make" in order to "fairly decide" an issue[12]. Still, despite the rationale for the *Muller* exception remaining somewhat elusive and problematic, at least litigants now know the test they will need to meet in order to rely on the *Muller* exception. First, they will need to point to an important issue

[12] However, if that is the case, the further question can then be asked: on what basis does the court actually determine whether it would be fair to allow certain WP communications into evidence in order that a given issue can be "fairly" decided? At that point, the analysis has gone full circle and one is still left looking for a further way of articulating a justification (insofar as one exists) for disapplying the privilege.

that has been put in issue by the other side; second, they will have to demonstrate to the judge's satisfaction that the WP material gong to that issue is "so central" to the resolution of that issue that their right to a fair trial would be impeded if they were not permitted to adduce it. That may, of course, lead one to ask the further question of "when is a piece of evidence is indeed sufficiently, or "so", central to an issue that without its admission the fairness of a trial would be jeopardised?" There no possible general answer to this question; it is something that will only be able to be resolved on a case by case basis.

44. In any event, the author considers that some of the difficulties or uncertainties which may go along with seeking to invoke the *Muller* exception could be avoided, at least in some cases, were the Courts to recognise certain other "exceptions" to the WP Rule. These discussed in the final section below.

The Estoppel Exception

45. Roth J held that this exception was not made out by the Defendants. His Lordship noted that Robert Walker LJ in *Unilever* derived this exception from Neuberger J's judgment in *Hodgkinson & Corby Ltd*, where it was said:

> "…*there is, to my mind, a powerful argument for saying that if a clear and unambiguous statement is made by one party in "without prejudice" correspondence, and the statement is acted on, and reasonably acted on, by the other party, an objection by the first party to the correspondence being put in evidence by the second party in order to justify the step taken by the second party would plainly be unconscionable and would not be upheld by the court."*

46. The "*unconscionable abuse of WP protection*" which the estoppel exception is aimed at preventing is: one party intentionally making unambiguous statements or representations in WP negotiations, where the other party has reasonably relied or acted upon the statement in question (and was intended to do so) and does so to their detriment, but where the statement-maker then seeks to prevent or restrain the other party, on the basis of the WP Rule, from giving evidence of that statement in subsequent litigation.

47. For completeness, it is worth noting that the Claimants had argued that the estoppel exception should be limited to promissory estoppel cases (as was the issue in *Hodgkinson*). Roth J decided he did not need to decide that issue, given his decision that the Defendants

could not get off the ground as regards the basis of this exception (see immediately below). Still, His Lordship did, in passing, note (a) a case[13] where it has been said that the exception ought to apply as regards *any* kind of enforceable estoppel; and (b) the acceptance (without discussion) by the Supreme Court of the additional estoppel argument in *Oceanbulk* at [47].

48. The problem for the Defendants in *Berkeley Square Holdings* in relying on the estoppel exception was that they were not just seeking to rely on or adduce evidence of an express/implied representation or statement made *by the Claimants* in the WP mediation. They were seeking to admit *D1's* own mediation statements: indeed, any representation that might be implied "by silence" could only be so implied by a Court if the Defendants' statements were first adduced, as such a representation would necessarily be related to and dependent upon those earlier statements.

49. As Roth J held the estoppel which was sought to be founded by the Defendants "*is based on the subsequent silence and conduct of the Claimants outside the confines of the mediation… The implied representation by silence and conduct of the Claimants alleged to found the estoppel accordingly occurred on occasions to which the WP Rule did not*" apply.

50. His Lordship continued at [61]-[62]:

> "*Of course, in order to establish an estoppel based on that implied representation and conduct, the Defendants would have to give evidence of what Lancer told the Claimants in the mediation. But that is in my view a very different from the object of the estoppel exception, as explained in* Hodgkinson *and effectively adopted in* Unilever. *Accordingly, if the relevant passages in Lancer's WP position statements are to be admitted, I consider that this must rest on a different ground.*
>
> *…If I have misunderstood the Defendants' case and they do indeed wish to rely also on silence by the Claimants in the mediation, I would hold that this falls outside the estoppel exception. Such silence is a very far cry from a "clear and unambiguous statement" to which Neuberger J referred. To extend this exception to an implied representation by silence would in my view impair the policy served by the WP Rule, since parties seeking to compromise a dispute would then have*

[13] *Pavilion Property Trustees Ltd v Urban & Civic Projects Ltd* [2018] EWHC 1759 (Ch) per Martin Griffiths QC (sitting as a Deputy High Court Judge)

to take care to controvert in the negotiations any statements made by the other side, which is not an approach conducive to open and constructive discussion."

51. Clearly, as the Defendants succeeded on the second and sixth *Unilever* exceptions they are effectively be able to plead and argue that the estoppel should ultimately be found on the basis of an implied representation by silence (in the form discussed at paragraph 14 above and set out at [31(i)] in the judgment).

52. Still, as Roth J found, the Defendants' stand-alone argument that D1's WP mediation statements should be admitted on the basis of the estoppel exception was, on the facts, structurally problematic. The Claimants' silence *in response* to the statements which were sought to be adduced under the exception was said to found the estoppel that would ultimately be relied upon. The estoppel exception identified by Neuberger J is, however, based on it being inequitable for a *statement-maker* to itself rely on the WP Rule so as to prevent *its own* statement(s) being admitted into evidence where the statement was made (or, at least, where there is an issue as to whether it was made) by the maker in order to induce action or reliance by the other party. The act which is estopped is that of a party purporting to place reliance on the WP Rule in order effectively "bury" its own statement, where such a statement was itself designed to elicit action or reliance by the other party, and does elicit action or reliance to the other party's detriment. As mentioned above, the representation which the Defendants were, in the present case, trying to rely upon – that being an implied representation[14] based on silence on the part of the Claimants after being given the Defendants' mediation statements – cannot of itself be understood (and the representation in question cannot be implied) unless the Defendants' own, logically prior, statements are first adduced. This structural problem accordingly took the present case outside of the kind of case envisaged by Neuberger J in *Hodgkinson,* and thus outside of the "estoppel exception" as it is conventionally understood.

[14] see paragraph 14 above

Should an "Equitable Bar Exception" or a "Statute Bar Exception" be recognised?

53. Just because the Defendants' case (or, more precisely, the facts which underpinned their arguments) did not exactly fit into the neatly-delineated/recognised estoppel exception to the WP Rule, does not mean that there is not an exception which ought to be recognised which would fit. It is proposed that an "equitable bar exception", if accepted, would have fit the facts of the case. It is submitted that such an exception should be recognised as a free-standing exception to the WP Rule. In short, where:

    (1) a party discloses or says something, in communications which are designated "WP", concerning facts which are relevant to another party's cause of action,

    (2) which goes to an issue concerning that other party's knowledge about (or consent to) a certain state of affairs,

    (3) in circumstances where the other party's knowledge was not (at the time of the communications in question) an issue that existed (or was reasonably contemplated) between the parties and was not part of the dispute being addressed by the settlement negotiations, and

    (4) which, if the communications had not been "without prejudice", could reasonably have grounded, for example, an argument that the claim should be barred in equity due a claimant's acquiescence,

    such communications should be admissible under an "**equitable bar exception**". The Defendants in this case, if their defence was framed on the basis acquiescence, for instance, could have advocated for this exception to be recognised as a principled extension or corollary to existing exceptions (see below).

54. Similarly, where, for example:

    (1) a party discloses or says something, in communications which are designated "WP", concerning certain facts which are relevant to a particular party's cause of action,

    (2) knowledge or notice of which would go to establishing that the a party had discovered (or with reasonable diligence ought to have discovered) a relevant fraud, concealment

or mistake for the purposes of s.32(1) of the Limitation Act 1980, such that a limitation period started running from the time of the communication,

(3) where the moment at which time began to run for limitation purposes is in issue in the proceedings in question, and where, if the communications had not been "without prejudice", they could reasonably have grounded, for example, an argument that the claim should be limitation barred, and

(4) where the relevant party's discovery or knowledge of such matters was not (at the time of the communications in question) an issue that existed between the parties and which was not part of the dispute being addressed by the settlement negotiations,

such communications should also be admissible under an exception to the WP Rule, as a "**statute bar exception**".

55. Such exceptions would, in their rationales, in fact be quite closely related to one of the rationales underlying the fraud exception discussed above at paragraph 31. A core mischief which these kinds of exceptions are designed to protect against is that of a party being permitted to plead and assert a certain state of affairs (most strikingly, as regards its own knowledge/discovery of a certain state of affairs) but being able to do so entirely free of the prejudice which would be associated with that plea or assertion were it to be known to the tribunal that there is evidence of communications, documented or otherwise (in the WP communications), which tends to undermine, or is arguably inconsistent with, the case advanced. Critically, that is only truly a mischief that requires guarding against where the WP privilege which *does* attach to the communications in question was itself not reasonably directed, at the time of the communications, towards providing any party with a shield from the prejudice described immediately above, *at least in relation to the issue in question*. In those circumstances, if there was no way to admit that evidence (whether by using the language of an "exception" to the WP Rule, or by using the language of the "scope" of the privilege/the privilege not attaching or extending to the communications in relation to an issue[15]) there would be a real risk that the Court would be materially misled

[15] because the parties did not (on any objective interpretation) agree that the communications should be privileged from disclosure or admission into evidence on the particular issue in question (quite simply because the parties were not, on an objective interpretation, in their "WP discussions" aiming at settling any existing or reasonably contemplatable dispute connected to the matter now in issue)

and make a fundamentally inaccurate determination of fact, e.g. as to a party's knowledge. To summarise, what justifies the admission into evidence is (1) the real risk of the Court being misled on that issue if the material is not adduced, *and* (2) that the material was generated in circumstances where the issue in question was not reasonably in the minds or contemplation of the parties at the time the WP negotiations were entered into and the relevant communications made.

56. Therefore (and perhaps more broadly), there should be an "exception" to the WP Rule in relation to WP communications which go to an issue about the knowledge or consent of a party in relation to a certain state of affairs where: (a) a central issue in the claim concerns that knowledge/consent (such that the answer could arguably defeat a crucial element of the cause of action, or could provide an equitable or statutory bar to the claim); and (b) at the time the WP communication was made, the issue of knowledge/discovery/consent in question was not itself a matter of dispute between the parties (in the sense that the WP negotiations/discussions were not themselves aimed at settling a dispute about *that* particular issue, because it was either not live or not in reasonable contemplation at the time). Such a position could well[16] be characterised as an instance of the WP privilege, properly understood, simply not applying[17]. As may be appreciated, the author prefers the latter characterisation. However, seeing as the language used in much of the case law is that of "exceptions" to the WP Rule – and that language is used insofar as it may be said that a communication is or has been "covered by WP" by virtue of being conveyed in the context (or of being associated with a set) of WP discussions/negotiations – the author has here proposed "exceptions" to the WP Rule. Importantly, however, whether they are analysed as "exceptions" or as instances of the privilege not in fact applying, the result in practice would be the same.

57. The strongest case for such "exceptions" being applied is where a party seeks to demonstrate that a party had knowledge of, or discovered, certain facts *for the first time* within the WP negotiations in question (particularly where the case of the party resisting the admission of the communications into evidence is that the party did not have

[16] and, probably, quite rightly

[17] This, it might be said, may be the true effect of paragraphs 53(3) and 54(4) above

knowledge or discover it until a later time). In the vast majority of cases it could not, in the author's view, be satisfactorily argued that the WP Rule should prevent the relevant communications being admitted into evidence on the issue of whether or not the other party had knowledge or discovered that fact by reason of those communications. That is precisely because the WP privilege could not have, at the time of the communication, reasonably have been directed to the issue to which the communication is said to be relevant. Until the communication was made, that issue did not exist. As set out at the very start of this article, the protection afforded by the WP Rule is that any statement made in negotiations and genuinely *aimed at reaching a settlement* is privileged. A settlement can only be sensibly defined and understood by reference to certain set of issues which are in dispute, or are reasonably contemplatable as being in dispute. In an example such as the one set out at the start of this paragraph, the statement in question could not possibly be aimed at reaching a settlement of the particular issue (that of knowledge/discovery), as it is by virtue of the statement being made that the particular issue was even capable of arising. Still, even if the case of the party seeking to adduce the statements is that a party knew/discovered (or with reasonable diligence ought to have discovered) the facts contained in the communication *earlier* than the time of the WP communications in question, if the fact of the WP communication is relevant to that case and the WP communications were not aimed at settling a dispute connected to the issue in question, the author considers that this proposed "exception" to the WP Rule should still nonetheless apply, and much for the same reasons.

58. For the reasons given above, the Court should recognise these equitable and statute bar "exceptions" (or substantially similar exceptions); indeed, to do so would complement aspects of the underlying rationale of the fraud/misrepresentation/undue exception, and would reflect the true nature of the WP privilege.

59. Furthermore, it is respectfully submitted that couching such exceptions to the WP Rule in the terms suggested would, at least in some cases, avoid some of the difficulties which could quite easily be associated with the *Muller* exception, which (as discussed above) is now recognised as being based on the somewhat nebulous question of whether a matter would be "fairly justiciable" without evidence of certain WP communications.

60. These proposed exceptions appear, although having slightly different emphases, in a sense intimately related to the potential "**independent fact exception**" which Roth J discussed towards the end of his judgment, at [93] - [98]. This possible exception was mentioned by Lord Griffiths in *Rush & Tompkins* where it was said that "*the admission of an "independent fact" in no way connected with the merits of the cause is admissible if made in the course of negotiations for a settlement."* In *Ofulue*, the question was left open "*whether, and if so to what extent, a statement made in without prejudice negotiations would be admissible if it was "in no way connected" with the issues in the case the subject of the negotiations."* Although the "independent fact exception" is labelled an "exception" to the WP Rule in the case law, for reasons discussed above the author would primarily suggest that it would not really amount to a true "exception" to the WP Rule; rather, it describes a situation in which WP privilege does not actually attach at all. Exception or not, the so-called independent fact exception is nonetheless clearly related, in its underlying rationale, to aspects of the rationale for the exceptions proposed here.

61. Roth J, at [97], considered that if there was a (narrow) independent fact exception it should apply to some of the mediation statements which the Defendants sought to rely upon because, as Roth J noted repeatedly throughout the judgment, those statements were largely unrelated to, were irrelevant to, and/or had nothing to do with, the issues which the 2012 mediation was directed to settling. His Lordship noted, however, that the independent fact exception point was not pursued by the Defendants; as had found 2 exceptions did apply, he did not determine whether an independent fact exception exists.

62. For the reasons given above, the author is of the view that there was likely no WP privilege actually attaching to (at least some of) the communications in question in the *Berkeley Square Holdings* case. Perhaps, therefore, no "exceptions" to the WP Rule needed to be applied. If that approach had been taken, it may have cleared up much of the obfuscation which has long surrounded the exceptions, and may have dispelled some of the haziness which surrounds the line between the exceptions to the rule, and the scope/nature of the rule itself. Still, in light of the Court's acceptance (albeit without discussion) that the WP Rule was in *prima facie* application and that exceptions were in play – and so in light of the probable approach of the Courts in future – it may well be that parties will have to

dress up arguments, which boil down to the privilege not applying at all, in the language of exceptions for some time.

SAMUEL HODGE

3 June 2020