Barclays Wealth Trustees (Guernsey) Limited et al and Alpha Development Limited et al
Court of Appeal
9th March, 2015

JUDGMENT 19/2015

Appeal against an interlocutory order dated 14 November 2014 refusing to order disclosure of certain documents. (See Judgment 21 – costs decision).

IN THE COURT OF APPEAL OF GUERNSEY

Civil Division - Appeal No 486

On Appeal from the Royal Court of Guernsey (Ordinary Division)

9th March 2015

Before:

John Vandeleur Martin QC
Sir David Calvert-Smith
David Anderson QC

BETWEEN:

(1) BARCLAYS WEALTH TRUSTEES (GUERNSEY) LIMITED
(2) SHARON ANN PARR
(3) WARNER THOMAS KOLLER
(4) GAVIN ANTHONY ST PIER
(5) STEPHEN PERRY LE RAY
(6) BARCLAYS WEALTH DIRECTORS (GUERNSEY) LIMITED
(7) BARCLAYS WEALTH CORPORATE OFFICERS (GUERNSEY) LIMITED

Appellants/Defendants

and

ALPHA DEVELOPMENT LIMITED
ALPHA DEVELOPMENT (CHELSEA) LIMITED

Respondents/Plaintiffs

Advocate Mark Dunster for the Appellants
Advocate Gareth Bell for the Respondents

JUDGMENT

MARTIN JA:

1. This is an appeal against an interlocutory order dated 14 November 2014 of Lieutenant Bailiff Marshall QC. By that order, she refused to order disclosure of certain documents. Leave to appeal was given by the Lieutenant Bailiff. In her judgment, she rightly described the case as involving "a rather difficult point". That point relates to the scope of the protection attaching to without prejudice communications.

Background

2. The background is as follows. In July 2007 the plaintiffs embarked on a project to convert a substantial property in Chelsea Manor Street, London SW5 into flats for sale. They entered into loan arrangements with Bank of Scotland ("BoS") in order to acquire the property and finance the development. In December 2008, BoS served a notice of default on the basis that the plaintiffs had broken the terms of the loan arrangements. Further notices of default were served in January and April 2009, and on 22 April 2009 receivers were appointed over the property. Between January 2009 and December 2009 the plaintiffs pursued litigation against BoS in the English courts contesting the default notices and contending that BoS had miscalculated interest. That litigation was compromised by an order dated 14 December 2009.

3. The first defendant provided professional administration services to the plaintiffs under an administration agreement. The remaining defendants were at material times individual or corporate directors of one or both of the plaintiffs. In the present proceedings, the plaintiffs allege that BoS's cancellation of funding was a result of breaches by the first defendant of the administration agreement and breaches by the remaining defendants of their duties as directors. They assert that, but for those breaches, BoS would not have been in a position to serve notices of default and the development would have proceeded. On that basis the plaintiffs claim from the defendants damages (originally amounting to some £145 million, now reduced to about £75 million) in respect of alleged lost profits on the development, together with just under £400,000 in damages in respect of legal costs of BoS which the plaintiffs agreed to pay as part of the compromise and the plaintiffs' own legal costs of the litigation with BoS.

Pleadings

4. The pleadings on both sides have been amended a number of times. References to paragraph numbers are to the pleadings in the state in which they were provided to the court. In paragraph 47 of their Cause, the plaintiffs asserted that by reason of BoS's actions they were unable to proceed with the development, and that they were "by then unable to obtain suitable alternative offers of finance from other financial institutions". In paragraph 40A of their Defences, the defendants required the plaintiffs to prove (among other things) that they were unable to obtain alternative finance either from BoS itself or from other lenders and that any offers received were unsuitable; and in paragraph 44 they claimed that the plaintiffs had caused or contributed to their own alleged loss or had failed to mitigate that loss by failing to avail themselves of offers of re-finance from BoS or other lenders. The defendants also asked for particulars of what is now paragraph 47 of the Cause, and were told (among other things) this:

> "[BoS] did make a without prejudice offer to the Plaintiff to provide alternative financing. The offer was made on a confidential basis. Without prejudice to that confidentiality the terms on which that finance was offered were materially different to those under the Facility Letter and were unacceptable. The terms of the alternative financing would have made the project unviable by reason of among other things the level of the increased interest rate of interest *(sic)* to be applied to drawn-down monies".

Finally, in paragraph 40A of the Replique, the plaintiffs said that BoS did not provide a viable finance option to allow the development to proceed.

The disclosure application

5. On 20 October 2014 the defendants issued an application for disclosure of a number of categories of documents, including the following:

> "All documents (whether sent to or from the Bank of Scotland ("BoS") or internal documentation of, or passing between the Respondents/ Third Parties, or their advisers) relating to the settlement and/or refinancing negotiations between BoS and the Respondents and/or Third Parties between 28 October 2008 and 16 December 2009".

6. The plaintiffs resisted disclosure on the grounds that the documents sought were protected from disclosure by without prejudice privilege belonging jointly to them and BoS.

The judgment below

7. The application came before the Lieutenant Bailiff, who refused it. Her extempore, but nevertheless full and careful, judgment contained the following summary of her reasons:

> "(1) The communications are prima facie privileged;
> (2) The privilege has not been waived, because there can be no unilateral waiver of that privilege by the Plaintiff on any basis;
> (3) The privilege is to be generously applied, as a matter of policy. There is no general exception to the privilege based on "common fairness" whether as a matter of general law, or specifically as regards disclosure of "without prejudice" negotiations leading to a settlement of earlier disputes with a third party, even if the quantum of this affects the measure of the plaintiffs' claim in the subject proceedings.
> (4) I am not satisfied that the Muller exception, whether based on alleged "common fairness" in the above situation, or formulated on the basis of there being some purpose other than reliance on admissions as the purpose for which the disclosure is sought, remains good general law in England; it appears to be now effectively confined to the facts of that case, (which are in any event distinguishable);
> (5) Even if the Muller exception remains good general law in England, it is not binding on me, I do not find it persuasive, I consider it unsound and I do not consider that it is or should be part of Guernsey law, and I decline to hold that it is.
> (6) In any event, I would not find the Muller exception, on either basis, applicable on the facts of this case, for the several reasons set out above."

The "Muller exception" is a reference to the decision of the English Court of Appeal in *Muller v Linsley & Mortimer* [1996] PNLR 74. Much of the argument on this appeal turned on the current status in England of that authority, which is discussed below.

Grounds of appeal

8. The defendants' grounds of appeal are as follows.

   (i) The Lieutenant Bailiff was wrong in law in finding the law of Guernsey on issues of without prejudice privilege and exceptions thereto was materially different from the common law position of England and Wales.

   (ii) The Lieutenant Bailiff was wrong in law in finding the exception to the general principal against production of without prejudice documentation set out in cases such as Muller was bad law and/or had been criticised in any relevant respect in England and Wales such that it should not be applied in Guernsey.

   (iii) The Lieutenant Bailiff was wrong in law and fact in holding that the exception did not apply to the facts and circumstances of this case.

   (iv) The Lieutenant Bailiff was wrong in law in finding that any absence of waiver by BoS was a bar to reliance by the appellants on a relevant exception to the without prejudice principle.

(v) The Lieutenant Bailiff was wrong in law and fact in holding that the interests of justice did not require the production of the documents sought.

The parties' positions

9. When he opened the appeal to us, Advocate Dunster for the appellant defendants announced that the only relief he now sought was disclosure of the terms of the offer of alternative finance made by BoS. His argument was that without knowledge of the terms of the offer the defendants would be unable at trial to challenge effectively the plaintiffs' assertion that the terms were unacceptable and would have made the project unviable. As he put it in his skeleton argument,

> "It will be highly unsatisfactory for the trial judge in these proceedings to be invited by the Plaintiffs to make a finding that the Plaintiffs' development opportunity had to be abandoned for want of viable financing in ignorance of the terms of a financing offer(s) that it is common ground was in fact made; and the Appellants will be substantially prejudiced should they be denied the opportunity to pursue effectively a mitigation defence to all or part of the £145 million claimed because the Bank's offer is held to be subject to without prejudice protection when the policy justifications underlying the without prejudice principle are here wholly absent."

10. For his part, Advocate Bell for the plaintiffs maintained that the Lieutenant Bailiff was right for the right reasons.

11. Both advocates devoted much of their written and oral arguments to analysing the basis of the without prejudice protection, *Muller* itself, and the English cases subsequent to *Muller*.

Preliminary

12. By way of preliminary, I should say that it seems to me at best uncertain whether or not the defendants need the disclosure they seek; and on the whole I think that they do not. The plaintiff's case involves two propositions: that the (assumed) failures of the defendants lost them the benefit of the finance, and that the loss of finance in turn brought about the loss of the development. On the face of it, the plaintiffs have to prove both propositions if they are to succeed in recovering the development profit. They do not plead that the defendants knew that no alternative finance would be available on any terms: in fact, they concede that there was alternative finance available, but say it was unsuitable. That concession means that they cannot say that the absence of the BoS finance necessarily meant the end of the development; and that means that they have themselves to establish the unsuitability of the alternative finance. They cannot do that without revealing the terms on which it was offered. If they choose not to do so, they will fail to make out their claim to damages representing the lost development profit. They will have failed to establish a key part of their case on causation. I therefore consider that in practice the plaintiffs will have to disclose the terms of the offer in order to pursue their own case.

13. When this was put to Advocate Bell, he accepted that the question was at least in part one of causation. However, both he and Advocate Dunster regarded the point as partially one of mitigation; and if it is properly to be regarded only as a question of mitigation there is no doubt that the burden of proof of establishing that the plaintiffs have failed to take reasonable steps to obtain substitute finance lies on the defendants. Because the point was not fully argued, I am content to consider the appeal on its merits; but even if the plaintiffs won this appeal they would in my view be taking a considerable risk if they maintained at trial their refusal to divulge the terms of the alternative BoS finance.

The without prejudice rule

14. The starting point in any discussion of the modern without prejudice protection is the decision of the House of Lords in *Rush & Tomkins Ltd v Greater London Council* [1989] 1 AC 1280. In that case, Rush & Tomkins ("R & T") had entered into a building contract with the GLC and had appointed a company ("Carey") as subcontractor for part of the works. R & T brought proceedings against the GLC and Carey claiming an enquiry as to the amount due to Carey under the subcontract, and an order that the GLC pay to R & T under the building contract the amount found due to Carey. R & T and the GLC compromised the proceedings between them on terms that the GLC paid R & T a fixed sum and R & T agreed to discharge Carey's claims. The proceedings continued against Carey. Carey considered that the without prejudice correspondence that had preceded the settlement was likely to contain an indication of the value R & T put on Carey's claim, and applied for disclosure of that correspondence. Disclosure was refused at first instance, but allowed on appeal to the Court of Appeal. The House of Lords restored the first instance decision.

15. The main Opinion was delivered by Lord Griffiths, with whom the other Law Lords agreed. At [1989] 1 AC 1299D – 1300G he said this:

> "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."
>
> The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence. A competent solicitor will always head any negotiating correspondence "without prejudice" to make clear beyond doubt that in the event of the negotiations being unsuccessful they are not to be referred to at the subsequent trial. However, the application of the rule is not dependent upon the use of the phrase "without prejudice" and if it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those negotiations will, as a general rule, not be admissible at the trial and cannot be used to establish an admission or partial admission. I cannot therefore agree with the Court of Appeal that the problem in the present case should be resolved by a linguistic approach to the meaning of the phrase "without prejudice." I believe that the question has to be looked at more broadly and resolved by balancing two different public interests namely the public interest in promoting settlements and the public interest in full discovery between parties to litigation.
>
> 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) 48 L.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".

16. Two other passages from Lord Griffiths' Opinion are relevant. The first appears at page 1301C-D of the report, where he said the following:

> "I would therefore hold that as a general rule the "without prejudice" rule renders inadmissible in any subsequent litigation connected with the same subject matter proof of any admissions made in a genuine attempt to reach a settlement."

17. The second relevant passage appears at pages 1301G - 1302 F, where Lord Griffiths discussed a case called *Stretton v Stubbs Ltd*, The Times, 28 February 1905. He said this:

> "This was an action for libel and slander arising in the following circumstances. Mr. Stretton was an artist and judgment had been obtained against him in the sum of £16 in the City of London Court by a picture frame maker. That judgment had been entered by consent pursuant to a "without prejudice" agreement with the plaintiff's solicitor that no publicity should be given to the result of the action. The defendants published the judgment in "Stubbs' Weekly Gazette" and the plaintiff alleged that their canvasser had gone round to various tradesmen pointing out the importance of subscribing to the "Gazette", directing their attention to the plaintiff's name and saying that he could not be worthy of credit. The jury returned a verdict for the plaintiff of £25. As part of his case the plaintiff had relied upon the contract between himself and the solicitor for the plaintiff in the City of London Court action that the judgment should not be made public. This contract was contained in two "without prejudice" letters. The offer was contained in a letter from the plaintiff and the acceptance in a letter from the solicitor. The judge permitted the second letter to be put in evidence and read but refused to admit the first letter which had contained admissions by the plaintiff that he was absolutely insolvent. From a reading of the report it appears that the ground upon which it was submitted to the Court of Appeal that the judge had erred in refusing to admit the first letter was that putting in the second letter as part of the "without prejudice" correspondence rendered the first letter admissible. It was also submitted that it would be wrong for the plaintiff not to be allowed to be cross-examined on his assertion that he was insolvent and
> at the same time to allow him to put himself before the jury as being quite solvent and of good credit. The Court of Appeal allowed the first letter to be read to the court.

> The report does not say why Sir Richard Henn Collins M.R. permitted it but Matthew L.J. is recorded as saying "that in his opinion a letter written with regard to an action and marked without prejudice' was only privileged for the purpose of that particular action." No citation of authority or reasoning is given in support of that opinion. *There may well have been good grounds for admitting the first letter in that action on the ground that it was a part of a correspondence*
> *which the plaintiff had chosen to put in evidence, and possibly also on the ground of establishing an independent fact, namely, the plaintiff's insolvency, which was unconnected with the merits of the dispute about the amount owed to the frame maker and was obviously of central importance to the issue of libel or slander*. I cannot however regard it as an authority of any weight for the proposition that "without prejudice" negotiations should in all circumstances be admissible at the suit of a third party" [emphasis supplied].

18. *Rush & Tomkins* was a case where the only basis for the protection from disclosure was a public policy one: the alternative basis (identified in *Cutts v Head*) is an implied contract between the parties to the correspondence, but that can have no relevance to the admissibility of the correspondence in disputes between one of the parties to the correspondence and a third party.

Muller v Linsley & Mortimer

19. The circumstances in *Muller* were as follows. The plaintiff had been a shareholder in and a director of a computer software company called Sagesoft. He was in dispute with the other shareholder and the other directors. The company's articles contained a provision obliging a person ceasing to be employed by the company to sell his shares to the other shareholders at a fair value fixed by the auditors. The plaintiff became concerned that the majority of the directors might dismiss him and so activate the provision. He consulted the defendant solicitors, who advised him to transfer his shares to his wife so that the provision of the articles could not take effect if he were dismissed. The articles obliged the directors to register a transfer if presented duly stamped; but the solicitors decided there was not enough time to have the transfer stamped before the board meeting at which the plaintiff was likely to be dismissed, so they presented an unstamped transfer with an undertaking to have it stamped. The directors rejected the transfer and dismissed the plaintiff, asserting that the obligation to sell the shares applied. Litigation ensued between the plaintiff and the other shareholder and directors; and that litigation was compromised on terms that the plaintiff received a sum by way of compensation for loss of office, a contribution to his legal costs, an amount higher than the auditors had fixed as the fair value of the shares, and an issue of new shares in the company. Those new shares became valued at £2 million when the company was subsequently floated; the plaintiff claimed that, had he retained the original shares, they would have been worth over £4 million. The plaintiff blamed the solicitor defendants for the loss of the original shares, and issued proceedings alleging that they had been negligent in submitting the unstamped transfer. The statement of claim in the proceedings against the solicitors alleged that the plaintiff had brought the earlier proceedings and compromised them in a reasonable attempt to mitigate damage. Credit was given for the money and shares received under the compromise of the original proceedings. The writ and statement of claim in the original action were annexed to the statement of claim in the proceedings against the solicitors; and the plaintiff subsequently disclosed the letter before action in the original proceedings and the final settlement agreement. Among other defences, the solicitors asserted that the conduct and settlement of the original action was not a reasonable mitigation of damage; and they sought production of the letters and other documents leading up to the settlement. They asserted that these documents were relevant in a way which did not infringe the without prejudice privilege or which fell within an exception to that privilege; and, in the alternative, they asserted that the plaintiff had waived the privilege, either by putting in issue the reasonableness of his conduct in mitigation or by partial disclosure in the form of the letter before action, pleadings and settlement agreement. The master and the judge refused to order disclosure; the Court of Appeal overturned that decision.

20. The main judgment in the Court of Appeal was given by Hoffmann LJ. He stated that the without prejudice rule had two justifications: first, the public policy of encouraging parties to negotiate and settle their disputes out of court; secondly, an implied agreement arising out of what is commonly understood to be the consequence of offering or agreeing to negotiate without prejudice. *Cutts v Head* rested solely on the second justification, *Rush & Tomkins* solely on the first (because the party against whom the privilege was claimed was not a party to the negotiations). He then said this:

> "The public policy basis of the rule is therefore to prevent anything said in without prejudice negotiations being relied upon as an admission. … 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 QB 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. … *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.
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> 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 claimant 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.* …
>
> 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*" (at pages 79A – 80D – emphasis supplied).

21. Swinton Thomas LJ agreed with Hoffmann LJ and with the judgment to be given by Leggatt LJ. He referred to Lord Griffiths' statement in *Rush & Tomkins* that it would generally place a serious fetter on negotiations if the parties knew that everything passing between them would ultimately have to be revealed, and then said this:

> "However, different considerations apply to the present case. Different considerations apply because it is the litigants who were engaged in the previous without prejudice negotiations and have themselves put their own conduct in issue. In paragraph 17 of their statement of claim, the plaintiffs allege that they have made a reasonable attempt to mitigate their damage. Accordingly, they have alleged in settling their proceedings for the sum that they accepted, they acted reasonably. It is the plaintiffs who have brought the reasonableness of their conduct in issue. As Mr Sher Q.C. rightly submitted, that allegation made by the plaintiffs would in reality not be justiciable without the court having sight of the without prejudice negotiations and correspondence. By bringing their conduct into the arena, and putting it in issue, the plaintiffs have, in my judgment, waived any privilege attached to without prejudice negotiations and correspondence" (at page 81A-C).

22. Leggatt LJ said this:

> "The plaintiffs have put directly in issue the reasonableness of that attempt to mitigate their loss which the plaintiffs say the compromise of their claim against Sagesoft constituted. As evidence of the compromise they have disclosed the letter before action and the compromise agreement itself, but not the documents by which it was arrived at.
> In my judgment the plaintiffs cannot both assert the reasonableness of the settlement and claim privilege for the documents through which it was reached. They are relevant because the plaintiffs rely not only on the fact of settlement, but also on the reasonableness of it.
> Discovery is sought not for the purpose of diminishing the protection afforded to the plaintiffs for any admissions that they may have made, but for the purpose of proving what they did. If they invoke the settlement for their own purposes, they must expect its worth to be evaluated by reference to the means by which it was achieved. There is no reason to suppose that the plaintiffs would have conducted themselves differently if they had appreciated that they might have to reveal what was written in course of settling the Sagesoft action.
> I accept Hoffmann LJ.'s thesis that for the reasons which he gives the "without prejudice"' correspondence falls outwith the scope of privilege. But even if the correspondence were privileged, I would reach the same conclusion on the ground of waiver. The waiver would relate to ail matters relevant to the issues raised by the plaintiffs in the present action; c.f. *Lillicrap v. Nalder & Son* [1993] 1 WLR 94. Were it not so, public policy might be used as a guise for concealing what happened in the earlier action and that might result in double recovery. It would be inequitable not to order discovery. In any event, partial disclosure of privileged documents is a concept as implausible as the curate's egg. I consider that production of the letter before action and of the compromise agreement impliedly waived any privilege that might exist in relation to all the other documents relating to settlement" (at pages 81C-82A).

23. In my judgment, the following propositions emerge from *Muller*:

    (1) Insofar as the without prejudice rule is based on public policy, it is directed solely to admissions and does not prevent reference to "statements which are relevant otherwise than as admissions, i.e. independently of the truth of the facts alleged to have been admitted". I shall call this "the independent relevance rationale". As applied to the facts in *Muller*, that rationale meant that the without prejudice correspondence could be relied on because "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".

(2) Reliance on the correspondence would not be contrary to the underlying public policy interest in encouraging settlements. Although that policy might be thought to be infringed because a party may be inhibited from negotiating if he knows that his communications will be open to examination in order to decide if he has acted reasonably, "this is a consequence of the rule that a party entitled to an indemnity must act reasonably to mitigate his loss. It would … be inconsistent to give the indemnifier the benefit of this rule but to deny him the material necessary to make it effective" (per Hoffmann LJ). A similar point emerges from the judgments of Swinton Thomas LJ: ("that allegation made by the plaintiffs would in reality not be justiciable without the court having sight of the without prejudice negotiations and correspondence"); and of Leggatt LJ ("were it not so, public policy might be used as a guise for concealing what happened in the earlier action and that might result in double recovery. It would be inequitable not to order discovery"). This appears to me to be an exercise in "balancing two different public interests, namely the public interest in promoting settlements and the public interest in full discovery between parties to litigation" as contemplated by Lord Griffiths in *Rush & Tomkins*. In *Muller*, the public interest in full disclosure was particularly strong, since without it the allegation that the plaintiff had acted reasonably would not be justiciable. I shall call this "the balancing rationale".

(3) A party who puts in issue against a third party the reasonableness of his own conduct in reaching a compromise will be taken to have waived the without prejudice protection attaching to the communications by which that compromise was reached. This was an alternative ground for the decision of both Swinton Thomas LJ and Leggat LJ, and is to be regarded as part of the ratio of the decision of the Court of Appeal. It reflects what was said by Lord Griffiths in *Rush & Tomkins* about *Stretton v Stubbs Ltd*: "There may well have been good grounds for admitting the first letter in that action on the ground that it was part of a correspondence which the plaintiff had chosen to put in evidence …". I shall call this "the waiver rationale".

Subsequent English decisions

24. *Muller* has been considered in a number of subsequent decisions of the English courts. It was followed by the English Court of Appeal in *Dora v Simper*, The Times, 26 May 1999; in *Murrell v Healy* [2001] 4 All ER 345; and in *Prudential Assurance Co Ltd v Prudential Insurance Co of America* [2004] ETMR 29 (in which Chadwick LJ said of *Muller* that "the relevance of the correspondence lay in the fact that it had taken place, not in the truth of any admission which it might contain").

25. In *Unilever plc v The Proctor & Gamble Co* [2000] 1 WLR 2436 the English Court of Appeal was concerned with an action based upon a threat of proceedings for infringement of a patent, the threat having been made in a without prejudice meeting. In a well-known judgment, with which the other members of the court agreed, Robert Walker LJ said the following:

> "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.

> At a meeting of that sort the discussions between the parties' representatives may contain a mixture of admissions and half-admissions against a party's interest, more or less confident assertions of a party's case, offers, counter-offers, and statements (which might be characterised as threats or as thinking aloud) about future plans and possibilities. As Simon Brown LJ put it in the course of argument, a threat of infringement proceedings may be deeply embedded in negotiations for a compromise solution. Partial disclosure of the minutes of such a meeting may be, as Leggatt LJ put it in [*Muller*], a concept as implausible as the curate's egg (which was good in parts). …
>
> Nevertheless, there are numerous occasions on which, despite the existence of without prejudice negotiations, the without prejudice rule does not prevent the admission into evidence of what one or both of the parties said or wrote. The following are among the most important instances. …
>
> (6) 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. Hoffman LJ 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."

Later in his judgment, Robert Walker LJ said this:

> "In those circumstances I consider that this Court should, in determining this appeal, give effect to the principles stated in the modern cases, especially *Cutts v Head, Rush & Tompkins Ltd v Greater London Council* and *Muller v Linsley & Mortimer*. 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] AC 1280, 1300: 'to speak freely about all the 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."

26. It is noteworthy that, in the same judgment in which (in the last of the passages I have quoted) Robert Walker LJ pointed out the practical difficulties of separating admissions from the remainder of without prejudice communications, he treated the decision in *Muller* as an instance of an occasion when the rule did not prevent the use of without prejudice material. He categorised *Muller* as a case in which the issue was one unconnected with the truth or falsity of anything (not just any admissions) stated in the negotiations. This is what I have described as the independent relevance rationale.

27. Lord Hoffmann (as he had by then become) presided in the House of Lords in *Bradford & Bingley plc v Rashid* [2006] 1 WLR 2066.The issue in that case was the admissibility of an acknowledgement of debt for the purposes of the section 29 (5) of the Limitation Act 1980 contained in correspondence in which the debtor was seeking a reduction of the debt or an extension of time for payment. The majority of the House held that the

correspondence did not attract the without prejudice protection; but Lord Hoffmann amplified what he had said in *Muller* in the following way:

> "The solution which I would therefore favour, and which I think is in accordance with principle, is that the without prejudice rule, so far as it is based upon general public policy and not upon some agreement of the parties, does not apply at all to the use of a statement as an acknowledgment for the purposes of section 29(5). That, I would infer, is what everyone thought in *Spencer v Hemmerde* [1922] 2 AC 507. It is in accordance with principle because the main purpose of the rule is to prevent the use of anything said in negotiations as evidence of anything expressly or impliedly admitted: that certain things happened, that the party concerned thought he had a weak case and so forth. But when a statement is used as an acknowledgment for the purposes of section 29(5), it is not being used as *evidence* of anything. The statement is not evidence of an acknowledgment. It *is* the acknowledgment. …
>
> The distinction between adducing a statement as evidence of something expressly or impliedly asserted in the statement and simply as evidence that the statement was made is well known in the law of evidence (see *Subramaniam v Public Prosecutor [1956] 1 WLR 965*) and was the basis upon which the Court of Appeal in *Muller v Linsley & Mortimer* [1996] PNLR 74 decided that without prejudice correspondence was admissible to prove that a party was acting reasonably in settling a claim against a third party. …
>
> After a detailed examination of the cases in *Unilever plc v The Procter & Gamble Co [2000] 1 WLR 2436*, 2446 Robert Walker LJ expressed some doubt as to whether the "large residue of communications which remain protected [as being outside the recognised exceptions to the without prejudice rule] can all be described as admissions". I would certainly accept that the without prejudice rule is capable of excluding statements which are not being used as evidence of the truth of what they expressly or impliedly admit. For example, I do not think that a litigant could be cross-examined to credit on without prejudice correspondence to show that he has made previous inconsistent statements. And I have no doubt that *Unilever*'s case was rightly decided. … But, as I pointed out in *Muller*'s case, at p 79, the thread which runs through most of the alleged exceptions to the without prejudice rule is that the statement is not being used as evidence of the truth of anything expressly or impliedly asserted or admitted."

28. Two of the other members of the House identified these views as a development of those expressed by Hoffmann LJ in *Muller* (see Lord Walker of Gestingthorpe at [40] and Lord Mance at [93]). Lord Walker and Lord Brown of Eaton-under-Heywood, and also Lord Hope of Craighead (see his sharing of their misgivings at [35]), were unable to accept Lord Hoffmann's suggestion that it was possible to distinguish between an admission and an acknowledgment of debt. As Lord Walker put it (at 42]), "an acknowledgment of a debt is in its very nature an express admission … of the existence of a debt". See also Lord Brown at [67]: "It is only as admissions that they are relevant as acknowledgments". Lord Mance took a slightly different point at [93]: "The possibility involves distinguishing between the use of Mr Rashid's admission as an acknowledgment to avoid any limitation problem and its use as an admission to prove liability on the merits at trial"; but that statement proceeds on the footing that what Mr Rashid had said was an admission, whatever use it was put to. It is therefore clear that no other member of the House was prepared to lend support to Lord Hoffmann's proposed distinction.

29. It is nevertheless noteworthy that no member of the House disputed the correctness of the decision in *Muller*. Indeed, Lord Brown dealt with *Muller* by distinguishing it, saying (at [66] and [67]):

> "If without prejudice admissions of liability are not admissible at trial as evidence of the truth, no more in my opinion can they be admitted as acknowledgements for the

purpose of setting time running afresh under the 1980 Act. I do not see the position here as analogous to that arising in *Muller v Linsley & Mortimer* where the Court of Appeal ordered disclosure to the defendants of without prejudice negotiations which had led to the settlement of an earlier action brought by the plaintiffs against other parties. The plaintiffs were asserting that their conduct in settling the earlier claim had been a reasonable attempt to mitigate their loss; the defendants denied this. Lord Hoffmann said:

> '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'.

Earlier he had said:

> 'The public policy aspect of the rule is not in my judgement 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'.

In acknowledgement cases, by contrast, the statements are sought to be adduced in evidence as admissions. Indeed, it is only as admissions that they are relevant as acknowledgements".

30. The supposed distinction between an acknowledgement and an admission again proved too fine for the House of Lords in *Ofulue v Bossert* [2009] 1 AC 990, a case involving an acknowledgement of title under section 29(2) of the Limitation Act 1980 made in the course of without prejudice negotiations. Lord Neuberger of Abbotsbury (with whom the remaining members of the House apart from Lord Scott of Foscote (who dissented) agreed), referred to the passage from Robert Walker LJ's judgment in *Unilever* stating that separating identifiable admissions from the rest of without prejudice communications would create huge practical difficulties and be contrary to the underlying objective of protecting the parties' ability to speak freely about all issues in the litigation; and then he said this (at [94-5]):

> "I turn to the argument that the offer in the letter is admissible because it is being relied on to establish that an admission was made as a matter of fact, as opposed to the truth of the admission. In other words, it is said that the offer is admissible as evidence that the Bosserts acknowledged the Ofulues' title to the property, although it would not be admissible as evidence of the fact that the Ofulues were the owners of the property. Some apparent support for this contention may be found in the judgment of Hoffmann LJ in the *Muller* case [1996] PNLR 74, 79. Having stated 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)", he then said that "the public policy aspect of the role is not … 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".
>
> 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."

31. As I have said, the other members of the House agreed with Lord Neuberger; but they all took the opportunity to add comments of their own. Lord Hope said this (at [12]):

> "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 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 live. 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".

Lord Rodger of Earlsferry said this (at [43]):

> "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. But if that is right, then there is no obvious justification for drawing a line between admissions and acknowledgements".

Finally, Lord Walker said (at [57]):

> "As a matter of principle I would not restrict the without prejudice rule unless justice clearly demands it. In England the rule has developed vigorously (more vigorously, probably, than in other common law jurisdictions and more vigorously than some overseas scholars … approved …)."

32. In *Oceanbulk Shipping and Trading SA v TMT Asia Ltd* [2011] 1 AC 662, the Supreme Court identified a further exception to the without prejudice rule, allowing negotiations evidencing the parties' common knowledge to be adduced for the purpose of construing their contract. The principal judgment was given by Lord Clarke of Stone-cum-Ebony JSC. In a passage starting at [19], he considered the legal principles relating to without prejudice communications, saying this:

> "The approach to without prejudice negotiations and their effect has undergone significant development over the years. Thus the without prejudice principle, or, as it is usually called, the without prejudice rule, initially focused on the case where the negotiations between two parties were regarded as without prejudice to the position of each of the parties in the event that the negotiations failed. The essential purpose of the original rule was that, if the negotiations failed and the dispute proceeded, neither party should be able to rely upon admissions made by the other in the course of the negotiations. The underlying rationale of the rule was that the parties would be more likely to speak frankly if nothing they said could subsequently be relied upon and that, as a result, they would be more likely to settle their dispute. … It is now well settled that the rule is not limited to such a case. This can be seen from a series of decisions in recent years, including most clearly from *Cutts v Head*, *Rush & Tompkins v Greater London Council*, *Muller*, *Unilever* and most recently *Ofulue*. … It is therefore sufficient to quote two paragraphs from the judgment of Robert Walker

> LJ [in *Unilever*] which show that the rule is not limited to admissions but now extends much more widely to the content of discussions such as occurred in this case. … The without prejudice rule is thus now very much wider than it was historically. Moreover, its importance has been judicially stressed on many occasions …".

33. It is again necessary to note that Lord Clarke cited the passage from Robert Walker LJ's judgment in *Unilever* that included *Muller* as one of the exceptions to the rule, without suggesting that *Muller* was wrongly decided.

34. In *Avonwick Holdings Ltd v Webinvest Limited* [2014] EWCA Civ 1436 the English Court of Appeal had to deal (in circumstances of some urgency: see Lewison LJ at [1]) with a dispute about the existence of a collateral term in a loan agreement, which the debtor claimed was to the effect that it was obliged to pay the creditor only when it was itself paid by a third party. Two issues arose: the first turned on whether or not correspondence was truly to be described as without prejudice, and it has no relevance to the present case. The second issue concerned the disclosure of negotiations leading to the settlement of an arbitration between the debtor and the third party. About that issue, Lewison LJ (with whom the other members of the Court agreed) said the following (at [21-2]):

> "The judge held that Mr Shlosberg [who was the moving spirit behind the debtor] had waived any privilege relating to those negotiations. I disagree. All he said in his evidence was that he told Mr Gayduk that an offer had been made and that his lawyers thought it was a good one. Even if he had purported to waive privilege it was not his to waive. The privilege is a joint privilege to which a third party is also entitled and there is no evidence that the third party has consented to waiver. If the without prejudice privilege has not been waived, on what basis is Avonwick entitled to disclosure? Mr Berry says that he is not seeking to rely on admissions made in the course of negotiations and that if he is not seeking to rely on admissions, then the decision in [*Muller*] requires disclosure.
>
> That was a case in which the plaintiff asserted that a settlement that he had made it 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*], namely that without prejudice negotiations once privileged remain privileged even after settlement. Moreover, Hoffman 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)."

The current status of Muller

35. It is in my view clear from these citations that English law has developed so that the without prejudice rule is no longer treated as being solely designed to protect a party from use against him of admissions that he has expressly or impliedly made in negotiations. Protection against such use is now merely a common instance of the application of the rule. That is partly a matter of practicality (because of the difficulty of separating admissions from other communications) and partly a matter of principle (the protection being designed to give parties free rein to say what they like in settlement negotiations without fear that their statements will be referred to subsequently). Although all the cases from *Unilever* onwards, apart from *Avonwick*, have been two-party cases, they are plainly dealing with considerations of public policy that would apply to three-party cases. In consequence, Hoffmann LJ's statement in *Muller* that "the public policy rationale is … directed solely to admissions" (a statement which he in any event modified in *Rashid*: "I would certainly accept that the without prejudice rule is capable of excluding statements

which are not being used as evidence of the truth of what they expressly or impliedly admit") is no longer good law in England.

36. Advocate Dunster contended that it was only Lord Hoffmann's extension of the admissions-based principle to acknowledgments that had attracted criticism. I do not agree. It is certainly true that the supposed distinction between admissions and acknowledgments attracted no support in either *Rashid* or *Ofulue*: and if matters had not advanced beyond the statements in *Rashid* it would be possible to conclude that it was only the equating of admissions and acknowledgments that was objectionable. It would also be possible to conclude that paragraph 95 of Lord Neuberger's speech in *Ofulue* was concerned only with the supposed distinction, despite what was said about that paragraph by the Court of Appeal in *Avonwick*. However, other statements in *Ofulue* clearly go further than this (see in particular Lord Rodger at [43], quoted in paragraph 31 above); and *Oceanbulk* is unequivocal in stating that the rule is no longer based on the protection of admissions ("the rule is not limited to admissions but now extends much more widely to the content of discussions such as occurred in this case" – per Lord Clarke at [25]). In *Best Buy Co Inc v Worldwide Sales Corpn España SL* [2011] Bus LR 1166 the English Court of Appeal said that the correctness of Hoffmann LJ's reasoning in *Muller* was open to some doubt, as demonstrated by some observations in *Rashid* and *Ofulue* (per Lord Neuberger MR at [39]); but since *Oceanbulk* that seems to me to be a considerable understatement.

37. I therefore consider that the decision in *Muller* cannot any longer be supported on the ground that reliance on the pre-settlement documents in that case was not for the purpose of establishing the truth of any admissions they might contain. But the fact remains that no English court has said that the decision in *Muller* was wrong; and in the most recent decision, *Avonwick*, the Court of Appeal clearly thought that it was right ("It is hardly surprising that in those circumstances the court ordered disclosure"). The question then arises as to the basis on which the decision may be supported. One suggestion, made in *Thanki, The Law of Privilege* (2nd ed, 2011) at paragraphs 7.22 and 7.36, is that *Muller* is best analysed as a stand-alone exception to the without prejudice rule applying to permit examination of without prejudice material for the purpose of considering whether a party has acted reasonably to mitigate his loss. In my view, that does not do justice to the way in which the case has been treated in the subsequent English authorities. Starting with *Unilever*, the English courts have treated *Muller* as a case where the issue to be determined was one unconnected with the truth or falsity of anything stated in the negotiations. I have already remarked, in paragraph 26 above, that this formulation refers to anything stated in the negotiations, not just to admissions made in them. If an issue arises in relation to which the truth or falsity of anything said in prior negotiations is simply irrelevant, it seems to me that the public policy protecting without prejudice communications is not endangered, however widely that policy may be expressed. Thus, in a case where the issue is the reasonableness of acts taken in mitigation, the question is whether a reasonable person in the circumstances as they presented themselves would have acted as the mitigating party in fact did: the truth or otherwise of what that party said to or was told by any other person is simply irrelevant to the question whether or not he acted reasonably. It will, of course, be necessary to keep clearly in mind the issue to which the without prejudice communications are relevant, so as to avoid the possibility that they may come to be used for some other issue where the truth or falsity of statements made in them is relevant; and it may also be that there will be problems, similar to those identified in *Unilever*, in separating communications relevant to reasonableness from other communications. These, however, seem to me to be problems inherent in treating *Muller* as correct on any basis. Accordingly, I consider that the decision in *Muller* can be supported on the basis of the independent relevance rationale.

38. I also consider that it can be supported on the balancing rationale. As Lord Neuberger MR pointed out in *Best Buy* ([2011] Bus LR 1166 at [44]), given that the without prejudice rule is based on public policy, it has to yield on occasions to another rule or principle which may apply. This is an echo of what Lord Griffiths said in *Rush & Tomkins* about

balancing the public interest in promoting settlements with the public interest in full disclosure in litigation. As I have pointed out in paragraph 23(2) above, the public interest in full disclosure is particularly strong if an issue is incapable of resolution without it. In the present case, it will be impossible to resolve the question of the plaintiff's reasonableness in refusing the offer of alternative finance without knowing what that offer was. The policy underlying the protection of without prejudice communications must in such circumstances give way to the policy of the law that avoidable loss cannot be recovered. As Hoffmann LJ put it in *Muller*, "it would … be inconsistent to give the indemnifier the benefit of this rule but to deny him the material necessary to make it effective".

39. The third basis on which *Muller* proceeded was the waiver rationale. Despite the apparent inclusion of this topic in his grounds of appeal, Advocate Dunster did not suggest that the decision could be supported on this basis, accepting that the protection for without prejudice communications was a joint protection which could not be waived unilaterally. In taking this line, he had the authority of the English Court of Appeal in *Avonwick* behind him; and it is certainly the case that one party to negotiations cannot use without prejudice communications against the other party without the latter's consent. It does not seem to me, however, that the waiver rationale is necessarily wrong. It does, after all, have the support not only of the Court of Appeal in *Muller* but also of the comments of Lord Griffiths in *Rush & Tompkins*. It might be thought surprising that the judges in the House of Lords and in the Court of Appeal had overlooked a fundamental reason why waiver could not provide an answer. 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; but the application of that rationale in the present case is doubtful, since it is not obvious that it was the plaintiffs that put the question of reasonableness in issue so as to waive the without prejudice protection.

The position in Guernsey

40. As the Lieutenant Bailiff rightly said, she was not bound by the English decisions. However, her conclusion that she should not apply *Muller* was founded on her view that the basis of the decision was unclear and in conflict both with the public policy underlying the without prejudice protection and with subsequent decisions of the English courts. For the reasons I have given, I consider that the decision in *Muller* is sustainable on two if not three bases, and I do not agree with the Lieutenant Bailiff's reservations about it. She did not suggest that the public policy considerations were different in Guernsey from those existing in England; and indeed there can be no basis for suggesting that the public interest in promoting settlements (and in proper disclosure between litigants) is different or weaker in this jurisdiction than in England. But in the absence both of any Guernsey authority on the point and of any material difference in the underlying public policy, the Lieutenant Bailiff should in my judgment in principle have followed the well-developed English jurisprudence on the topic.

Is Muller distinguishable?

41. In the final subparagraph of her summary, the Lieutenant Bailiff said that she would not in any event have regarded *Muller* as applicable to the facts of the present case. Her reasons appear in the body of the judgment, and may be summarised as follows.

    (1) There was a significant overlap between the issues in the index proceedings and the issues in the proceedings in which the "without prejudice" communications were made. Issues to be debated in the present case would include whether BoS was in fact entitled to call in the loan or to rely on the default provisions in the facility letter, and those were exactly the issues that arose in the earlier proceedings. The central issues in both cases overlapped and were related to such a degree that there could be no possibility of separating them out, as the *Muller* principle required (paragraphs 15 and 28). The Lieutenant Bailiff expressed her conclusion on this aspect as follows (at paragraph 44):

        > "I am impressed, as I have said, by the fact that, here, issues in the cases themselves are virtually the same, and certainly very closely related, and also that in fact what is being sought is more evidence of what was said in the negotiations in relation to offers and such like, rather than (it appears) broader allegations about the reasonableness of the settlement although I am not to be taken to be saying my decision would be different if the application had been solely based on evidence going to the reasonableness of the settlement".

    (2) "In *Muller* the plaintiffs sought the defendants' advice, took the initial proceedings to vindicate that advice, but then compromised them and subsequently claimed a large sum on the basis that the advice had been negligently defective. It is scarcely surprising, therefore, that the degree to which they had reasonably abandoned reliance on that advice should be seen as highly material to their claim. Here, however, the initial proceedings were not brought on the basis of voluntary reliance on the defendants' acts, but to try to salvage a loss situation in which the plaintiffs found themselves involuntarily": paragraph 37.

    (3) Although the present proceedings were separate from the earlier proceedings, it would theoretically have been possible for them to be combined. That meant that the situation had more in common with *Rush & Tomkins*, where there was only one set of proceedings (paragraph 41). The significance of the comparison with *Rush & Tomkins* is no doubt that in that case disclosure was refused.

42. It does not seem to me that any of these is a valid reason to distinguish *Muller*. The fact that there is an overlap of issues is irrelevant. The basic allegation made by the plaintiffs is that it was reasonable to settle on the terms in fact achieved, whereas the defendants' assertion is that a person acting reasonably would have accepted the offer of alternative finance. As the Lieutenant Bailiff recognised in her judgment (paragraphs 20 and 36), the question of reasonableness is an objective one. It is only for elucidation of that question that reference to without prejudice communications would be permissible. In fact, all the defendants wish to see now is the terms of the alternative finance offered – although this may of course involve disclosure of more than one document. Reference to the communications would not be permissible on the question of whether BoS was entitled to withdraw finance, or indeed on any other point involving an assessment of the truth or falsity of what was said in them. That is the point of difference from *Rush & Tomkins* (ground of distinction (3)). In that case, the purpose for which Carey wanted disclosure was so that it could assert that the valuation put by R&T on Carey's claim in the negotiations with the GLC was accurate: it wanted to hold R&T to the truth of what it had said in the negotiations. By contrast, in *Muller* the reasonableness of the mitigation fell to be judged regardless of the truth or falsity of anything said in the course of the negotiations. As to the Lieutenant Bailiff's second ground, I do not see that the

difference in circumstances that she identifies has any relevance. In each case the question is as to the reasonableness of the settlement; and, while the circumstances in which the settled proceedings arose may have an impact on how the question of reasonableness is resolved, they are irrelevant to the question of what material is legitimately available for the resolution of the issue of reasonableness.

Conclusion

43. At various stages in her judgment, the Lieutenant Bailiff referred to the strength and width of the protection given to without prejudice communications. She was entirely justified in doing so. However, the protection, strong and wide as it is, admits of exceptions. One of the established exceptions is that set out in *Muller* and recognised as such in *Unilever* and subsequent cases. Despite the rejection of the narrow admission-based ground of the decision in *Muller*, it continues to constitute an exception to the protection in the terms identified in *Unilever*, namely where the issue to be resolved is unconnected with the truth or falsity of anything stated in the negotiations. It may be that its only application is when the issue is of the reasonableness or otherwise of steps taken in mitigation; but in relation to that issue there is a strong practical justification for the exception, since without at least some disclosure of the negotiations it will be impossible for a court to determine the issue. In the present case, there is in my judgment no reason as a matter of Guernsey law why the exception should not apply, and no reason as a matter of fact why it should not apply in the circumstances of this case. It may be that the Lieutenant Bailiff's attitude to the disclosure application was adversely influenced by the breadth of the disclosure originally sought, which effectively demanded sight of the entirety of the negotiations. Be that as it may, however, and although we are dealing with a discretionary decision of the Lieutenant Bailiff, it seems to me that she exercised her discretion on a wrong principle and produced an answer that was clearly wrong.

44. Accordingly, I would allow the appeal and direct that the plaintiffs disclose all such documents in their possession or power as evidence the terms of alternative offers of finance made by BoS in the course of negotiations towards settlement of the original proceedings. The plaintiffs will, of course, be entitled to raise if appropriate other objections to disclosure, such as that certain of the documents are the subject of legal professional privilege.

CALVERT-SMITH JA:

45. I agree.

ANDERSON JA:

46. I agree.

