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Client Alert

‘Without Prejudice’ Privilege: A Small and Principled Extension to a Small and Principled Exception

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In *Berkeley Square Holdings v Lancer Property Asset Management Ltd* [2021] EWCA Civ 551, the Court of Appeal upheld the High Court’s decision that statements made in ‘without prejudice’ mediation papers were admissible as evidence to defend an allegation that a settlement agreement apparently concluded between the parties should be set aside on the grounds of fraud. This decision is a reminder that ‘without prejudice’ protection is far from absolute and that there are “*small principled*” exceptions to it that “*serve the interests of justice*” - in this case, a small and principled *extension* to an existing exception.

Background

The proceedings were brought by 24 claimant companies (Berkeley Square Holdings Ltd and others, the “**Claimants**”) that own a £5bn portfolio of properties in London on behalf of the President of the United Arab Emirates, Sheikh Khalifa bin Zayed Al Nahyan and his family. By an agreement entered into on 18 November 2005, Lancer Property Asset Management Ltd (“**Lancer**”), was appointed to act as asset manager of the property portfolio, entitling it to management services fees, together with a performance fee. By a side letter executed in April 2006, the Claimants agreed to pay Lancer an additional “*capital performance fee*”. In addition, a deed of variation to the 2005 agreement was executed in March 2011, giving Sheikh Khalifa's agent, Dr Mubarak Al Ahbabi (“**Al Ahbabi**”), authority to direct Lancer to make payments to certain third parties, including Becker Services Limited (“**Becker**”), a company that was beneficially owned by Al Ahbabi. The deed of variation also ratified the payments that had already been made to Becker (and other third parties) prior to the date of the variation.

Between 2005 and 2015, over £26 million of the additional fees paid to Lancer under the 2006 side letter were paid on by Lancer to Becker.

In 2012, a dispute arose over Lancer’s entitlement to the capital performance fees under the side letter and the parties engaged in a ‘without prejudice’ mediation to resolve the matter. Mediation papers were duly exchanged in advance of the mediation, with Lancer’s position paper, importantly, making reference to the arrangement with Becker and the fact that Lancer had been paying fees to Becker (including the amounts paid). That dispute was settled shortly after the mediation and the parties entered into various settlement deeds, pursuant to which the Claimants agreed to pay £30 million to Lancer.

Two years after giving notice to terminate Lancer’s appointment, the Claimants issued proceedings in 2018 against Lancer, its directors and holding company (the “**Defendants**”), alleging that “*from April 2006 at the latest Lancer and its directors had been complicit in a substantial fraud perpetrated on the Claimants by*

their own appointed representative, Dr Al Ahbabi, in dishonest breach of fiduciary duty."[1] Specifically, the Claimants alleged that through the arrangements under the 2006 side letter and the 2012 settlement deeds, Al Ahbabi misappropriated over £26 million from the Claimants because neither Lancer, nor Becker, provided any services in return for the amounts paid.

In its defence, the Defendants asserted that the Claimants were aware of the arrangement with Becker, not least because Lancer informed them of the position in its 'without prejudice' mediation paper shared as part of the September 2012 mediation.

The Claimants applied to strike out the paragraphs of the defence that referred to the statements in the mediation papers on the basis that those statements were made on a 'without prejudice' basis during a mediation and were, therefore, inadmissible in evidence. The Defendants claimed that the mediation statements were admissible as falling within one or more of the general exceptions to the 'without prejudice' rule set out by Lord Justice Walker in *Unilever plc v The Proctor & Gamble Co* [2000] 1 WLR 2436.[2]

The 'without prejudice' rule and its exceptions

The public policy basis for the 'without prejudice' rule is that parties should be encouraged as far as possible to settle their disputes without resorting to litigation and, in doing so, should be comforted by the knowledge that anything that is said during the course of such negotiations may not be used against them in subsequent litigation.[3] However, there are several instances where, notwithstanding the existence of 'without prejudice' discussions, the rule does not prevent the admission into evidence of statements made during those negotiations. Walker LJ in *Unilever* helpfully summarised the following (non-exhaustive) exceptions where 'without prejudice' statements may be admissible:

(1) Where an issue arises as to whether 'without prejudice' communications have resulted in a concluded settlement agreement.
(2) Where the 'without prejudice' communications show that an agreement apparently concluded between the parties during negotiations should be set aside on the ground of misrepresentation, fraud, undue influence or similar impropriety.
(3) Where a clear statement is made by one party to negotiations (and on which the other party is intended to, and does in fact, act), giving rise to an estoppel.
(4) Where preventing one party giving evidence of 'without prejudice' communications would act as a cloak for perjury, blackmail or other 'unambiguous impropriety'.
(5) Where the 'without prejudice' communications explain delay or apparent acquiescence. The parameters of this exception are best described as generally limited to the "*fact that such letters have been written and the dates at which they were written*".[4]
(6) Where 'without prejudice' communications evidence that a party has acted reasonably to mitigate its loss in reaching a settlement of proceedings with a third party (known as the so-called *Muller* exception from the case of *Muller v Linsley and Mortimer* [1996] PNLR 74).[5]
(7) Where the parties have written 'without prejudice save as to costs offers' and the Court is being asked to determine the question of costs.
(8) Where communications are received in confidence with a view to matrimonial conciliation.

The decision at first instance

In seeking to admit the 'without prejudice' statements, the Defendants relied on the *Unilever* exceptions (2), (3) and (6). Whilst Mr Justice Roth rejected exception (3), he held that the mediation statements were

[1] Para 7 of the Claimants Amended Particulars of Claim, as referred to by Roth J at para [20] of his first instance judgment [2020] EWHC 1015.
[2] [2000] 1 WLR 2436 at [23].
[3] *Rush & Tompkins Ltd v Greater London Council* [1989] A.C. 1280.
[4] Lindley LJ in *Walker v Wilsher* (1889) 23 QBD 335 at [338].
[5] As Leggatt LJ put it at [81], "*the plaintiffs cannot both assert the reasonableness of the settlement and claim privilege for the documents through which it was reached.*"

admissible under exception (2), or by reason of a "*small and principled extension of it to serve the interests of justice*".[6] He considered that it would be illogical to permit the admissibility of 'without prejudice' negotiations to prove a misrepresentation and rescind the agreement (which clearly fell within exception (2)), but not permit the admissibility of the same evidence to disprove a misrepresentation and uphold the agreement: "*If Lancer had misled the Claimants by misrepresentation in the mediation, then the Claimants could rely on that in challenging the 2012 Deeds. It seems to me contrary to principle to hold that where Lancer was truthful in the mediation, their statement cannot be admitted to rebut a case that the Claimants were deceived by Lancer as to the true state of affairs*".[7]

As for exception (6), Roth J considered the 2019 case of *Briggs v Clay* [2019] EWHC 102 (Ch) in which that exception arose for determination. *Briggs* concerned 'without prejudice' negotiations between the claimants and certain of the defendants (Aon), to which the remaining defendants were not parties (albeit that those defendants had taken part in the negotiations in their capacities as legal counsel for the claimants). The non-Aon defendants sought to adduce evidence of the negotiations on the basis of the *Muller* exception and, whilst the claimants waived privilege in those negotiations, Aon declined to do so. In analysing the *Muller* exception, Mr Justice Fancourt held that "[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*", but the admissibility of such evidence had to be necessary to make the issues "*justiciable*". [8]

Roth J adopted Fancourt J's analysis of the *Muller* exception, articulating further what he considered "*fairly justiciable*" to mean ("*that the evidence is so central to an issue which the party resisting disclosure has introduced that there is a serious risk that there will not be a fair trial if that evidence is excluded*").[9] Since the Claimants had put in issue that the Defendants were complicit in a substantial fraud of which they were unaware, Roth J concluded that the Defendants could rely on the *Muller* exception on the basis that the issue of the Claimants' knowledge of the financial arrangements would not be "*fairly justiciable*" without admitting the 'without prejudice' statements into evidence.[10]

The Court of Appeal decision

In dismissing the appeal and upholding Roth J's decision that the 'without prejudice' statements were admissible, the Court of Appeal made the following key findings:

Fraud exception (2)

Richards LJ rejected the Claimants' submission that the purpose of exception (2) is to prevent the abuse of the 'without prejudice' privilege by a party who makes a wrongful or actionable statement with the intention of inducing a settlement. Such a purpose would make the fraud exception "*indistinguishable*" from exception (4), which renders admissible 'without prejudice' communications that otherwise would act as a cloak for perjury, blackmail or other 'unambiguous impropriety'. Exception (2) is not directed to the abuse of the privilege; it concerns the agreement reached during, or as a result of, the 'without prejudice' discussions and whether that agreement was made with the necessary consent of the contracting parties. The absence of consent can arise in a number of ways, with 'misrepresentation, fraud or undue influence' being a non-exhaustive list.

In this case, it was said by the Claimants that Al Ahbabi had a very substantial personal interest in the side letter and settlement deeds, which had not been disclosed to them and that he, therefore, lacked authority to commit the Claimants to the settlement. In the circumstances, the Claimants' knowledge (or lack thereof) of Al Ahbabi's interests and the arrangements with Becker was a central issue in the dispute for which the mediation statements were directly relevant. In this regard, Richards LJ saw no "*principled ground*" for the

[6] [2020] EWHC 1015, para [52].
[7] *Ibid*.
[8] [2019] EWHC 102, para [99].
[9] [2020] EWHC 1015, para [83].
[10] *Ibid*, para [87].

distinction that the Claimants sought to make between the admissibility of 'without prejudice' statements in order to set aside the settlement deeds, and admissibility in order to defeat a claim to set the deeds aside.[11] A defendant must be afforded an equal opportunity to adduce evidence for the purpose of defending a claim, as a claimant would have to bring the claim, otherwise there would be an "*unprincipled asymmetry*".[12] To the extent that amounted to an extension of exception (2), it was a "*principled extension*".[13] On that basis, the Court of Appeal concluded that the mediation statements were admissible and dismissed the Claimants' appeal.

Muller exception (6)

Whilst Richards LJ regarded the *Muller* exception as "*troublesome*" because the two bases on which the Court had reached its decision could no longer stand in the light of recent developments in the law, the decision had not been overruled and so had to be regarded as correct.[14] In the present case, reliance on the *Muller* exception was found to be "*misplaced*" on the basis that *Muller* has no application to a two-party case (i.e., where the parties to the 'without prejudice' communications are the same as the parties to the dispute). The Court considered that Roth J (and Fancourt J in *Briggs*) had (inadvertently) developed a new exception which seemingly attempted to cover the situation where "*one party raises an issue which cannot, or cannot fairly, be decided without recourse to evidence of without prejudice negotiations or communications but the party raising the issue resists disclosure or use of such evidence*."[15] That exception raises several potential issues and careful consideration would need to be given as to whether the exception would involve an unacceptable interference with the public policy basis for the 'without prejudice' rule. It was not necessary to do that in *Berkeley* (because evidence of the mediation, including the mediation statements, was admissible in any event under exception (2)) and so the Court of Appeal ultimately refrained from deciding whether a new exception to the rule exists, reserving such an analysis for a better case where the issue would be decisive of an appeal.

Conclusion

The *Berkeley* decision provides useful judicial guidance on the scope of the fraud and *Muller* exceptions to the 'without prejudice' rule and approves the first reported decision in which the fraud exception has been applied. The decision is also a welcome reminder that the 'without prejudice' rule is not absolute and the existing exceptions may be expanded in the future, whether by way of principled extensions to an existing exception, or by the development of an entirely new exception.

[11] [2021] EWCA Civ 551, para [50].
[12] *Ibid*, para [54].
[13] *Ibid*.
[14] *Ibid*, para [58].
[15] *Ibid*, para [84].

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