NEW SQUARE

“Without prejudice” communications

When can they be used with prejudice?

PATRICK LAWRENCE QC
4 New Square

The presumption: under wraps

"I have no doubt that busy practitioners are acting prudently in making the general working assumption that the rule, if not "*sacred*", has a wide and compelling effect"

Unilever plc v Proctor & Gamble [2000] 1 WLR 2436

The dual foundation

Unilever, again:

Partly public policy (compromise is good; compromises have to be negotiated; negotiations won't work if the parties think that any concession might be used against them if the dispute continues)

And partly the agreement of the parties

Some well-established exceptions

- Has a compromise agreement been made?
- The construction of any such agreement (*Oceanbulk* [2011] 1 AC 662)
- The setting aside of such an agreement for fraud/misrepresention
- Estoppel
- Impropriety
- WPSATC

A possible exception

What if the WP communication is relied on not to show that a party has admitted something, or said something that is in some way damaging to a case being advanced; but for “an independent fact”?

Some authority to the effect that the communication can be admitted to prove some matter entirely extraneous to the subject matter of the negotiation.

But of uncertain weight.

The pragmatic reason for not indulging in fine distinctions

Thomisticating is **not** encouraged

"Parties cannot speak freely at a WP meeting if they must constantly monitor every sentence …."

Unilever

"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."

Olofue v Bossert [2009] 1 AC 990

Oceanbulk v TMT [2011] 1 AC 662; #30.

The retreat from *Muller*

Unilever and *Olufue* sound the retreat from *Muller v Linsley & Mortimer* [1996] 1 PNLR 74

Muller has not been overruled, in the sense that no court has held it to be wrongly decided. However, much of the reasoning has been disapproved. What is *Muller* to be taken to have decided, in the light of the subsequent case law? That is the question at the heart of this particular pocket of the law of evidence.

Muller

- Claimant a shareholder, who sued other shareholders in connection with his dismissal as director
- That action was settled.
- He then sued his solicitor for failing to protect his interests *qua* shareholder
- He asserted that his settlement of the action represented reasonable mitigation of his loss
- The solicitors disputed that
- The court held that WP negotiations leading to the settlement were discloseable

On what grounds?

- 3 judgments
- Hoffmann LJ held that the purpose of the WP rule was to protect the parties to WP negotiations from their WP statements being used as admissions
- It followed that it was permissible to adduce WP communications for some other purpose, so long as this principle was not contravened
- This was a radical reconstruction of the rule
- It has not survived, and is clearly no longer good law: see *Unilever, Olufue* and other cases

Waiver?

- The judgments speak of waiver.
- The claimant had raised – or "***put in issue***" – the reasonableness of the negotiations
- The term "waiver" was loosely deployed. WP privilege is founded on a bilateral agreement, and it is not open (for obvious reasons) for one party to "waive" the privilege
- So: what does "waiver" mean in this context?
- Recent case law sheds some light

EMW Law v Halborg [2017] EWHC 1014

- Halborg, a solicitor, used EMW (another solicitor) as an agent in litigation brought by the Halborg family against a third party
- The claim was settled, and a costs assessment followed
- EMW sought its costs; Halborg pleaded that in negotiations with the paying party, no value had been "*ascribed to EMW's work*"
- EMW sought disclosure of WP negotiations in relation to the costs assessment, and relied on *Muller*

Muller (lite) applied

- The judge, Newey J., held that the negotiations were discloseable
- He noted, correctly, that the "admissions only" theory, the first limb of Hoffmann's judgment, was not sound
- Further, that *Muller* was not a case of waiver
- But: there must be an exception that encompasses the fact of the *Muller* case
- So that exception must be hunted down, and defined

Ratio?

A party to WP communications should be aware that …

"Communications otherwise protected by the WP rule may become discloseable and admissible because the other party unilaterally chooses, for reasons of his own, to put forward a case about negotiations in litigation with a third party."

What of the ‘innocent’ party who may wish to keep the negotiations under wraps?

- This point is sometimes disregarded
- Newey J. observed that the court could in due course make an order (redaction, in camera, etc) to protect the interests of the other party to the negotiations

Single Buoy Moorings v Aspen Insurance [2018] 1763

Sounds a note of caution:

Only “principled and incremental extensions of existing exceptions can be allowed”

There is no principle enabling the court to relax the application of the rule because it appears just and equitable to do so (or because it is curious about what might lie beneath the surface)

Briggs v Clay [2019] EWHC 102

- A case on singular facts
- The claimants were trustees of a pension scheme, whose liabilities had been increased as a result of a failure to make valid amendments, which was attributable to the negligence of the scheme's advisers, Aon
- The relevant issues were resolved by a compromise between the trustees and the members, and the trustees then sued Aon
- Aon alleged that the compromise had been overly generous to the members, as a result of negligence on the part of the lawyers ("the lawyer-defendants") who had been acting for the trustees
- The trustees then also sued the lawyer-defendants in the alternative

The relevant WP negotiations

Fell into 2 parts:

- Negotiations between the trustees and the members: these were admissible in the usual way, privilege being waived by the making of the claim
- Negotiations between the trustees (acting by their then lawyers) and Aon

So it was a tangled web

The lawyer-defendants' position

The lawyer-defendants had some reason to be aggrieved by Aon's case that a 'big point' had been overlooked in the litigation involving the members, because Aon had (as a potentially liable party) been kept informed as to the formulation of issues, and had at no time suggested that the said 'big point' had been overlooked (or, at least, that is the inference for which the LDs contended).

Accordingly, the LDs were anxious to place before the court the WP negotiations with Aon.

The judgment of Fancourt J.

Is a tour de force, and if anyone has a pressing Tier 1 social commitment which tears them away from this presentation, then they should honour that commitment and read the judgment instead.

The judge found that the case did not fall within the *Muller* exception or any extension thereto

Analysis

- The LDs' attempt to invoke *Muller* was bold, because the instant litigation was concerned with the subject of the WP negotiations; unlike *Halborg* or *Muller* itself which involved 'collateral' litigation
- The LDs had put in issue the reasonableness of the settlement between trustees and members; the competence of the LDs; and the causal effect of the alleged negligence of the LDs
- It could be said that the WP negotiations were relevant to these issues; but it could not be said that Aon had deployed those negotiations in support of its case
- Aon's pleaded case said nothing about the negotiations at all

The test: deployment and non-justiciability

In the end, the judge did not find it difficult to conclude that the WP rule was engaged, and no relevant exception applied.

The LDs sought to make something of the fact that the WP privilege arose out of an agreement between Aon and the trustees to which they were not a party, but the judge had no time for that point.The LDs had conducted the negotiations as agent for the trustees, and were within the scope of the rule.

So: what is left of *Muller/Halborg*? A party who deploys (or puts in issue) WP communications may find that court treats them as admissible, where an issue raised by that party is "non-justiciable" if reference cannot be made to the content of the negotiations.

Meaning of non-justiciability?

That is a good question

Referring to the fact that there have been WP negotiations

Aon's victory had a Pyrrhic flavour.

The judge held that the parties could refer to the fact that WP negotiations had occurred. This is orthodox; in cases where delay and other procedural defaults are concerned, it is always permissible to refer to the fact that there have been WP negotiations. It is routine to refer to the fact the mediation has, or has not, taken place.

The inference that Aon had not spotted the 'big point' might, then, have been drawn at trial, had a trial taken place.

Willers v Joyce [2019] EWHC 937

Does not develop the law, but is a striking illustration of the dangers of 'opening up' WP material by relying on it in subsequent correspondence which is not marked WP.

On the facts of the case, the judge held that the privilege had been waived (or, if one prefers, the parties had impliedly agreed that the exclusionary rule of evidence was disapplied.

NEW SQUARE

4 NEW SQUARE LINCOLN'S INN
LONDON WC2A 3RJ

WWW.4NEWSQUARE.COM

T: +44 20 7822 2000
DX: LDE 1041
E: CLERKS@4NEWSQUARE.COM