Neutral Citation Number: [2019] EWHC 102 (Ch)

Case No: HC-2016-003089

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

The Rolls Building, 7 Rolls Buildings
Fetter Lane, London, EC4A 1NL

Date: 25/02/2019

Before :

MR JUSTICE FANCOURT

- -

Between :

CHRISTOPHER JAMES BRIGGS AND OTHERS **Claimants**

- and –

(1) ALEXANDER CLAY **Defendants**
(2) AON CONSULTING FINANCIAL SERVICES LIMITED
(3) AON CONSULTING LIMITED
(4) AON UK LIMITED
(5) GOWLING WLG (UK) LLP
(6) PAUL NEWMAN QC

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Patrick Lawrence QC and David E Grant (instructed by **Burges Salmon LLP**) for the **Claimants**
Ben Hubble QC and Saaman Pourghadiri (instructed by **Mayer Brown International LLP**) for the **First, Second, Third and Fourth Defendants**
Nicolas Stallworthy QC and Victoria Brown (instructed by **Clyde and Co LLP)** for the **Fifth Defendant**
Joanna Smith QC and James Walmsley (instructed by **Withers LLP**) for the **Sixth Defendant**

Hearing dates: 4, 5, 7 December 2018

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Approved Judgment

Mr Justice Fancourt:

Introduction

1. The First to Fourth Defendants in this action (to whom I shall refer collectively as "Aon") apply for a determination that the fact and content of "without prejudice" correspondence between May 2014 and October 2016 and a meeting on 2 July 2014 between lawyers acting for the Claimants and lawyers acting for Aon is inadmissible in these proceedings.

2. Substantial parts of the content of those communications have been pleaded by the Fifth and Sixth Defendants ("Gowling" and "Counsel" respectively) in their Defences, filed on 3 August 2018. The same material is now referred to by the Claimants in their Amended Reply dated 12 October 2018. Gowling and Counsel contend that they are entitled to deploy this material because of the nature of the allegations that have been made against them by the Claimants and Aon.

3. Other draft amended statements of case (including a re-amended defence of Aon, re-re-amended particulars of claim and a contribution notice to be issued by Aon) have been prepared but have not yet been formally served. It was agreed that, as there would be no objection in principle to the proposed amendments and the contribution notice, I should make my decision on the basis that they will be served and that they accurately represent the parties' cases.

The Part 8 Proceedings and this Claim

4. This claim is brought by a number of participating employer partnerships and companies and the trustees of the Gleeds pension scheme ("the Scheme") against Aon and the Claimants' previous lawyers for damages for professional negligence. Aon were the Scheme administrators and its professional advisors for many years. The claim follows a decision of Newey J. in separate Part 8 proceedings, Briggs v Gleeds [2014] EWHC 1178 (Ch); [2015] Ch 212, in which it was held that various deeds prepared by Aon for the Scheme and executed between 1991 and 2010 were invalidly executed and of no effect. Gowling and Counsel acted for the participating employers on the Part 8 claim and on the agreed compromise of the employers' appeal against the order of Newey J.

5. Some of the ineffective deeds were intended to limit benefits accruing to members and so reduce the burden on the participating employers of financing the non-contributory Scheme. Since these deeds were ineffective, the financial burden was not reduced as intended. Five other deeds (which were not in issue in the Part 8 Proceedings) were so-called deeds of adherence, by which certain associated or service companies in the Gleeds group were intended to become participating employers and bound by the rules of the Scheme, for the benefit of

their employees. The effect on these deeds of the court's decision is a matter with which the current proceedings are concerned.

6. The potential invalidity of the deeds was first identified in 2010. Before the Part 8 proceedings were issued, the Claimants sent a pre-action letter to Aon alleging negligence in the preparation and execution of the deeds. In the usual way, agreement was reached that time would be deemed not to run against the Claimants for limitation purposes while the potential claim was being evaluated. The trustees brought the Part 8 claim against the participating employers and representative beneficiaries of the Scheme in order to determine whether any of the deeds were valid or otherwise effective according to their terms. It was at all times clear that, following this attempt to mitigate losses, the Claimants would seek to hold Aon liable for any loss suffered resulting from defective execution of the deeds.

7. The decision of Newey J. was not the decision that the participating employers and Aon were hoping to receive. They had to decide whether to appeal it. As anyone familiar with such proceedings and any judge trying this claim would be unsurprised to learn, there was discussion on a without prejudice basis between the lawyers acting for the Claimants (Gowling) and the lawyers acting for Aon, who at the time were CMS Cameron McKenna LLP ("CMS").

8. Apart from the question of an appeal and subject to the outcome of any such appeal, the Claimants and their professional advisors had to evaluate the practical and financial consequences of the judgment. This involved assessing which employees were members of the Scheme and on what terms, the likely future funding cost of the Scheme as it stood in the light of the judgment, and also comparing that cost with the future funding cost of the Scheme that the employers had expected. The difference between those two sums plus all the consequential expenses of the litigation would be likely to be the alleged quantum of the claim brought against Aon. Without prejudice communications took place between Gowling and CMS following the judgment.

9. In the event, the trustees and participating employers did decide to appeal Newey J's order. Permission to appeal was granted on 29 December 2014. Negotiations then ensued between the Claimants and the representative beneficiaries of the Scheme, seeking to reach agreement on a compromise of the appeal. These negotiations were conducted on a without prejudice basis. There were therefore different sets of without prejudice negotiations being carried on at about the same time: negotiations between the Claimants and the representative beneficiaries, and negotiations between the Claimants and Aon. Aon had a proper interest in knowing about the content of the negotiations with the beneficiaries, even though they did not participate in them, and the Claimants kept Aon generally informed.

10. For present purposes, what matters is that the employers and the representative beneficiaries reached agreement on a compromise of the appeal. A settlement was approved by Lewison LJ on 11 October 2016 ("the Approved Settlement"). It had the effect, in very broad terms, that members' benefits were not limited in the way that they would have been if the deeds had been validly executed, and

the employees of the associated and service companies that made the deeds of adherence were treated as members of the Scheme. The negotiations with the representative beneficiaries were at all times conducted on behalf of the Claimants by Gowling, with the input of Counsel as and when he was instructed to advise, to draft letters or to attend meetings. Both Gowling and Counsel were also similarly involved in negotiations between the Claimants and Aon.

11. Following the Approved Settlement and in the absence of an agreed settlement between the Claimants and Aon, the Claimants issued their claim form in these proceedings on 31 October 2016, claiming compensation for losses arising from Aon's alleged breaches of duty.

The Statements of Case

12. Particulars of the claim were served on 19 December 2016.

13. The main allegations originally made against Aon were: 31 deeds relating to the Scheme were invalidly executed as a result of defective drafting by Aon; Aon did not advise correctly about the limits to any purportedly retrospective changes to members' benefits, and Aon did not draw to the Claimants' attention at an earlier time the defects in its drafting and advice (the latter allegation calculated to overcome a potential limitation problem arising from the fact that some of the defective deeds date back to the 1990s).

14. The Claimants pleaded that they took reasonable steps to mitigate their losses, including bringing the Part 8 claim and the appeal and entering into the Approved Settlement. The losses set out in a schedule to the Particulars of Claim are alleged to have been caused by the negligence of Aon.

15. In their original Defence, served on 10 March 2017, Aon pleaded that the deeds, although formally defective, nevertheless had effect as intended, by reason of estoppel. This was an issue addressed in the Part 8 claim, but Aon were not parties to or otherwise bound by the decision in that claim. Aon admitted that they owed a duty of care to the trustees but denied that they owed a duty to the participating employers, and denied that they were in breach of any such duty. They pleaded a number of different limitation defences, asserted that the claimed losses include sums referable to employees of the associated or service companies that had not become participating employers, and asserted that the Claimants failed to take reasonable steps to mitigate their losses and that the Approved Settlement was unreasonably generous.

16. In response to a request for further information from Aon, the Claimants later confirmed that most of the intended members of the Scheme were employed by the associated or service companies.

17. Importantly for present purposes, in January 2018 Aon gave notice of its intention to amend its Defence. The amended statement of case raised in some detail an additional defence, denying that Aon were liable in respect of "additional benefits" for employees of associated or service companies. The

effect of the Approved Settlement was that such employees received their intended benefits as members of the Scheme (on the assumption that the deeds were valid) together with further final salary benefits. Aon contended that the negligence of Gowling and Counsel, in failing during the Part 8 proceedings or in negotiations leading to the Approved Settlement to raise the argument that these employees never became part of the Scheme at all ("the Participating Employer Argument"), was a new intervening act that broke the chain of causation between any liability of Aon and the losses incurred by the Claimants. Aon denied that they are liable for any of the "additional benefits".

18. The Claimants agreed to Aon having permission to amend its Defence and then, in consequence, served Amended Particulars of Claim dated 31 May 2018, adding Gowling and Counsel as Fifth and Sixth Defendants. Making it plain that their primary case remained against Aon, the Claimants adopted Aon's case that Gowling and Counsel were negligent. They alleged that the Participating Employer Argument should have been raised and that the Claimants should have been advised to pursue it in the Part 8 claim and in the negotiations, with the effect of either limiting any benefits conferred on employees of associated or service companies to the benefits intended to be conferred by the invalid deeds or, at least, obtaining a substantial discount from the amount of "additional benefits" conferred. The second schedule of loss annexed to the Defence makes it clear that, at that time, the claim to recover loss from Gowling and Counsel based on the Participating Employer Argument was only pursued to the extent that Aon succeeded on its new intervening cause defence.

19. The Claimants additionally alleged against Gowling and Counsel a further breach of duty, namely a failure to advise on structuring the Part 8 claim so that Aon were bound by its outcome and not in a position subsequently to dispute or seek to avoid its consequences.

20. Gowling and Counsel served their Defences in August 2018. They both denied negligence and denied breaking the chain of causation between Aon's negligence and the claimed losses.

21. Gowling pleaded the extent of Counsel's involvement, alleging close involvement in the conduct of the Part 8 claim, the appeal and the negotiations with the representative beneficiaries and also a without prejudice meeting on 2 July 2014 with Aon's lawyers. Gowling then pleaded the following introductory words in para 30 of their Defence:

> "Aon's lawyers were kept closely informed about the issues and arguments raised in the Part 8 proceedings (on the basis that Aon would be sued for any losses in relation to the Scheme consequent on the Part 8 proceedings) and liaised closely with Gowling and Leading Counsel about the issues and arguments raised in the Part 8 Proceedings, including during the negotiations leading to the Approved Settlement."

Aon disputes in particular that it was "closely" involved or that there was close liaison in such matters. There is, however, no dispute that Aon were involved to some extent with the way in which the negotiations with the representative beneficiaries were being conducted: some of the communications between Gowling and Aon's lawyers are open and will be admissible to prove a degree of liaison and involvement.

22. After the introductory words of para 30, cited above, there follow sixteen sub-paragraphs setting out the detail of particular communications or meetings relied upon by Gowling between May 2014 and October 2016, only seven of which refer to open correspondence. The pleading of those matters leads to the following assertion in para 31 of the Defence:

> "At no point did Aon, CMS or Mr Short QC [Counsel for Aon at that time] themselves raise the Participating Employer Argument."

23. Gowling plead that the new intervening act defence of Aon is bad in law and that, even if they were negligent, there remained a sufficient causal connection between Aon's breaches of duty and the Approved Settlement following the Part 8 proceedings to justify Aon being held liable for the entire loss suffered by the Claimants.

24. The Defence of Counsel is not in identical terms to the Defence of Gowling in this regard. There is, in particular, a difference in the facts alleged in relation to Counsel's involvement in the negotiations with the representative beneficiaries and the extent of his instructions, but for present purposes it can be treated as raising essentially the same arguments by reference to open and without prejudice communications between Aon's lawyers and the Claimants' lawyers. The point sought to be made is encapsulated in this way in para 39(iv) of Counsel's Defence:

> "It is to be inferred that [Aon's] legal advisers (who also had specialist pensions expertise) were of a similar mind [as regards the weakness of the Participating Employer Argument], because the Participating Employer Argument (as defined in paragraph 84) was never raised by [Aon] at any time prior to the Part 8 hearing or in the lead up to the Approved Settlement, notwithstanding the information and evidence that had been provided to them and the opportunities that were afforded to them to provide their input on the issues to be put before the court … and on the arguments to be taken in the context of an appeal and in respect of a settlement …"

25. Gowling and Counsel ("the Lawyer Defendants") emphasise that they are not seeking to rely on the without prejudice communications between them and Aon's lawyers for the truth or falsity of anything said in them, or for any admission or implied admission, but only so that the trial judge can see any extent to which Aon's lawyers were involved, and see (as they contend) that

Aon were in as good a position as Gowling and Counsel to raise the Participating Employer Argument, if it was a good one that should have been raised.

26. One difficulty to which the Lawyer Defendants' arguments give rise is that the material in the communications that they say is necessary to prove what they want to prove is closely linked to material that they avow they do not seek to rely on. Although their primary case is that they are entitled to rely on all the without prejudice communications that they have pleaded, they have also argued that the letters relied upon could be redacted to obscure any admissions or implied admissions. In some instances, however, the suggested redaction would be of part of a sentence, or part of a short paragraph.

27. Having received the Defences of Gowling and Counsel and the Amended Defence of Aon, the Claimants served their Reply. This supports the Lawyer Defendants' case on the new intervening act defence and pleads that CMS were kept informed about the development of the Part 8 proceedings and that Aon had ample opportunity through their lawyers to raise the Participating Employer Argument. The Claimants further plead that:

> "…the involvement of [Aon] in the Part 8 Proceedings and their failure to make any allusion to the Participating Employer Argument is highly relevant in a different respect. It provides strong support to the proposition advanced by the Lawyer Defendants, and by the Claimants as their primary case, that the New Intervening Act Defence is bad in law because there remained at all times a close connection between the negligence of [Aon] and the totality of the losses resulting from the Approved Settlement."

28. That statement of case was served on 31 August 2018. There then followed Re-Amended Particulars of Claim served by the Claimants on 12 October 2018. These adopted the allegations of negligence pleaded by Aon in their Amended Defence and made it clear (in the amended second schedule of loss) that the Claimants' claim against the Lawyer Defendants was no longer to be regarded as contingent on the success of Aon's new intervening act defence.

29. In the draft Re-Amended Defence, provided in response to the Re-Amended Particulars of Claim, Aon admit for the first time that they were in breach of duty to the trustee claimants only, but they deny that the trustee claimants have suffered any loss. They deny liability for sums in excess of the benefits that were intended to be provided to the members of the Scheme (i.e. the benefits that members would have received had the deeds been validly executed). Para 92.6 pleads that the Approved Settlement was unreasonably generous irrespective of whether the Claimants relied on legal advice when negotiating and entering into the Approved Settlement. Aon further allege that the intervention of the Lawyer Defendants (sc. their failure to raise the Participating Employer Argument) could be characterised as "unreasonable, unforeseeable, inappropriate, grossly

negligent, such that it disturbs the sequence of events and/or such that the adjectives 'wholly' or 'completely' can be placed before each of those characterisations" (para 100A). Para 100F reads as follows (so far as directly material):

> "The intervention of the Lawyer Defendants was grossly, wholly, or completely negligent for all the reasons set out in paragraphs 100B – 100E. In particular, *the Participating Employer Argument was an obvious one to make and the failure to make it was an exceptionally serious failure on the part of specialist pensions solicitors and leading counsel*. Without prejudice to the generality of the foregoing, the error was exceptionally serious because:
>
> 100F.1 It was obvious that if the other Defective Deeds were invalid as deeds for want of attestation, the Deeds of Adherence would be invalid as deeds for want of attestation.
>
> 100F.2 The Lawyer Defendants were aware that the vast majority of purported members of the Scheme would have derived their membership of the Scheme from the Deeds of Adherence (or the same was obvious).
>
> 100F.3 The Lawyer Defendants expressly identified the issue concerning the potential invalidity of the Deeds of Adherence (or had the issue expressly brought to their attention)…."
>
> ……
>
> 100F.8 Thus, the obvious error of not putting the validity of all the Defective Deeds in issue in the Part 8 Proceedings, was then compounded by a complete failure to follow through on the rationale for not doing so - namely that the judgment in the Part 8 Claim would inform how all the Defective Deeds (including the Deeds of Adherence) were to be treated. The Lawyer Defendants thus caused all the losses by including and treating as valid all the Deeds of Adherence … in the Approved Settlement with the result that excessive and unnecessary liabilities were assumed.
>
> 100F.9 As a result of these obvious and exceptionally serious mistakes, the net financial effect of the Approved Settlement was to give members the entirety of the benefits of treating some of the Defective Deeds as valid (the Deeds of Adherence ….), whilst also giving them the majority of the benefits of treating other Defective Deeds as invalid." (*with my emphasis added*)

30. The final matter on the statements of case is that Aon have provided a draft indemnity or contribution claim that they intend to issue against the Lawyer

Defendants, on the usual basis, asserting that if Aon are liable in damages to the Claimants then the Lawyer Defendants are also liable for the same losses. The Lawyer Defendants emphasise that the intended contribution claim puts in issue another question required to be determined at trial in the event that Aon do not succeed in their new intervening act defence, namely the degree of culpability and responsibility as between Aon and the Lawyer Defendants for losses suffered by the Claimants.

The Relevance of the "without prejudice" Communications

31. There are, in summary, four issues raised by Aon's statements of case in this claim to which the Lawyer Defendants contend that the content of "without prejudice" communications between the Claimants and Aon is highly material, namely—

    (1) whether the Lawyer Defendants were negligent (or grossly negligent) in failing to raise the Participating Employer Argument;

    (2) whether the Claimants reasonably mitigated their losses by bringing the Part 8 claim and entering into the Approved Settlement with the benefit of the Lawyer Defendants' advice;

    (3) whether the failure of the Lawyer Defendants to raise the Participating Employer Argument broke the chain of causation such that any negligence of Aon did not cause any of the Claimants' losses, and

    (4) if not, to what extent Aon and the Lawyer Defendants as between themselves should be held responsible for the Claimants' loss.

32. The Lawyer Defendants contend that they are entitled to refer to the without prejudice correspondence for the purpose of proving the extent of Aon's involvement (as they say, "close involvement") in discussion of arguments to be advanced on the appeal and negotiations for the Approved Settlement. It is not said that Aon was directly involved in either of those matters with the representative beneficiaries; merely that Aon had (and took) the opportunity to make suggestions to the Claimants about the arguments to be used in the claim and the representative beneficiary negotiations.

33. As a consequence of the Lawyer Defendants pleading in detail the content of without prejudice communications, Aon now seek an order that they serve replacement versions of their Defences, omitting the without prejudice content, and a declaration that the without prejudice content is not to be referred to in evidence or in submissions at trial.

34. There is no dispute that the correspondence in question, by its nature as well as by the conventional use of the "without prejudice" heading, was without

prejudice to the current claim brought by the Claimants against Aon. The Lawyer Defendants do not argue that the correspondence with Aon is to be treated as part of without prejudice correspondence with the representative beneficiaries (which correspondence will be before the court). However, the Claimants (who supported the position of the Lawyer Defendants) did suggest that the "without prejudice" material could sensibly be regarded as falling into two parts: the first in substance part of the Claimants' and Aon's discussions relating to settlement of the appeal, and the second the Claimants' and Aon's discussions relating to settlement of the claim against Aon.

35. While that may be a partially valid approach, I do not accept that there is a clear-cut distinction. By the start of the without prejudice correspondence in May 2014, the claim against Aon had been notified and all parties were aware that the Claimants intended to sue Aon once the issue about the validity of the deeds had been finally resolved and its impact on funding the Scheme had been fully assessed.

36. [redacted].

The Parties' Cases

37. Given that it is accepted that the communications in question are without prejudice as between the Claimants and Aon, it may be wondered on what basis the Lawyer Defendants (who only know of the without prejudice communications because they conducted the correspondence and attended the meeting on behalf of the Claimants) felt that they were entitled to plead the content of some of the communications. The answer given by the Lawyer Defendants is in two parts.

38. First, they submit that any without prejudice "privilege" in the content of the communications has been impliedly waived by Aon, by making the allegations against the Lawyer Defendants that they did in their Amended and Re-Amended Defence, and further by their intention to serve a contribution notice against the Lawyer Defendants. In this regard, it is material to note that the Claimants have expressly waived their privilege in relation to the same communications.

39. Second, the Lawyer Defendants submit that they are entitled to rely on the correspondence and the meeting, by way of exception to the without prejudice rule, in order to be able fairly to address the allegations made by the Claimants and Aon, because it would be unjust to require them to face those allegations at trial without being allowed to deploy material that may enable them to answer them. Such an exception, they say, is one established by the decision of the Court of Appeal in Muller v Linsley & Mortimer [1996] 1 PNLR 74, or is a principled, incremental development of that exception or a comparable exception.

40. Aon's response is that neither the Muller exception, properly understood, nor any principled and incremental extension of it, allows without prejudice correspondence to be put in evidence in the very proceedings that the

correspondence was trying but failed to compromise. That, Aon say, is the case whether the correspondence is sought to be relied on for the truth or falsity of anything said in it, for an admission, or for the proof of a collateral fact. Aon also deny that it is necessary to admit the communications in order to try the issues that they have raised. Further, Aon contend, there is no general exception to the without prejudice rule that any material that is otherwise without prejudice can be relied on to prove a "collateral fact", i.e. something other than the facts in issue in the underlying proceedings.

41. As to the waiver argument, Aon contend that waiver of without prejudice privilege cannot be unilateral. One party does not have a right to waive another party's "privilege" in without prejudice communications. Given that in this case the Claimants have expressly waived their right to rely on the application of the rule to the without prejudice communications, the question is whether Aon have similarly waived their right to do so. Waiver depends on some distinct act, putting in issue the content or effect of without prejudice communications, and is not lightly to be inferred. Nothing that Aon have done in pleading its case is to be taken as such a waiver.

The Principles established by the Authorities

42. The arguments of the Lawyer Defendants raise important issues of principle, namely how without prejudice privilege operates and how and when such privilege can no longer be relied upon. Questions such as whether there is a "collateral fact" exception have been considered recently in decisions of the House of Lords. I have heard detailed argument from all parties, both as a matter of principle and based on a line of authority starting with the decision of the House of Lords in Rush & Tompkins Ltd v GLC [1989] AC 1280. It is necessary to refer briefly to that sequence of cases in order to evaluate the arguments that I have briefly summarised above.

43. In Rush & Tompkins, a main contractor sued an employer and a sub-contractor for a declaration that the employer was liable to reimburse any sums payable to the sub-contractor and for a determination of what sums were payable to the sub-contractor on its loss and expense claim. The main contractor settled with and discontinued its claim against the employer but pursued its claim against the sub-contractor. The latter sought disclosure of the negotiations between the main contractor and the employer leading to the settlement of that claim. The House of Lords held that the without prejudice rule made inadmissible in any subsequent litigation concerned with the same subject-matter proof of any admissions made in an attempt to reach a settlement. Lord Griffiths gave the only reasoned speech. He said at p.1299D-1300G:

> "The 'without prejudice' rule is a rule governing the admissibility of evidence and is founded upon the public policy of encouraging litigants to settle their differences rather than litigate them to a finish. It is

nowhere more clearly expressed than in the judgment of Oliver L.J. in Cutts v. Head [1984] Ch. 290, 306:

> 'That the rule rests, at least in part, upon public policy is clear from many authorities, and the convenient starting point of the inquiry is the nature of the underlying policy. It is that 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, as it was expressed by Clauson J. in *Scott Paper Co. v. Drayton Paper Works Ltd. (1927) 44 R.P.C. 151* , 156, 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.'

.....

> Nearly all the cases in which the scope of the 'without prejudice' rule has been considered concern the admissibility of evidence at trial after negotiations have failed. In such circumstances no question of discovery arises because the parties are well aware of what passed between them in the negotiations. These cases show that the rule is not absolute and resort may be had to the 'without prejudice' material for a variety of reasons when the justice of the case requires it. It is unnecessary to make any deep examination of these authorities to resolve the present appeal but they all illustrate the underlying purpose of the rule which is to protect a litigant from being embarrassed by any admission made purely in an attempt to achieve a settlement. Thus the 'without prejudice' material will be admissible if the issue is whether or not the negotiations resulted in an agreed settlement, which is the point that Lindley L.J. was making in *Walker v. Wilsher (1889) 23 Q.B.D. 335* and which was applied in Tomlin v. Standard Telephones & Cables Ltd. [1969] 1 W.L.R. 1378 .The court will not permit the phrase to be used to exclude an act of bankruptcy: see In re Daintrey, Ex parte Holt [1893] 2 Q.B. 116 nor to suppress a threat if an offer is not accepted: see *Kitcat v. Sharp (1882)48L.T.64*. In certain circumstances the 'without prejudice' correspondence may be looked at to determine a question of costs after judgment has been given: see Cutts v Head [1984] Ch. 290 .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* . I regard this as an exceptional case and it should not be allowed to whittle down

> the protection given to the 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. If the compromise fails the admission of the facts made for the purpose of the compromise should not be held against the maker of the admission and should therefore not be received in evidence."

44. The effect was therefore that negotiations attempting to compromise a claim in the proceedings were immune from disclosure in the same proceedings, even when a settlement with one of the defendants had resulted. The reason was that public policy required parties to be able to attempt to settle without fear of any concessions made being subsequently used against them.

45. Although Lord Griffiths referred to the rule that excluded all negotiations aimed at settlement from being given in evidence, the rationale of the rule was explained by reference to admissions against interest. His Lordship was nevertheless willing to accept in principle only a very narrow exception relating to proof of "independent facts" in no way connected with the merits of the cause, i.e. facts unconnected to the substance of the dispute that was being negotiated.

46. The rationale based on protecting admissions was further developed in the judgment of Hoffmann LJ in the Muller case. The plaintiff was a shareholder in a company. He sued the other shareholders in connection with his dismissal as a director and the sale of his shares. A settlement of that action was reached. The plaintiff then sued his solicitors for negligently advising him to take steps that failed to protect his interests, and in those proceedings he asserted that the settlement with the shareholders was a reasonable attempt to mitigate his loss. The solicitors disputed the reasonableness of the settlement and sought disclosure of the negotiations leading to the settlement agreement. The plaintiff was willing to disclose the letter before action and the agreement itself, but no negotiations.

47. The Court of Appeal held that the plaintiff was bound to disclose the negotiations, but the reasons of the three members of the court differed. Hoffmann LJ, after referring to Lord Griffiths' speech, considered the reason for the without prejudice rule and its ambit at p.79C-80A:

> "If one analyses the relationship between the without prejudice rule and the other rules of evidence, it seems to me that the privilege operates as an exception to the general rule on admissions (which can itself be regarded as an exception to the rule against hearsay) that the statement or conduct of a party is always admissible against him to prove any fact which is thereby expressly or impliedly asserted or admitted. The public policy aspect of the rule is not in my judgment concerned with the admissibility of statements which are relevant otherwise than as admissions, i.e. independently of the truth of the facts alleged to have been admitted.

> Many of the alleged exceptions to the rule will be found on analysis to be cases in which the relevance of the communication lies not in the truth of any fact which it asserts or admits, but simply in the fact that it was made. Thus, when the issue is whether without prejudice letters have resulted in an agreed settlement, the correspondence is admissible because the relevance of the letters has nothing to do with the truth of any facts which the writers may have expressly or impliedly admitted. They are relevant because they contain the offer and acceptance forming a contract which has replaced the cause of action previously in dispute. Likewise, a without prejudice letter containing a threat is admissible to prove that the threat was made. A without prejudice letter containing a statement which amounted to an act of bankruptcy is admissible to prove that the statement was made; see Re Daintrey [1893] 2 Q.B. 116. Without prejudice correspondence is always admissible to explain delay in commencing or prosecuting litigation. Here again, the relevance lies in the fact that the communications took place and not the truth of their contents. Indeed, I think that the only case in which the rule has been held to preclude the use of without prejudice communications, otherwise than as admissions, is in the rule that an offer may not be used on the question of costs; a rule which, as I have said, has been held to rest purely upon convention and not upon public policy.
>
> This is not the case in which to attempt a definitive statement of the scope of the purely convention-based rule, not least because, as Fox L.J. pointed out in Cutts v. Head at p. 316, it depends upon customary usage which is not immutable. But the public policy rationale is, in my judgment, directed solely to admissions. In a case such as this, in which the defendants were not parties to the negotiations, there can be no other basis for the privilege."

48. He then explained his reasons for holding that disclosure of the negotiations was to be given as follows:

> "If this is a correct analysis of the rule, then it seems to me that the without prejudice correspondence in this case falls outside its scope. The issue raised by paragraph 17 of the statement of claim is whether the conduct of the Mullers in settling the claim was reasonable mitigation of damage. That conduct consisted in the prosecution and settlement of the earlier action.
>
> The without prejudice correspondence forms part of that conduct and its relevance lies in the light it may throw on whether the Mullers acted reasonably in concluding the ultimate settlement and not in its admissibility to establish the truth of any express or implied admissions it may contain. On the contrary, any use which the defendants may wish to make of such admissions is likely to take the form of asserting that they were not true and

> that it was therefore unreasonable to make them. I do not think that interpreting the rule in this way infringes the policy of encouraging settlements. It may of course be said that a party may be inhibited from reaching a settlement by the thought that his negotiations will be exposed to examination in order to decide whether he acted reasonably. But this is a consequence of the rule that a party entitled to an indemnity must act reasonably to mitigate his loss. It would, in my judgment, be inconsistent to give the indemnifier the benefit of this rule but to deny him the material necessary to make it effective."

49. There therefore appear to be two bases for Hoffmann LJ's decision. The first is that the without prejudice rule only applies to protect admissions, not facts that are relevant independently of their truth or falsity, and the defendant was not seeking to rely on the content of the without prejudice negotiations to prove any admissions. The second basis is that the plaintiff himself had raised (or "put in issue") the reasonableness of the negotiations; that issue could not be determined without disclosure of the negotiations, and the public policy underlying the rule was not infringed by ordering disclosure in favour of the defendant for the purpose of the second claim. The shareholders were not parties to the second claim or (apparently) affected by its outcome.

50. Swinton Thomas LJ, while agreeing with both Hoffmann LJ and Leggatt LJ, preferred to rest his decision on the basis that by putting his own conduct in issue in the second claim, the plaintiff had waived any privilege attaching to without prejudice negotiations. Leggatt LJ accepted Hoffmann LJ's "thesis" that the without prejudice correspondence fell outside the scope of privilege, but also held that in any event the plaintiff could not both assert the reasonableness of the settlement and claim privilege for the negotiations; he further held that by disclosing the letter before action and the settlement agreement the plaintiff had waived any privilege in all the other documents relating to settlement.

51. The decision in the Muller case has given rise to considerable comment in later cases and still generates controversy today. In so far as the judgment of Hoffmann LJ rests on the first basis identified above, it has been substantially discredited in later cases, both as to the rule only applying to protect admissions and as to there being any general exception to the rule where negotiations are relied upon to establish a "collateral fact". The true ratio of the second basis for the decision is controversial. A narrow interpretation would be to say that it is a decision based on its own facts, or limited to a case where the issue is the reasonableness of a negotiated settlement, but no judge subsequently considering the case has said so.

52. There has also been judicial disagreement with the basis for the decision preferred by Swinton Thomas and Leggatt LJJ. The privilege conferred by the without prejudice rule cannot be waived unilaterally by one party only to the negotiations, in the way that the sole owner of legal professional privilege can waive the privilege. There was no suggestion in Muller that the shareholders

had expressly or impliedly agreed to give up their privilege. Accordingly, waiver, in its true sense – voluntarily giving up privilege that exists and is protected by the without prejudice rule – could not have arisen: see per Lewison LJ in Avonwick v Webinvest Ltd [2014] EWCA Civ 1436 at [21] and per Newey J in EMW Law LLP v Halborg [2017] EWHC 1014 (Ch); [2017] 3 Costs LO 281 at [62]. It is however clear that both Swinton Thomas and Leggatt LJJ considered it material to their decision that the plaintiff had raised an issue on which the court could not adjudicate unless the negotiations were disclosed.

53. Despite the criticism of the building blocks of the three judgments in Muller, it 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.

54. The next important authority in which Muller was considered as an exception to the rule is Unilever plc v The Proctor & Gamble Co [2000] 1 WLR 2436. The plaintiff sought to rely on a threat made during a without prejudice meeting as the basis of a claim under section 70 of the Patents Act 1977. The Court of Appeal held that it would be an abuse of process for the plaintiff to plead anything that was said at the meeting. The judgment of Robert Walker LJ is often cited as the modern statement of the without prejudice rule and its exceptions. After referring to Rush & Tompkins and Muller, he said:

> "Without in any way underestimating the need for proper analysis of the rule, I have no doubt that busy practitioners are acting prudently in making the general working assumption that the rule, if not 'sacred' (Hoghton v. Hoghton (1852) 15 Beav. 278, 321), has a wide and compelling effect. That is particularly true where the 'without prejudice' communications in question consist not of letters or other written documents but of wide-ranging unscripted discussions during a meeting which may have lasted several hours."

55. His Lordship then stated that there are numerous occasions on which the rule does not prevent the admission into evidence of what one or both parties said or wrote, and listed the most important instances. These include: to determine whether such negotiations gave rise to a binding compromise agreement (or, as has been more recently established, what the binding compromise means); whether such an agreement should be set aside on the ground of fraud, undue influence or misrepresentation; whether a clear statement intended to be relied upon gives rise to an estoppel; where the rule is being relied on to conceal an unambiguous impropriety; where the negotiations are being relied on to explain delay or apparent acquiescence, and where communications are made on a "without prejudice save as to costs" basis. As his instance (6), Robert Walker LJ referred to the decision in Muller in the following terms:

> "In *Muller's* case (which was a decision on discovery, not admissibility) one of the issues between the claimant and the defendants, his former solicitors, was whether the claimant had

> acted reasonably to mitigate his loss in his conduct and conclusion of negotiations for the compromise of proceedings brought by him against a software company and its other shareholders. Hoffmann L.J. treated that issue as one unconnected with the truth or falsity of anything stated in the negotiations, and as therefore falling outside the principle of public policy protecting without prejudice communications. The other members of the court agreed but would also have based their decision on waiver."

56. Robert Walker LJ pointed out that his list was not exhaustive, and referred to some nineteenth century decisions, then said:

> "It is apparent that none of the exceptions to the public policy rule involves the disclosure of admissions bearing on the subject matter in dispute, at any rate unless the expression 'admission' is given a substantially wider meaning than it usually has in the law of evidence. (I disregard the old case of *Waldridge v. Kennison (1794) 1 Esp. 143*, which Lord Griffiths in the *Rush & Tompkins case [1989] A.C. 1280*, 1300, regarded as exceptional.) Conversely, however, I respectfully doubt whether the large residue of communications which remain protected can all be described as admissions (again, unless that expression is given an unusually wide meaning). One party's advocate should not be able to subject the other party to speculative cross-examination on matters disclosed or discussed in without prejudice negotiations simply because those matters do not amount to admissions."

57. Having referred to the nineteenth century cases, Robert Walker LJ set out some conclusions on the without prejudice rule, of which the following passage is of particular importance in this case:

> "Whatever difficulties there are in a complete reconciliation of those cases, they make clear that the without prejudice rule is founded partly in public policy and partly in the agreement of the parties. They show that the protection of admissions against interest is the most important practical effect of the rule. But to dissect out identifiable admissions and withhold protection from the rest of without prejudice communications (except for a special reason) would not only create huge practical difficulties but would be contrary to the underlying objective of giving protection to the parties, in the words of Lord Griffiths in the *Rush & Tompkins case [1989] A.C. 1280*, 1300: '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." Parties cannot speak freely at a without prejudice meeting if they must constantly

> monitor every sentence, with lawyers or patent agents sitting at their shoulders as minders.'

Simon Brown LJ and Wilson J agreed with Robert Walker LJ.

58. That case therefore marks the start of the retreat from the notion that only admissions are protected by the without prejudice rule. The public policy underlying the rule necessitates a wider application and would be undermined by seeking to remove parts only of the communications in the nature of admissions from the rest of the text. The Unilever case does not in terms recognise as a general exception to the rule reliance on privileged communications to prove a fact that is independent of the truth of what is said. However, the list of exceptions does include a number of cases in which that is what in substance is being done.

59. The without prejudice rule was considered further by the House of Lords in Ofulue v Bossert [2009] UKHL 16; [2009] 1 AC 990. The issue in that case was whether an offer to buy real property, made in without prejudice negotiations in a first set of possession proceedings, was admissible as an acknowledgment of title in subsequent proceedings between the same parties. The Court of Appeal had held that the offer was inadmissible and the House of Lords by a majority dismissed the appeal. It held that there was no principle of law limiting the without prejudice rule to identifiable admissions. Much of the speeches is concerned with the particular nature of an acknowledgment for the purposes of the Limitation Act 1980 and the relationship between an acknowledgment and an admission, however their Lordships made a number of more general observations about the function of the without prejudice rule and the ambit of the exceptions to it.

60. Lord Hope said:

> "Sometimes letters get headed 'without privilege' in the most absurd circumstances, as Ormrod J observed in *Tomlin v Standard Telephones & Cables Ltd [1969] 1 WLR 1378*, 1384. But where the letters are not headed 'without prejudice' unnecessarily or meaninglessly, as he went on to say at p 1385, the court should be very slow to lift the umbrella unless the case for doing so is absolutely plain. The principle which the court should follow was that expressed by Romilly MR in *Jones v Foxall (1852) 15 Beav 388*, 396. If converting offers of compromise into admissions of acts prejudicial to the person making them were to be permitted no attempt to compromise a dispute could ever be made. The basis for the rule has been explained more fully by Oliver LJ in *Cutts v Head [1984] Ch 290*, Lord Griffiths in *Rush & Tomkins Ltd v Greater London Council [1989] AC 1280* and Robert Walker LJ in *Unilever plc v The Procter & Gamble Co [2000] 1 WLR 2436*. With the benefit of those explanations it may be re-stated in these terms. Where a letter is written 'without prejudice' during negotiations with a view to a compromise, the protection that these words

claim will be given to it unless the other party can show that there is a good reason for not doing so.

I think that the public policy basis for not allowing anything said in the letter to be used later to her prejudice provides Ms Bossert with all she needs to defeat the argument that the implied admission that it contains can be used as an acknowledgement against her in these proceedings. The essence of it lies in the nature of the protection that is given to parties when they are attempting to negotiate a compromise. It is the ability to speak freely that indicates where the limits of the rule should lie. Far from being mechanistic, the rule is generous in its application. It recognises that unseen dangers may lurk behind things said or written during this period, and it removes the inhibiting effect that this may have in the interests of promoting attempts to achieve a settlement. It is not to be defeated by other considerations of public policy which may emerge later, such as those suggested in this case, that would deny them that protection."

61. Lord Rodger said:

"Over the years the courts have recognised certain exceptions to the privilege which are made when the justice of the case requires it. They were helpfully summarised in the judgment of Robert Walker LJ in Unilever plc v The Procter & Gamble Co [2000] 1 WLR 2436, 2444–2445. As Lord Griffiths noted in Rush & Tompkins [1989] AC 1280, 1300 d-g, there is also some authority to the effect that an admission of an 'independent fact', lying outside the area of the offer to compromise, is admissible. That approach has been developed in the Court of Session in cases which were discussed by my noble and learned friend, Lord Hope of Craighead, in Bradford & Bingley plc v Rashid [2006] 1 WLR 2066, 2075–2077, paras 26–30.

Undoubtedly, it would be possible to carve out an exception along those lines. The question is whether creating such an exception would be consistent with the overall policy behind the rule. Pretty clearly, Lord Griffiths thought not. In Rush & Tompkins [1989] AC 1280, 1300 f-g, he went out of his way to emphasise that the exception in Waldridge v Kennison (1794) 1 Esp 143

'should not be allowed to whittle down the protection given to the 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.'

> Despite the difficulties, I would be prepared to assume that the law could make the distinction favoured by Lord Hoffmann. But should it do so? His argument, that it should, really depended on his view that the main purpose of the privilege is 'to prevent the use of anything said in negotiations as evidence of anything expressly or impliedly admitted …': Bradford & Bingley plc v Rashid [2006] 1 WLR 2066, 2072, para 16. While that may well be the commonest application of the rule in practice, its rationale appears to be wider: it is that parties and their representatives who are trying to settle a dispute should be able to negotiate openly, without having to worry that what they say may be used against them subsequently, whether in their current dispute or in some different situation."

62. Lord Neuberger of Abbotsbury noted at [87] that the "without prejudice" offer was made in previous proceedings between the same parties and that the issue in those proceedings was still unresolved. In other words, the acknowledgment that was sought to be relied upon by the owner was capable of being detrimental to the interests of the other party to the negotiations. Lord Neuberger warned that any judge tempted to decide that a statement made in without prejudice negotiations should be exempted from the rule should bear in mind the judgment of Robert Walker LJ in Unilever at pp.2448-9, which approach he said was entirely consistent with the approach in Rush & Tompkins. He held that even if the acknowledgment could be regarded as not related to an issue in the earlier proceedings, the very sentence relied upon was an admission against interest that was clearly within the ambit of the rule. Then at [91]-[92] he said:

> "Quite apart from this, it appears to me that, save perhaps where it is wholly unconnected with the issues between the parties to the proceedings, a statement in without prejudice negotiations should not be admissible in evidence, other than in exceptional circumstances such as those mentioned in the Unilever case [2000] 1 WLR 2436 , 2444d -2445g . It is not only that the offer contained in the relevant sentence of the letter was connected with the issue between the parties in the earlier proceedings. It is also that the title to the property was in issue in the earlier proceedings in the sense that the Ofulues claimed the unencumbered freehold, whereas the Bosserts were contending that the freehold was subject to their legal or equitable interest. Bearing in mind the point made in the passage quoted above from Robert Walker LJ [2000] 1 WLR 2436 , 2448–2449, it seems to me that it would set an unfortunate precedent if your Lordships held that an admission of the claimants' title in a without prejudice letter was sufficiently remote from the issues in a possession action relating to the same land as to be outside the rule.
>
> I leave open the question of whether, and if so to what extent, a statement made in without prejudice negotiations would be admissible if it were 'in no way connected' with the issues in the

case the subject of the negotiations. That point was mentioned by Lord Griffiths in the Rush & Tompkins case [1989] AC 1280 , 1300, where he referred to Waldridge v Kennison (1794) 1 Esp 143, in which a without prejudice letter was admitted solely as evidence of the writer's handwriting. That was a factor wholly extraneous to the contents of the letter, and Lord Griffiths described it as

> 'an exceptional case [which] should not be allowed to whittle down the protection given to the 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.'"

63. Lord Neuberger then referred to Muller and said:

> "Despite the very great respect I have for any view expressed by Lord Hoffmann, and the intellectual attraction of the distinction which he draws, I am inclined to think that it is a distinction which is too subtle to apply in practice; I consider that its application would often risk falling foul of the problem identified by Robert Walker LJ in the passage quoted above. In any event, the observation appears to be limited to the public policy reason for the rule, and says nothing about the contractual reason, which plainly applies here…
>
> Since preparing this opinion, I have had the privilege of reading in draft the characteristically trenchant opinion of my noble and learned friend, Lord Scott of Foscote, in which he comes to a different conclusion. I entirely agree with my noble and learned friend, Lord Rodger of Earlsferry, whose opinion I have had the benefit of reading in draft, that it is open to your Lordships to create further exceptions to the rule, and in particular the sort of admission identified by Lord Hoffmann in the *Rashid case [2006] 1 WLR 2066* , para 13 and by Lord Scott in this case. However, I also agree with him, and indeed with Lord Hope and Lord Walker, that it would be inappropriate to do so, for reasons of legal and practical certainty. To uphold such an exception in this case would run counter to the thrust of the approach of Lord Griffiths in the *Rush & Tompkins case [1989] AC 1280* and of Robert Walker LJ in the *Unilever csae [2000] 1 WLR 2436* , and would severely risk hampering the freedom parties should feel when entering into settlement negotiations."

64. Accordingly, the decision in Ofulue v Bossert offers no support for the proposition that there is a general exception to the without prejudice rule where a without prejudice statement is being relied on to prove something other than the truth of the statement made or something unconnected to the issues in the

case. On the contrary, the general tenor of the speeches is that exceptions to the rule should be strictly limited, in order to uphold the policy underlying the rule. 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.

65. In this case, the Lawyer Defendants cannot say that what they rely on is something that has nothing to do with the subject-matter of the claim by the Claimants against Aon. The negotiations sought to be relied upon do address and negotiate the subject-matter of that intended claim, and the Lawyer Defendants contend that they also address aspects of the Claimants' appeal. Further, the Lawyer Defendants seek to adduce a substantial part of those negotiations. Their case is that they are nevertheless relying on the fact and content of the negotiations for a distinct purpose, namely to try to show that Aon were closely involved in the negotiations with the representative beneficiaries and that such reliance does not offend the purpose of the rule. The "collateral fact" sought to be proved is close involvement of Aon's lawyers in negotiations with the representative beneficiaries leading to the Approved Settlement.

66. The next authority is Oceanbulk Shipping and Trading SA v TMT Asia Ltd [2010] UKSC 44; [2011] 1 AC 662. In that case, the Supreme Court held that without prejudice negotiations were admissible as part of the surrounding circumstances where the issue was the true meaning and effect of the settlement agreement reached. That is an example of a principled and incremental extension of an already recognised exception, namely that without prejudice negotiations are admissible on the question of whether a binding agreement was reached or where the agreement is sought to be rectified.

67. Lord Clarke of Stone-cum-Ebony JSC approved the observations of Robert Walker LJ that the without prejudice rule is not limited to admissions and said that it extends more widely to the content of discussions, and is very much wider than it was historically (paras [25], [27]). Having referred to some of the authorities to which I have also referred, Lord Clarke observed that they show that, because of the importance of the without prejudice rule, its boundaries should not lightly be eroded (para [30]).

68. In Avonwick Holdings Ltd v Webinvest Ltd [2014] EWCA Civ 1436, the Court of Appeal had to consider the Muller exception in relation to a case where disclosure was sought of without prejudice negotiations between the defendant and a third person. The issue was whether the defendant had to repay a loan made by the claimant only when the monies were repaid to the defendant by the third person. The dispute between the defendant and the third person had been

settled prior to an arbitration. The judge had held that the defendant had waived any privilege relating to the without prejudice negotiations with the third person by referring in evidence to the fact that a good offer had been made by him. Lewison LJ disagreed. Such a reference was not sufficient to waive privilege in without prejudice communications, and in any event it was not the defendant's privilege to waive: there was no suggestion that the third person had consented to a waiver. The defendant sought to rely on the exception in Muller, on the ground that it was not seeking to rely on an admission in the negotiations. Lewison LJ observed:

> "That was a case in which the plaintiff asserted that a settlement that he had made was a reasonable settlement and the defendant asserted that it was not. The reasonableness of the settlement was therefore directly in issue and it was the plaintiff who had put it in issue. It is hardly surprising that in those circumstances the court ordered disclosure of the negotiations leading to the settlement. The general rule however is still that stated in Rush & Tompkins Ltd v Greater London Council & Another [1989] AC 1280, namely that without prejudice negotiations once privileged remain privileged even after settlement. Moreover, Hoffmann LJ's reasoning in Muller which distinguished between an admission and other statements was disapproved by The House of Lords in Ofulue (see Lord Neuberger at paragraph 95 with whom the other Lords agreed)."

69. It is right to note, as Lewison LJ said, that the judgment of the Court of Appeal in that case was given in circumstances of great urgency, and that time did not permit a scholarly treatise on the without prejudice rule but only brief reasons for a decision. Nevertheless, the observations about the requirements for waiver and the first basis of the Muller exception are, with respect, clearly right and are consonant with other judicial analysis.

70. Particular reliance was placed by all parties on the EMW Law case, a recent decision of the High Court. Mr Halborg, a solicitor, was conducting litigation on behalf of members of his family against Savage Hayward, architects. Mr Halborg acted on a conditional fee agreement, but engaged EMW on an agency conditional fee agreement to assist him. There were in fact two conditions for payment to EMW: the success of the family members' underlying claim and payment of fees by Savage Hayward to Mr Halborg. The family members agreed to the EMW conditional fee agreement though they were not parties to it.

71. The underlying litigation was settled favourably to the family members, following a Part 36 offer. Mr Halborg entered into without prejudice negotiations about costs with Savage Hayward's solicitors, BLM. EMW brought proceedings for a costs assessment and then further proceedings claiming breach of contract by Mr Halborg, on the basis that he had failed to recover costs from Savage Hayward. EMW's particulars of claim alleged that Mr Halborg had settled the costs of the underlying proceedings by agreement with BLM, but Mr

Halborg disputed that. His defence pleaded that he explained to EMW that in negotiations BLM "ascribed no value at all to [EMW's] work".

72. Newey J held that the without prejudice negotiations between Mr Halborg and BLM were disclosable. He referred to the Muller case and the analysis of it in subsequent cases. He noted that although the reasoning of the court in Muller had been criticised, no judge had criticised the result. At para 62 he said:

> "In the circumstances, I ought, as it seems to me, to proceed on the basis that *Muller v Linsley & Mortimer* was correctly decided on its facts. Further, I do not think that the case can be satisfactorily explained as one of waiver. Although Leggatt and Swinton Thomas LJJ suggested that the decision could be justified in that way, (a) they also both agreed with Hoffmann LJ and (b) it is hard to see how there can have been waiver since the authorities indicate that the benefit of the without prejudice rule cannot be waived by just one party to the negotiations. The correct inference must, in my view, be that (as is suggested in Thanki, "The Law of Privilege") there is an exception to the without prejudice rule that encompasses the facts of the Muller case."

and at para 64:

> "I have concluded that, to echo Lord Walker in *Ofulue v Bossert* and Lord Clarke in the *Oceanbulk* case, justice clearly demands that an exception to the without prejudice rule (whether that encompassing the facts of the Muller case or another, comparable, exception) should apply even aside from the question of whether an agreement has been reached with Savage Hayward".

His reasons for his decision include that the family members supported Mr Halborg's stance in EMW's claim; Mr Halborg had made reference to the negotiations in his defence; it was hard to see how EMW's claim could be justiciable without referring to the negotiations with BLM to see what payments had been agreed and on what basis; what had been agreed about EMW's fees and whether any settlement was reached with BLM, and at para 64(v) the following:

> "I see no likelihood that recognising that an exception to the without prejudice rule applies would deter parties from seeking to settle. Those undertaking negotiations will, if well informed, already be aware that the without prejudice rule will not apply if there is a dispute about whether they have reached agreement and that the facts of the *Muller* case have been held to fall within another exception. The existence of the *Muller* exception, moreover, means that communications otherwise protected by the without prejudice rule may become disclosable and

> admissible because the *other* party to negotiations unilaterally chooses, for reasons of his own, to put forward a case about the negotiations in litigation with a third party".

Newey J also observed that the court could make an order (as the Master had done) to protect or restrict the use of documents relating to the negotiations, so as to protect the privilege of the family members and Savage Hayward.

73. This decision arguably extends the Muller exception in some degree to a case where the negotiations have not concluded, and so the legitimate interests of the owners of the privilege are greater than in circumstances where the negotiations have concluded. The court recognised the need to protect the legitimate interests of the parties to the negotiations, but nevertheless held that there had to be an exception to the without prejudice rule where in other proceedings the content or effect of the negotiations has been legitimately put in issue and the proceedings would not be justiciable without being able to refer to them. In that case, the effect or content of the negotiations had arguably been put in issue by both EMW and Mr Halborg, but Newey J considered that it was material that Mr Halborg was seeking to rely on them too.

74. As a counterbalance to the EMW Law case, the recent decision of Teare J in Single Buoy Moorings Inc v Aspen Insurance Ltd [2018] EWHC 1763 (Comm) emphasises, at [54], that although the number of exceptions to the without prejudice rule are not limited, only principled and incremental extensions of existing exceptions should be allowed to derogate from the policy underlying the rule, and the court cannot in a particular case simply decide whether it is just and equitable to relax its application.

Discussion

75. In both Muller and EMW Law, the without prejudice negotiations involved third parties and related to a different claim, albeit a claim that had some connection with the proceedings before the court. In Muller the negotiations had been concluded and the claim against the third party had been resolved. In EMW Law, there was no finding that the dispute with the third party had been resolved. The orders for disclosure made in neither case included without prejudice communications about the claim that was before the court.

76. What is distinctive about this case is that there is one claim against different parties: Aon – who, unless they have waived it, have the benefit of privilege in the without prejudice communications with the Claimants – and the Lawyer Defendants, who acted for and advised the Claimants in those negotiations and who wish to rely on the privileged material. The case is unusual in that related without prejudice communications between the Claimants and the representative beneficiaries will be in evidence at trial. The Claimants have waived privilege by suing their former solicitors and Counsel in relation to the conduct of those

negotiations and the representative beneficiaries have confirmed their agreement to those negotiations being disclosed. But the Lawyer Defendants seek to put in evidence the content of separate without prejudice communications made in an attempt to settle this claim at the same time as the Approved Settlement was being negotiated with the representative beneficiaries' lawyers.

(1) Waiver

77. The first question is waiver of "privilege" (or the benefit of the without prejudice rule). So far as this is concerned, it is important to note that waiver of without prejudice "privilege" cannot be partial or limited: Somatra Limited v Sinclair Roche & Temperley [2000] 2 Lloyd's Rep 673. If Aon is taken to have waived its privilege, the whole of the without prejudice communications with the Claimants become admissible in evidence (since the Claimants have expressly waived their privilege), not only to prove whether Aon was involved in discussions about the settlement with the representative beneficiaries but to prove any relevant fact. Thus, any express or implied admissions made by Aon would be admissible and the court could not redact documents to limit the material put in evidence at trial.

78. It is for that reason that an implied waiver of the privilege attaching to without prejudice negotiations is not lightly inferred: see Sang Kook Suh v Mace (UK) Ltd [2016] EWCA Civ 4. In that case, a landlord had sought to deploy without prejudice material in correspondence before trial and the tenant engaged in debate about the substance of the without prejudice negotiations and admissions that had been made in them. Vos LJ refused to make comparison with the issue of waiver of legal professional privilege or waiver of the right to forfeit and held that:

> "…the issue of waiver in the circumstances of this case requires an objective evaluation of the tenants' conduct, in the context of the purpose of the without prejudice privilege. That evaluation should be aimed at determining whether it would be unjust, in the light of the tenants' conduct, for them to argue that the admissions made in the interviews were privileged from production to the court at the trial."

In the Avonwick case, Lewison LJ considered that there would have been no waiver even by stating in evidence that a good offer had been received.

79. In the Somatra case, solicitors applied for a freezing injunction in support of their counterclaim for fees. They put in evidence the content of without prejudice negotiations that referred to the solicitors offering an apology for their conduct, believing that this was needed to satisfy their duty to make full and frank disclosure. In their evidence they explained that this had not been intended as

an admission. The client, Somatra, was held entitled to rely on transcripts of the without prejudice meetings to prove that admissions had indeed been made.

80. These cases establish that when a party to without prejudice negotiations deploys the content of without prejudice negotiations as evidence on the merits of the claim, even for a limited purpose, he thereby waives his right to insist on the protection of the rule in relation to those negotiations if the counterparty accepts that the negotiations may be referred to. (The counterparty can of course instead seek to restrain the unauthorised deployment of the material.) But where the content of negotiations is not deployed in that way (e.g. where reference is made to the negotiations in correspondence, or where only the fact of them is referred to in evidence) the court must ask itself whether, given the purpose of the rule, any reference to the negotiations is such that it would be unjust for that party to insist on the protection of the rule at trial. On Clarke LJ's analysis in the Somatra case:

> "The essential point in a case like the present case is, in my judgment, that 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."

In the only other English case relied on by the Lawyer Defendants in support of their case on waiver, Re Sunrise Radio Ltd [2010] 1 BCLC 367, one party had sought to rely on the negotiating stance of the other party in the without prejudice negotiations themselves and the judge held that she had waived her right to the protection of the without prejudice rule (paras [34], [35]).

81. Ms Joanna Smith QC on behalf of Counsel argues that a waiver can be implied in other circumstances, namely where A makes allegations against B to which facts in without prejudice negotiations between A and C are relevant. In those circumstances, she argues, A will be taken to have waived its right to privilege in those communications, and cannot object to the admissibility of those facts if C also agrees to waive privilege. For that proposition Ms Smith relies on the Muller case (on the reasoning of Swinton Thomas and Leggatt LJJ, at least) and on an interpretation of the rationale of that case advanced by John Martin QC sitting as a Justice of Appeal in the Court of Appeal of Guernsey in a case called *Barclays Wealth Trustees (Guernsey) Ltd v Alpha Development Ltd* (Judgment 19/2015, dated 9 March 2015). Martin JA addressed the difficulty previously identified in treating the basis of the Muller decision as being one of waiver and observed that:

> "The solution may well lie in the fact that, in a three-party situation such as that at issue in *Muller* – where the person seeking to use the without prejudice communications was not a party to the negotiations so that the implied contract basis for the protection could not apply – the public policy basis will not necessarily require the consent of both parties to the negotiations before the communications can be examined. If one party to the

> negotiations has chosen to put in issue against a third party an aspect of his own conduct in those negotiations, he can hardly at the same time rely upon the confidentiality of those negotiations. The interests of the other party to the negotiations can if necessary be protected in other ways, for example by redaction; and the fact that the use of the documents might involve a breach of an implied contract is unlikely to be determinative. If necessary, therefore, I would take the view that *Muller* can be supported by reference to the waiver rationale …"

The judge went on to say that its application in the case under appeal was doubtful as it was not clear that the plaintiffs had put the question of reasonableness of conduct in issue.

82. Martin JA was not accepting that in Muller the privilege in the without prejudice negotiations with the shareholders had been waived, since that would have required waiver or consent by the shareholders too. The reference to redaction having a part to play shows that he was not considering waiver properly so-called. What he was addressing the possibility of analysing and justifying the Muller exception to the without prejudice rule on the basis of a deemed unilateral waiver of the right to insist on protection, where the policy underlying the rule would not be infringed by the limited use to be made of the negotiations without the consent of the other party.

83. In the current claim, Aon have not deployed any of the content of the without prejudice negotiations between them and the Claimants. Aon have put in issue the reasonableness of the Approved Settlement, the negligence of the Lawyer Defendants in failing to raise the Participating Employer Argument, the question of whether that negligence should be treated as the only effective cause of the Claimants' loss and, if not, the extent to which the Lawyer Defendants rather than Aon should be held responsible for the Claimants' loss. All of those issues are independent of the fact or content of the parallel negotiations being conducted between Aon and the Claimants. The most that can be said, in my judgment, is that the content of the negotiations may be relevant to an assessment of whether the Lawyer Defendants were grossly negligent, the true effective cause of the Claimants' loss and the fair apportionment of responsibility between Aon and the Lawyer Defendants.

84. Given that Aon have not referred to or deployed any of the content (or the fact of, or any facts about) their without prejudice negotiations with the Claimants, I cannot accept that Aon have waived their right as against the Claimants and others such as the Lawyer Defendants to the protection of the without prejudice rule. Aon's conduct in pleading the basis of its defence, including allegations about the Claimants and the Lawyer Defendants, is not such as to repudiate the implied agreement with the Claimants that their negotiations are to be treated as without prejudice, nor can it be understood as an implied offer to the Claimants to treat the without prejudice negotiations as open. Nor does it put the

negotiations or any of their content in issue. The pleaded case of Aon says nothing about the negotiations or their content.

85. If the Lawyer Defendants were right about waiver, the effect would be that the Claimants would be entitled to refer to any of the content of the without prejudice negotiations at trial, including any express or implied admissions made by Aon in the negotiations. Considered in that light, the question posed by Vos LJ in the Mace case bears further consideration: would it be unjust, in the light of Aon's conduct, for Aon to argue that any admissions in the negotiations are privileged from production to the court at trial? The consequence of answering "no" to this question, as the Lawyer Defendants would urge, is that merely by pleading its defence to a claim, following attempts to settle the claim in without prejudice negotiations but without any reference to those negotiations, a party may be exposed to any admissions in those negotiations being put in evidence at trial. Such a conclusion would be liable to discourage attempts to settle litigation and be contrary to the public policy underlying the rule. In my judgment, the Mace question should only be answered "no" in this case if Aon can be said deliberately to have deployed (or "put in issue") the content of the negotiations themselves.

86. For these reasons, if the Lawyer Defendants are to succeed in their claim to be entitled to rely on the fact and content of the without prejudice communications that they have pleaded, it can only be on the basis of a Muller-type exception to the without prejudice rule.

(2) Exception to the without prejudice rule

87. Mr Stallworthy QC, on behalf of Gowling, submitted that the answer to the question whether a Muller or other exception applies is provided by considering what the position would have been if Aon had not been sued in these proceedings but in separate proceedings. He submitted that if the Claimants had sued only the Lawyer Defendants, the negotiations between Aon and the Claimants would be admissible, under an exception to the without prejudice rule, to prove that Aon did not raise the Participating Employer Argument despite their allegedly close involvement in the negotiations. He submits that the position should be no different in principle merely because Aon are sued in the same proceedings as the Lawyer Defendants.

88. The basis for that argument, as I understood it, can be set out in the following six propositions (using the term "lawyers" in this context for the Lawyer Defendants as defendants to a notionally separate claim):

    a. First, by suing their lawyers for negligent conduct of the Part 8 proceedings and the negotiations with the representative beneficiaries, the Claimants waive legal professional privilege;

b. Second, that waiver must extend to material otherwise protected by the without prejudice rule, otherwise a client could never sue his lawyers for negligence in the conduct of without prejudice negotiations;

c. Third, although the representative beneficiaries in principle also have the right to the protection of the without prejudice rule, that would not prevent the negotiations with them from being adduced in evidence in the claim against the lawyers, to the extent relevant to it, even if they had not consented to such use;

d. Fourth, the same would apply to the negotiations between the Claimants and Aon, if relevant to the claim against the lawyers;

e. Fifth, if the analysis is right so far, the lawyers are entitled to see and make use of the without prejudice negotiations by virtue of the issues raised in the claim against them, and that right cannot be taken away from them just because Aon are also defendants;

f. Alternatively, sixth, it cannot be taken away from them at the insistence of Aon if Aon are themselves making the very same allegations against the lawyers (indeed, where Aon's allegations against the Lawyer Defendants are the reason why the Lawyer Defendants have been sued at all).

89. Addressing those propositions first in the context of separate claims being brought against the lawyers and against Aon, I agree that legal professional privilege is waived by bringing the negligence claim against the lawyers and that in principle (at least so far as the Claimants' right to privilege was concerned) this would extend to relevant without prejudice negotiations. That is to say that the Claimants could not in those proceedings assert against the lawyers their own privilege in without prejudice material. Where the negotiations are being relied upon to prove some collateral matter (such as reasonable mitigation of loss) and the other party to the without prejudice communications is unaffected by the claim (as the representative beneficiaries are), the exception to the without prejudice rule exemplified or established by Muller is readily applicable. So it is relevant to note that the third proposition in Mr Stallworthy's argument depends on establishing an exception to the without prejudice rule.

90. Similarly, therefore, the fourth proposition of Mr Stallworthy (still on the assumption that Aon are not parties to the claim against the lawyers) depends on establishing an exception to the rule (in the absence of any waiver by Aon). However, Aon are not in the same position as the representative beneficiaries, whose rights have already been finally determined and who have no interest in the claim against the lawyers. The very claim against Aon that was being negotiated in the without prejudice negotiations is pending and will have to be determined by the court if no compromise is reached. That seems to me to be a significant and potentially important difference from the Muller case. Aon have a legitimate continuing interest in the broad protection conferred by the without

prejudice rule. If the content of their without prejudice negotiations is put in evidence at the lawyers' trial, even if to prove a collateral matter, Aon will potentially lose the very protection that the without prejudice rule is intended to confer on them, namely the confidentiality of its negotiations to try to settle the claim against them.

91. Further, that prejudice will result from the without prejudice material being used against Aon by the lawyers who were acting for the Claimants in the negotiations. Aon can assert their privilege against the Claimants not only on the basis of public policy underlying the without prejudice rule (which occasionally has to give way to other considerations of policy and justice) but because of an implied agreement between them, arising from the heading of their communications "without prejudice", to the effect that their content shall not be admissible in evidence at trial. It is not easy to see how the Claimants' then solicitors and counsel could be in any better position than the Claimants in this regard: Gowling wrote the letters headed "without prejudice" on behalf of the Claimants, and Counsel drafted certain letters and advised on the content of the negotiations, as well as attending a without prejudice meeting with Aon's lawyers, on an expressly "without prejudice" basis. The lawyers are only aware of the content of the communications because they were acting on behalf of the Claimants at the time. They can properly be said to be fully within the ambit of the without prejudice negotiations.

92. In Instance v Denny Bros. Printing Ltd [2000] FSR 869, an issue arose about whether a related company of one of the parties to without prejudice negotiations could refer in other proceedings to statements by way of admissions made in those negotiations. Lloyd J. observed at p.883:

> "The present case of course is concerned with the position as between the parties to the communications and other entities related or connected to them, rather than with complete outsiders. At one pont Mr Watson sought to rely on the fact that the F-A-F parties were not party to any implied contract arising from the without prejudice communications and were therefore not bound by it. Wisely he withdrew from that position since they had come into possession of the documents by receiving them from Eversheds, acting on behalf of Denny Bros. who, if there was any such contract, were clearly parties to it and bound by it."

At p.884 he said:

> "The present dispute arises between persons who either were parties to the original communications or have obtained the documents from persons who were such parties, and, to the extent that it be relevant, are commercially and corporately connected with such parties. If there was an implied agreement the persons before me are either bound by it as parties or must

> be taken to be subject to it by reason of the source of the documents in their hands. In my judgment it is very strongly arguable, and indeed probable, that the without prejudice communications are indeed governed by an implied agreement that they will not be used in the current or any subsequent litigation between the same or related parties. That contract would give way to the circumstances identified in Robert Walker L.J.'s eight exceptions if any were relevant. As I say, none of them are relevant to this application."

The reference to Robert Walker LJ's exceptions is a reference to the exceptions to the without prejudice rule identified in the Unilever case.

93. In the light of that decision, I consider that Gowling and Counsel must be treated as bound by the implied contract between the Claimants and Aon that their negotiations could not be referred to openly at trial or elsewhere. They were both acting on behalf of the Claimants in the negotiations and they derived the relevant documents in that capacity, on behalf of the Claimants. They must be taken to be subject to the same implied contract as the Claimants. As Lloyd J observed, however, that does not mean that the rule becomes absolute – the identified exceptions to it may still apply – but it does mean that Aon's protection does not depend entirely on a balance of public policy considerations.

94. It follows that I am not persuaded that the lawyers would *without more* be entitled to make use of the without prejudice negotiations because issues were raised against them in separate proceedings by the Claimants. Aon would be entitled in principle to the protection of the without prejudice rule, even if they were being sued in separate proceedings. The lawyers would have to satisfy the court that the case fell within a recognised exception to the without prejudice rule (or amounted to a principled and incremental extension of one). It might well do so if appropriate measures could be put in place by the court to give Aon the necessary protection.

95. Aon's argument is stronger on the actual facts of this case, given that what is sought is admission of the communications in evidence in the very proceedings in which Aon's liability will also be determined. Not only does Aon have a legitimate interest in protecting its privilege but, if an exception to the without prejudice rule applies, Aon will in fact suffer the very prejudice that it was agreed and understood by the Claimants and the Lawyer Defendants that it should not suffer.

96. Moving on to Mr Stallworthy's sixth proposition, what significance is there in the fact that Aon first raised in these proceedings the allegations of negligence against the Lawyer Defendants? The answer in general principle must be "none". If making allegations against another party to proceedings takes one outside the operation of the without prejudice rule, the very foundation of the rule would be undermined. That is so just as much where a defendant makes allegations against

a co-defendant as when a claimant who issue the claim makes allegations against a defendant.

97. Is the position then any different because Aon has raised allegations that the Approved Settlement was unreasonably generous, that the gross negligence of the Lawyer Defendants broke the chain of causation and, if not, that the Lawyer Defendants should contribute towards any losses for which Aon is liable? The without prejudice communications are to some extent relevant to these issues, but relevance is of itself no exception to the rule.

98. It is significant that all three Lords Justices in the Muller case considered it to be material that the plaintiff had put in issue the reasonableness of his negotiations with the shareholders and that that issue would not be justiciable without disclosure of the negotiations. Similarly, in EMW, Newey J considered it to be material that Mr Halborg had referred to the content of his without prejudice negotiations with BLM and that it was hard to see how EMW's claim would be justiciable without disclosure of the negotiations. Lewison LJ observed in Avondale that it was hardly surprising that the court ordered disclosure of the negotiations in Muller given that the plaintiff had put that matter directly in issue.

99. In this light, the general principle that bringing a claim or making an allegation does not disentitle a party to rely on without prejudice privilege may well be qualified where an issue is raised that is only justiciable upon proof of without prejudice negotiations. Indeed, in cases where the Muller exception has been applied, the judges have emphasised that the claim would otherwise be non-justiciable. A claimant (or defendant) cannot at one and the same time raise an issue to be tried and rely on without prejudice privilege to prevent the court from seeing the evidence that is needed to decide it. However, this exception has not previously been held to apply in the case of without prejudice negotiations in the very claim that is before the court.

100. I consider that there are a number of facets to the so-called Muller exception, which go beyond the fact that the negotiations have some independent relevance as a fact apart from the truth or falsity of anything stated in them. That is no doubt a necessary condition for any exception applying, otherwise the policy underlying the without prejudice rule would be directly infringed, but it is not a sufficient condition for the application of the Muller exception. This appears to me to depend on the necessity of admitting the material to resolve an issue raised by a party to without prejudice negotiations, in circumstances in which the legitimate protection given to the parties to the negotiations is not adversely affected.

101. It is clear, on authority, that there is no exception to the without prejudice rule merely because justice can be argued to require one on the facts of a particular case. In EMW Law, Newey J did not conclude that disclosure should be given because justice required it: he concluded that it was just to regard an established exception to the without prejudice rule, whether the Muller exception or a comparable one, as applying on the facts of that case. The facts of EMW

Law were somewhat different from Muller, in that there was no evidence of a concluded settlement with Savage Hayward on costs, therefore there was a possibility of prejudice from disclosure of the negotiations. However, given that the family's and Savage Hayward's rights were not being adjudicated by the court in that claim, the court felt able to protect them in a different way. The outcome was the same: the legitimate interests of neither party to the without prejudice communications would be prejudiced by their being available to be referred to at trial.

(3) Does the Muller exception to the without prejudice rule apply here?

102. I must therefore consider whether it is necessary to admit the without prejudice communications in order to make the issues raised by Aon justiciable and whether it is appropriate to do so.

(i) Negligence

103. It is not necessary to examine the without prejudice communications in order to determine whether the Lawyer Defendants were negligent in failing to raise the Participating Employer Argument. That is a question to be assessed objectively on the basis of facts that have nothing to do with Aon's involvement. The fact that Aon did not raise the argument is irrelevant to whether the Lawyer Defendants were negligent in not doing so.

(ii) Reasonableness of Approved Settlement

104. So far as the reasonableness of the Approved Settlement is concerned, that is likely to require the without prejudice negotiations between the Claimants and the representative beneficiaries to be examined, although it is not clear whether Aon will rely on any matter other than the failure by the Claimants to raise the Participating Employer Argument. But even if that is necessary, the reasonableness of the Approved Settlement is a question to be judged objectively, having regard to the Scheme deeds, the judgment of Newey J. and the grounds of appeal, the legal advice the Claimants received, any other professional advice they received and the matters negotiated with the representative beneficiaries' lawyers and experts. Moreover, the burden lies on Aon to prove that what the Claimants did with the benefit of legal and other advice was unreasonable.

105. The negotiations with Aon are unnecessary to make the allegation of unreasonable settlement justiciable. Given the open correspondence between Aon and the Claimants, including the letter dated 23 July 2015 in which Aon make observations about what the Claimants should bear in mind when seeking to reach a compromise, it is evident that the Participating Employer Argument was not raised by Aon's lawyers any more than it was raised by the Claimants'. Neither the Claimants nor the Lawyer Defendants allege that they relied on Aon or their lawyers in any way, nor do Aon allege that they should have done. In

the circumstances, Aon cannot be said to have made it necessary to refer to their own without prejudice communications by pleading that the Approved Settlement was unreasonably made.

(iii) New Intervening Act / Gross Negligence

106. So far as breaking the chain of causation is concerned, it is clearly potentially relevant to allegations of gross negligence (serious failure by specialist lawyers to advert to an obvious point) that Aon's specialist lawyers did not identify the Participating Employer Argument before the Approved Settlement was made. As stated above, that is capable of proof without reference to the without prejudice correspondence and in any event will surely be uncontentious at trial (it was not disputed before me). What will be missing is evidence of the content of further without prejudice negotiations. The Lawyer Defendants wish to show the extent of Aon's involvement, if any, with the issues to be negotiated with the representative beneficiaries, to seek to minimise the force of the argument that they failed to identify an obvious argument, and to counter the suggestion that what they did was a wholly independent cause of the Claimants' loss.

107. I accept that it is arguable that evidence of any further involvement than is revealed by the open correspondence may be relevant to an assessment of whether the Lawyer Defendants' alleged failure should be treated as the only cause of the Claimants' loss, though it is far from being the only relevant factor. The primary argument for Aon will be that the invalidity of the deeds of adherence caused nothing, and that any funding costs of the Scheme beyond the benefits that the employees of the associated and service companies thought they were entitled to can only have been caused by the Approved Settlement, something for which Aon had no responsibility to the Claimants.

108. In my judgment, the issue of causation pleaded by Aon is far from being non-justiciable in the absence of the content of the without prejudice negotiations. The fact of Aon's involvement to some degree in discussing the basis of the Approved Settlement emerges from the open correspondence. What on a fair analysis the Lawyer Defendants seek to establish by relying on the without prejudice communications is, first, a greater degree of involvement in discussions that may emerge from those communication (such as to justify their pleading that Aon was "closely involved"), and secondly some colour derived from statements and assertions in that correspondence, which they hope will make it less credible for Aon to argue that the failure to identify the Participating Employer Argument was grossly negligent.

109. I accept that the fact of the without prejudice communications and the content of some of them is relevant, but it is far from necessary to refer to them in order to have a fair trial of the issues of gross negligence and break in the chain of causation. Even in the absence of the content of the without prejudice communications, Aon cannot mislead the court by making untrue assertions about the extent of any involvement, and (for reasons I give in the final part of this judgment) the Lawyer Defendants will be entitled to refer to the fact of without prejudice discussions with the Claimants at the time of the appeal and

Approved Settlement. It should also be borne in mind that the Lawyer Defendants' primary defence is that they were not negligent because, as the trustees were advised in November 2011 by a different Leading Counsel, the Participating Employer Argument would fail.

110. I therefore do not accept that by pleading a new intervening act defence Aon has disentitled itself to rely on the privilege attaching to the contents of its without prejudice communications with the Claimant. Some relevant material will be excluded from evidence, but that is often the case where legal professional privilege or without prejudice privilege is invoked. Once the fact (rather than the content) of the without prejudice communications is admitted, there is relatively little of any substance that will be excluded.

(iv) Contribution Claim

111. So far as the contribution issue is concerned, it is accepted that - at the time when the Lawyer Defendants were advising the Claimants - Aon owed no duty to advise the Claimants. Aon had been served with a pre-action letter by the Claimants. Nevertheless, the Lawyer Defendants seek to argue that, if Aon's negligence did cause the Claimants loss, any responsibility that the Lawyer Defendants are adjudged to have and the degree of their contribution should be assessed bearing in mind that Aon were also "closely" involved at the time and could themselves have been expected to raise the Participating Employer Argument, even though they owed the Claimants no duty to do so.

112. In this regard, the Lawyer Defendants rely on the decision of the Court of Appeal in Brian Warwicker Partnership plc v Hok International Ltd [2005] EWCA Civ 962; [2006] PNLR 5. The judge had determined contribution proceedings between architects and engineers relating to losses caused on a development project. He adjudged the architects liable for 40% of the loss on account of breaches of duty owed by the architects to the developer, even though these were not causally related to losses suffered by the developer. The Court of Appeal held that there was no misdirection of law in taking account of non-causative factors, since "responsibility" in section 2(1) of the Civil Liability (Contribution) Act 1978 was not limited to causative responsibility.

113. Sir Andrew Morritt V-C referred to an earlier decision, Re-Source America International Ltd v Platt Rite Services [2004] EWCA Civ 665, for the proposition that non-causative responsibility could still be relevant to an apportionment of liability. The architects submitted that there was a distinction in principle between Re-Source and their case, in that in Re-Source the matters taken into account were not breaches of duty owed to the employer itself (though they were found to have been negligent), whereas in their case they were breaches of duty but did not cause any loss. Unsurprisingly, the Vice-Chancellor was not impressed by that argument. He said:

> "If the non-causative factor also involves a breach of duty relied on in the action the more likely it is to be a relevant factor for the purposes of section 2(1)."

In that context, a breach of duty relied on in the action refers to a duty owed directly to the employer claimant. Arden and Keene LJJ, who also delivered judgments, were rather more guarded about the potential significance of any non-causative breaches and held that such breaches could only have been intended to have secondary significance in an assessment of what was just and equitable by way of apportionment, and that they had to have some close connection (albeit not causative) with the breaches that gave rise to the loss. They said nothing about conduct not amounting to a breach of a duty to the employer.

114. The single sentence in the Vice-Chancellor's judgment is therefore a rather slender thread for the Lawyer Defendants' argument that, at a time when Aon owed no duty to the Claimants, anything that they did or did not do should be taken into account in the just and equitable assessment. What will be central to the assessment is the relative causative potency of the original (alleged) negligence of Aon in relation to the defective deeds and the subsequent (alleged) negligence of the Lawyer Defendants, if the latter did not break the chain of causation entirely. The Lawyer Defendants will be able to identify the fact of continued involvement by Aon in the preparation for the appeal and the settlement negotiations from the open correspondence and the fact of without prejudice communications having taken place, albeit not what was said in the without prejudice communications.

115. Accepting as I should at this interlocutory stage that the exchanges in the without prejudice correspondence are potentially relevant to an assessment of relative responsibility for the losses of the Claimants, it does not appear to me that the contribution issue is non-justiciable (or not fairly justiciable) without reference to those communications. For the reasons previously given, the main facts relating to the relative liability of Aon and the Lawyer Defendants will be in evidence, as will be the fact of Aon's involvement in discussing with the Claimants their negotiations with the representative beneficiaries. On the contribution notice, the court must seek to do what is just and equitable in all the circumstances. That does not, however, mean that all relevant circumstances have to be considered whether or not they are admissible in evidence. The question is rather whether an exception to the without prejudice rule applies that entitles the Lawyer Defendants to place otherwise inadmissible evidence before the court.

116. The privileged communications are, in this case, the negotiations between Aon and the Claimants, not (as in Muller and EMW Law) negotiations in other proceedings that have some independent relevance to the current proceedings. In this instance, the without prejudice communications would not be admitted in connection with a particular issue, such as the reasonableness of the Approved Settlement or whether Gowling were grossly negligent, but on the issue of the relative degrees of responsibility of Aon and the Lawyer Defendants for the Claimants' losses. In my judgment, admitting such negotiations in those circumstances would be likely significantly to undermine the policy of

encouraging parties to attempt to settle disputes in any multi-party litigation. The without prejudice negotiations would be admitted in the very proceedings in which the negotiations took place to seek to establish the extent of Aon's responsibility for losses suffered. It cannot be right that, in multi-party litigation, a defendant can only serve a contribution notice at real risk of its previous without prejudice negotiations with the claimant being put in evidence to assist the court in apportioning liability. The circumstances of this claim, where a likely defendant in a claim yet to be brought has had without prejudice negotiations with the likely claimant, are hardly unusual. An exception such as the Lawyer Defendants seek to establish would be capable of applying in many cases.

(4) Conclusions

117. I acknowledge that, if no exception to the without prejudice rule applies, the trial judge will have an incomplete picture of any involvement of Aon in the Claimants' negotiations with the representative beneficiaries. That is, however, a consequence of any exclusionary rule of evidence and it is the inevitable consequence of the without prejudice rule, justified by broad policy considerations and underscored in this case by all parties' implied agreement that their negotiations were to be inadmissible in evidence. Having referred to the breadth of the without prejudice rule, Teare J. in Single Buoy Moorings Inc v Aspen Insurance Ltd [2018] BLR 616 said:

> "It thus appears that the fact that in the present case the Defendant is not seeking to embarrass SBM with admissions made in the course of its negotiations with Talisman is not by itself a good reason for concluding that the negotiations are not protected by the without prejudice privilege. They are protected by that privilege so long as the use to be made of what was said in the negotiations is not covered by an existing exception. No existing exception covers the present case and I am not persuaded that the exception recognised in Oceanbulk can properly be extended to the present case. That exception concerned the construction of the settlement agreement. In the present case no such question arises. Instead, the Defendant simply wishes to use statements made by SBM to advance its case that the cause of the topside damage to the MOPUstor was not the defective grouting but SBM's own preference to bring the MOPUstor project to an end. That would be, in my judgment, a new exception quite different from that which has so far been recognised.
>
> Mr. Schaff complains that SBM is seeking to prevent the Defendant and the court from fully understanding the full background to the termination of the contract between SBM and Talisman and to the abandonment of the project. I agree that it

> is. But that is the effect of claiming without prejudice privilege. It is not a reason for denying that privilege."

118. As long as without prejudice privilege is not being abused (and, if it is, a different exception may apply), the exclusion of relevant evidence will normally be the result. As explained in the Unilever and Ofulue cases, the rule is designedly broad in its effect and the exceptions are narrow. Though the list of exceptions is not closed, any exception must be of the same character or a principled and incremental extension of an existing exception: see Single Buoy Moorings at [54], per Teare J.

119. In my judgment, treating the contents of the without prejudice communications between Aon and the Claimants as admissible, even for the purpose of proving the extent and nature of Aon's involvement in discussions about the appeal and Approved Settlement, would create an exception with a considerably different character, namely a broad exception where the interests of justice in a particular case can be said to require evidence to be admitted and privilege overridden. Had Aon waived its right to rely on the rule, by putting in issue the content or effect of some of the without prejudice communications, it could not be heard to complain that potentially prejudicial material was admitted. But it clearly has not waived its privilege, nor in my judgment has it raised an issue that cannot fairly be tried without admitting its without prejudice negotiations.

120. If there is an exception to the without prejudice rule, the consequence will be that Aon's negotiations with the Claimants would be admitted (at least in some part) on the trial of Aon's liability. That may not be an impossible conclusion to reach: some of the established (other) exceptions to the rule produce that result, e.g. where the negotiations explain the reason for a claimant's delay in seeking relief or in progressing his claim, or where a defendant pleads that the claimant is estopped by reason of matters said in the course of the negotiations. These are exceptions (3) and (5) in Robert Walker LJ's list. But the court should, for obvious reasons, scrutinise closely any suggestion that other circumstances should produce that result, particularly where (as here) the negotiations are sought to be relied upon specifically to establish the liability (or greater share of liability) of Aon to the Claimants.

121. The Lawyer Defendants (supported by the Claimants) ultimately suggested that the court should engage on a process of separating out the without prejudice material and redacting it as necessary, so that matters relating to the Claimants' claims against Aon are not able to be deployed at trial but matters relating to the Claimants' negotiations with the representative beneficiaries are able to be used.

122. Although at first that seemed to be an attractive course to take, in order to attempt to reach a fair solution on the facts of this case, it runs into a number of difficulties both in practice and in principle.

a. First, there is no clear divide between the two categories identified in para 121 above. All parties recognised that this claim would be brought once

the Approved Settlement was made and its funding implications fully understood. The two aspects of the negotiations cannot properly be separated, as reflected in the Lawyer Defendants' acceptance that the material on which they seek to rely is properly to be treated as being without prejudice to the Claimants' claim against Aon.

b. Second, in some instances the redaction of particular documents, which would be necessary in order to try to separate material that is potentially prejudicial to Aon from the material that it is alleged only to relate to negotiations with the representative beneficiaries, requires the removal of part and leaving other parts of paragraphs of letters, and in one case removing part of a single sentence in a letter. Although in the course of argument Gowling gave some examples of how redaction might work, there is no definitive map of the surgery to be performed to achieve the objective. Rather, Mr Stallworthy suggested that, in the light of this judgment, the parties might then attempt to agree (or the court if necessary would decide) what had to be excluded by reference to certain themes or issues.

c. Third, and as a consequence of the second point, the exercise to be embarked on is therefore – at best – that against which Robert Walker LJ protested in the Unilever case at p.2448H-2449B, which observations Lord Neuberger of Abbotsbury endorsed in Ofulue at [89]. The risk of such an exercise being conducted tends to undermine the public policy that litigants should be encouraged to speak openly in an attempt to settle their disputes, and not have to take great care about what they say for concern that parts of their discussions may become admissible in the trial of the very dispute that they are attempting to settle.

d. However, on the facts of this case, what is proposed by the Lawyer Defendants and supported by the Claimants really amounts to this, that the without prejudice communications should be admitted generally (not just particular statements admitted to prove a discrete fact), subject to the redaction of what might be said to amount to admissions or implied admissions against Aon's interest. That approach gives effect in a different way to the now discredited view that the without prejudice rule should only protect admissions, and is contrary to the clear statements of Robert Walker LJ in the Unilever case, Lord Hope, Lord Rodger and Lord Neuberger in Ofulue and Lord Clarke in Oceanbulk.

123. During the course of argument, the Lawyer Defendants placed emphasis on the fact that Aon had invited the Claimants to agree that, if a settlement with the representative beneficiaries was achieved, the without prejudice communications should be treated as open. Aon indicated that, if the Claimants did not so agree, they would write an open letter to protect their position. No such agreement was reached and Aon did in fact write an open letter dated 23 July 2015. The Lawyer Defendants suggest that it should be regarded as

appropriate to put the communications before the trial judge, since that is what Aon wanted in 2015.

124. I am not impressed by that argument. It can just as well be said that the Claimants were offered the chance by agreement to refer to the without prejudice communications, if they thought that was appropriate, but that they declined to agree that previously and are now seeking in effect to refer to them without Aon's agreement. In 2015, the Claimants perhaps considered that disclosure might be disadvantageous to them, whereas now Aon seem to prefer to keep the negotiations under wraps. The fact that Aon at one stage offered mutually to give up privilege in the communications does not mean that what are genuinely without prejudice communications should be treated in any different way, given that no agreement was reached. Parties are always at liberty to agree to waive privilege in such communications but one party cannot do so unilaterally. The fact that one party sees a tactical advantage in relying on its privilege makes no difference to its right to do so.

125. In view of the conclusions expressed above, I reject the Lawyer Defendants' approach, despite its initial attraction, which is ultimately contrary to principle. The content of the communications remains privileged.

Relevance of the Fact of "without prejudice" Communications

126. I observed at the outset of the argument on this application – which took three full days in court – that it appeared to be a case where a fair solution was for appropriate admissions by Aon to be drafted, summarising briefly the extent of Aon's involvement in discussions with the Claimants but without referring to the content. That appeared to me to be fair on the basis that –

> (a) there was admissible evidence in any event that Aon had been involved;
> (b) some evidence of the extent of involvement would probably emerge in any event at trial;
> (c) in the circumstances of this case a judge would expect that Aon were probably involved, so there would be no prejudice to Aon in admitting that there were without prejudice discussions at the time of the negotiations with the representative beneficiaries;
> (d) there was no dispute in any event that neither Aon nor the Lawyer Defendants had raised the Participating Employer Argument; and
> (e) it would avoid any risk of unintentional misleading of the trial judge, and any further issues about waiver or abuse of privilege at trial.

127. It will be evident that the parties were unable to agree that approach. It seems that Aon wishes to exclude from the evidence at trial, to the fullest extent that is proper, any involvement with the negotiations with the representative beneficiaries, and the Lawyer Defendants wish not only to maximise any

involvement of Aon in that regard but refer to some of the actual words used (other than any admissions or implied admissions). I am sceptical that either the precise extent of Aon's involvement or the words used in certain communications would make any real difference to the evaluation of the Defendants' liability at trial, though I can understand why the parties think that they may do.

128. The Lawyer Defendants submitted that even if I decide that the content of the communications is inadmissible, the fact of the negotiations is not inadmissible and that I should so determine. Ms Smith QC referred me to the statement in the current edition of *Passmore on Privilege* at para 10-002: "there is no privilege over the fact that such communications have occurred, rather the privilege is limited to the contents of such communications". She also referred to statements to similar effect by Knox J in Independent Research Services Ltd v Catterall [1993] ICR 1 at p. 7C-D; by Judge Havelock-Allan QC in RWE NPower plc v Alstom Power Ltd [2009] 12 WLUK 734 at [54], and the judgment of Lindley LJ in Walker v Wilsher (1889) 23 QBD 335, all of which support the conclusion that it may be perfectly proper to refer to the fact of without prejudice communications even when the content is protected by the rule.

129. In my judgment, the fact of without prejudice communications can properly be referred to where that fact is relevant to an issue in the case. If irrelevant to the resolution of any issue, the fact is inadmissible for that reason. In the RWE NPower case, the issue was whether a dispute had crystallised by a particular date; in the Walker case, the issue was whether there had been discussions between the plaintiff and the defendant that provided an explanation for the plaintiff's apparent delay, in the context of a defence of laches. It is obvious why the fact of the communications was relevant in those cases.

130. The question therefore arises: what is the relevance to the issues in this claim of the fact of without prejudice negotiations between the Claimant and Aon from May 2014 to October 2016? Clearly, they cannot be referred to for the purpose of inviting the trial judge to infer and find that particular matters were being discussed, or that Aon was involved in any particular way with the negotiations with the representative beneficiaries. However, the fact of communications between Aon and the Claimants prior to and in connection with the Approved Settlement is arguably relevant in the respects that I have already identified and is partially proved by the open correspondence. Ms Smith submitted that the fact of the without prejudice negotiations was relevant and therefore admissible to prove that discussions between Aon and the Claimants in the period between the judgment of Newey J and the Approved Settlement were not limited to the open communications.

131. There can be a fine line between referring to the fact that communications took place and seeking to infer that particular matters were discussed. On balance, I consider that the fact of the without prejudice communications is admissible because it will enable the Lawyer Defendants to establish that there were communications between Aon and the Claimants at the time when the

Claimants were seeking to reach a compromise with the representative beneficiaries, which fact may be relevant to the new intervening act issue and the apportionment of responsibility. More particularly, it will prevent the trial judge from being inadvertently misled about the extent of the contact during that period by relying on the open correspondence alone. But the Lawyer Defendants may not tell the trial judge what the without prejudice communications were about.

132. I will therefore in principle make the declaration sought by Aon that the content of without prejudice communications set out in the first schedule to the second witness statement of Neil Martin Smith dated 26 October 2018 is subject to without prejudice privilege and is inadmissible in the proceedings.