Neutral Citation Number: [2016] EWCA Civ 4

Case No: B2/2014/1263

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE CENTRAL LONDON COUNTY COURT
HER HONOUR JUDGE BAUCHER
Case Number: 2KT00092

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/01/2016

Before :

LORD JUSTICE BEATSON
and
LORD JUSTICE VOS

- -

Between :

(1) SANG KOOK SUH	**Claimants**
(2) MI JUNG SUH	
- and -	
MACE (UK) LIMITED	**Defendant**

- -

Ms Bo-Eun Jung (instructed under the Bar Public Access Scheme) for the first Appellant tenant, Mr Suh

Mr Richard Samuel (instructed by Goodge Law) for the second Appellant tenant, Mrs Suh

Mr Jonathan Wills (instructed by Wellers Hedleys) for the Respondent landlord, Mace (UK) Limited

Hearing date: 15th December 2015

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Approved Judgment

Lord Justice Vos:

Introduction

1. This appeal raises questions concerning the applicability of the "without prejudice" privilege to certain discussions that took place between one of two claimant tenants and the landlord's solicitor.

2. The tenants were a recently estranged couple, Mr Sang Kook Suh ("Mr Suh") and Mrs Mi Jung Suh ("Mrs Suh"), who had held a 20-year business lease dated 7th May 1999 (the "lease") of restaurant premises at 1st Floor, 41 High Street, New Malden, Surrey (the "premises"). The tenants operated the premises as a Yoshi Sushi Japanese restaurant until 14th August 2010, when their landlord, Mace (UK) Limited ("Mace" or the "landlord"), re-entered the premises, changed the locks and purported to forfeit the lease. The director and company secretary respectively of the landlord were a Mr and Mrs Tong. On 27th January 2012, Mr and Mrs Suh issued proceedings against Mace in the Kingston-Upon-Thames County Court claiming, ultimately, damages arising out of the landlord's alleged wrongful forfeiture of the lease.

3. The events which give rise to this appeal occurred in two meetings between Mrs Suh, on the one hand, and Mace's solicitor, a Ms Kate Jackson ("Ms Jackson") on the other hand. The meetings took place in Ms Jackson's office on 6th and 27th January 2014 (the "interviews"), and it was alleged, in broad outline, that Mrs Suh admitted that there had indeed been rent arrears when the landlord re-entered the premises. It is important to note that the most relevant admissions were made at an early stage in the first interview. The landlord later sought to admit Ms Jackson's witness statement dated 10th February 2014 exhibiting her two attendance notes of the meetings ("Ms Jackson's statement") at the 3-day trial, which had been fixed for 17th March 2014 before Her Honour Judge Baucher.

4. The judge decided the question of the admissibility of Ms Jackson's statement and Mrs Suh's statement in response dated 20th February 2014 ("Mrs Suh's statement") at the start of the trial. She recorded that the claimants contended that the source of Ms Jackson's statement and the fact that it contained without prejudice matters meant that privilege attached, which had not been waived. The tenants said that neither Ms Jackson's statement nor Mrs Suh's statement should go before the court for the purposes of the trial.

5. The judge's reasoning on 17th March 2014 was encapsulated in the following passage:-

> "I have seen the statements in relation to this matter and what is evident to me is that, looking at the statements of Miss Jackson and taking into account all the matters which are raised in the statement of Mrs Suh, I am satisfied that this was not a without prejudice meeting. It was not for the purpose of a genuine attempt to compromise a dispute between the parties. It follows, therefore, that privilege does not attach and, therefore, there can be no question of any waiver".

6. The judge then also declined to use her case management powers to exclude the statements. She went on to decide the substantive case giving judgment on 26th

March 2014. She heard extensive evidence about the interviews and the events surrounding them. Her relevant findings about the evidence she heard are summarised at paragraphs 47-50 as follows:-

> "47. I find that Mrs Suh did go to Miss Jackson, the defendant's solicitor, to find out what was happening in the case. I have no doubt that her retraction statement, because that is effectively what it is … was given to assist her husband's case because, effectively, for the reasons she gave, as Mrs Tong and Mr Tong set in their statements, she is scared of her husband and his authority. In my view that was self-evident from her evidence in the witness box.
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> 48. I reject out of hand her description of what occurred at the defendants' solicitor's office and, in particular, her denial that she accepted that there were rent arrears at the time of forfeiture. I find she lied. She did tell Miss Jackson there were rent arrears.
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> 49. Miss Jackson was an impressive witness and was placed in an invidious position when [Mrs Suh] approached her as [Mrs Suh] was a litigant in person. Miss Jackson even went so far as to seek the assistance of the court pre-trial, but unfortunately, given the closeness to this hearing date, it was impossible for the matter to be determined … before then. However, even if it had been determined at that stage, the matter would still have had to have been tested in the court given, effectively, the retraction statement from Mrs Suh.
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> 50. Miss Jackson has also had a difficult time with her own clients. Whilst I have accepted there were rent arrears at the time of forfeiture given my findings above, I have to say that I was also unimpressed by the evidence of Mr Tong. I accept he sent the letters to which I have made reference, but I also believe he has tampered with documents, namely, amended figures, failed to produce originals and he has even blamed his own solicitor, who sits next to him for the lack of disclosure …"

7. The judge then made findings about whether or not the 8 disputed payments had been made to the landlord, which led to her order that the claim should be dismissed and that there should be judgment for the landlord on the counterclaim in respect of outstanding rent of £5,871.35 plus interest of £627.71. The tenants were ordered to pay all the costs except those of the final day, reflecting the judge's concern about the landlord's disclosure.

8. Against this background, Lewison LJ granted the tenants permission to appeal. He did so on one ground only namely that the judge's decision was "unjust because of a serious procedural or other irregularity … in that … the [judge] erred in ruling that alleged 'admissions' by [Mrs Suh], which were detailed in [Ms Jackson's statement] were not protected by the without prejudice privilege and were therefore admissible in the trial".

9. The Landlord raises three arguments in answer to the appeal: (a) the interviews were not without prejudice because their purpose was not to negotiate a settlement of the proceedings, (b) even if the interviews were *prima facie* without prejudice, the cloak

of privilege should be denied to the tenants because they are using it for perjury or unambiguous impropriety, and (c) any such privilege was waived by three events. Those events were (i) the promulgation of Mrs Suh's witness statement, (ii) the tenants' application notice dated 3rd March 2014 to cancel the special hearing fixed to decide admissibility and to consolidate the issues at the trial, and (iii) the tenant's direct access counsel's email to Ms Jackson dated 10th February 2014 saying that it was neither necessary nor appropriate to list the matter for a case management hearing "as the issue at hand goes to credibility which is a matter ultimately for the trial judge to decide upon hearing evidence".

The circumstances in which Mrs Suh came to attend the interviews

10. The key factual material for the purposes of determining whether the interviews were properly to be regarded as privileged occasions relates to the purpose, rather than the contents, of the meetings. That material can be summarised quite briefly.

11. On 2nd January 2014, Mrs Suh called Ms Jackson. They had not spoken before. Ms Jackson's statement describes that call and the start of the meeting on 6th January 2014 at paragraphs 4-8:-

> "4. Mrs Suh requested a meeting with me at my office. As Mrs Suh has no legal representation and is therefore acting as a litigant in person I believed I was able to meet with her and so a meeting was arranged for 4pm on Monday 6 January 2014.
>
> 5. Our telephone conversation was brief and Mrs Suh did not explain why she wanted to meet with me. The only point discussed was whether Mrs Suh was able to bring a friend with her to assist with her English and to translate if necessary. I confirmed my agreement as I thought this would be helpful.
>
> 6. As I was not sure of the nature or purpose of the meeting I took my bundles of papers into the meeting with me in order that I had any documents Mrs Suh may want to refer to to hand. I was also accompanied by my colleague Vicki Andrews to ensure a good note was taken of the meeting.
>
> 7. The first question I asked Mrs Suh was what the purpose of the meeting was. Mrs Suh explained that she wanted to know what was happening with the case and how it was progressing.
>
> 8. I was surprised by this question given that I had been served with a witness statement purportedly signed by Mrs Suh on or about 18 December 2013 …"

12. In the meeting that followed, Ms Jackson took Mrs Suh through a number of witness statements, application notices and amended pleadings and noted down Mrs Suh's admissions as to the existence of arrears of rent and the fact that she had not personally signed certain court documents. Paragraph 18 of Ms Jackson's witness statement recorded that "Mrs Suh went on to explain to me that she no longer wanted any part in these proceedings. I explained to Mrs Suh that she could withdraw from the proceedings but that she would be liable for the Defendant's costs if she did so. However, I indicated that the Defendant may be prepared to negotiate regarding the

costs liability given that Mrs Suh did not appear to have much, if any, knowledge of the state of the proceedings". Mrs Suh left the meeting saying she would speak to Mr Suh and revert to Ms Jackson. Ms Jackson's file note of the meeting does not add much to these passages, save that it shows that Ms Jackson embarked on her questioning of Mrs Suh immediately Mrs Suh had described the purpose of the meeting as "would like to know about the case and progress of case", and that the first time that Mrs Suh initiated any question of her own was when her friend said "How does she get out of this matter?" That question prompted an immediate discussion about negotiation, and the possibility that Mace would be reasonable and let Mrs Suh out of the claim without payment of all the costs, if she made a statement containing, in effect, the admissions she had made in the meeting.

13. On 10th January 2014, Ms Jackson wrote to Mrs Suh saying that the landlord had "indicated that they would support an application by you to the Court to be removed from the legal proceedings with there being no order as to costs, if such an application were to be supported by the evidence you disclosed to me" … "in light of which it seems impossible for you to maintain the claim for wrongful forfeiture".

14. On 24th January 2014, Ms Jackson wrote again to Mr Suh referring to a further telephone conversation arranging the second interview, and saying "if it remains the case that you no longer wish to pursue the claim against the [landlord] and remove yourself from the litigation I am able to discuss the possible ways forward having taken instructions from my client". On the same day, Ms Jackson sent Mr Suh her attendance note of the first interview inviting him to discontinue the claim on the basis of his wife's admissions.

15. Ms Jackson's file note of the second interview on 27th January 2014 recorded that "Mrs Suh had not taken any steps to speak to her ex-husband since we met on 6 January 2014 but it remains her intention to exit the litigation. She is scared that it will impact on her ex-husband's case if she withdraws", and "Mrs Suh suggested she had met with me under false pretences because Mrs Tong said I could help …"

16. Mrs Suh's statement was a detailed document running to 43 paragraphs. She explained how she had been told by the steward of her church that she had been told by her very close friend that worked for Mace that the tenants "would lose the case with 100 percent certainty". The steward made a number of follow-up calls to Mrs Suh and gave her the landlord's solicitor's contact details suggesting that Mrs Suh should meet her. Mrs Suh's statement then said this about the purpose of the visit:-

> "7. I went to Ms Jackson because I was advised that I should speak to her to find out about the case whether it was true that we were going to lose for certain. I did not think that it would affect my case just to speak to the other solicitor. Also the Steward kept telling me that [Ms Jackson] could help me so thought that was the case. I just wanted information.
>
> 8. When I met [Ms Jackson], she asked me what the purpose of my visit was. I told her that I wanted to know the present situation of the proceedings and whether it was true that there was 100% certainty that I would lose …"

17. Mrs Suh's statement then dealt in detail with the contents of the interviews, a call she made to Mrs Tong between the interviews, and her meeting with Mr Suh and their counsel on 10th February 2014. She denied having made admissions to Ms Jackson, but, as appears above, the judge rejected those denials.

When are discussions held to be covered by the "without prejudice" privilege?

18. In the result, there is little, if any, dispute between the parties as to the law on this central issue. Where the parties diverge is on the application of the law to the facts of this case.

19. The classic statement of the law was contained in Lord Griffiths' speech (with whom the rest of the Committee agreed) in *Rush & Tomkins v. GLC* [1989] 1 AC 1280 at pages 1299-1300 as follows:-

> "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 … 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".

20. It is common ground that this requires the court to consider the circumstances of the communications from an objective standpoint, despite some early authorities to the contrary (see Phipson on Evidence 18th edition, 2013, at paragraph 24-13(d) and Bodey J in *BE v. DE* [2014] EWHC 2318 (Fam) at paragraphs 20-22). Bodey J added an important qualification at paragraph 24 of his judgment in *BE v. DE* to the effect that "[i]t must be necessary … that both parties realised or must or should have realised [that the parties were seeking to compromise the dispute], not just the person now praying in aid the without prejudice protection".

Was the judge right to say that the first interview was not "without prejudice"?

21. The judge reached the conclusion that the first interview was not privileged without hearing any evidence. She read the two witness statements and heard oral argument. Since the test is an objective one, it seems to me that the Court of Appeal is in as good a position as the judge to determine the matter.

22. In my judgment, the true question is whether the discussions were or ought to have been seen by both parties as "negotiations genuinely aimed at settlement" within the principles stated above. The judge plainly took a narrow view of the kind of discussions that might be properly so regarded. In my judgment, a broader view is now authoritatively required. As Lord Neuberger (with whom Lords Hope, Rodger and Walker agreed) said at paragraph 89 in *Ofulue v. Bossert* [2009] 1 AC 990:-

> "… it is worth quoting a passage from Robert Walker LJ's invaluable judgment in *Unilever plc v The Procter & Gamble Co* … [2000] 1 WLR 2436, which, in my opinion, makes a point which should always be borne in mind by any judge considering a contention that a statement made in without prejudice negotiations should be exempted from the rule. After considering a number of authorities, Robert Walker LJ said (… [2000] 1 WLR 2436 at 2448-2449) that the cases which he had been considering-
>
> > '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 ... "to speak freely about all issues in the litigation ..." Parties cannot speak freely at a without prejudice meeting if they must constantly monitor every sentence, with lawyers ... sitting at their shoulders as minders.'
>
> This approach is entirely consistent with the approach of your Lordships' House in *Rush & Tomkins Ltd v Greater London Council* … [1989] AC 1280, and with that of the courts in the nineteenth century, mentioned by [Lord Walker in paragraph 57 of his opinion]".

23. Mr Jonathan Wills, counsel for the landlord, argued that Ms Jackson behaved fairly in the first interview. It was natural, he submitted, for Ms Jackson to ask Mrs Suh about the amended Particulars of Claim purportedly signed by Mrs Suh, which Ms Jackson had only just received. There was, he submitted, no negotiation at the time the admissions were made, even if those negotiations began when Mrs Suh asked how she could get out of the proceedings.

24. Where litigants in person are concerned, it may sometimes, as in this case, be more difficult to determine objectively whether the discussions in question were negotiations genuinely aimed at settlement. But I am influenced here by asking what else could it be said the discussions were about? Mrs Suh told Ms Jackson that she wanted to know what was happening with the case and how it was progressing, but Ms Jackson proceeded immediately to ask her a number of pointed questions. Mrs Suh had not gone along to see Ms Jackson to answer her questions. Mrs Suh's first unprompted comment was to say that "she no longer wanted any part in these proceedings". I cannot help but think that that must have been obvious to any outside observer from the beginning. Mrs Suh was not there to obtain legal advice. Ms Jackson was at pains to point out repeatedly that she could not provide any. The discussions must be regarded objectively and in the round. The only sensible purpose for such a meeting must have been to seek some kind of solution to the litigation for

Mrs Suh. That is what a settlement is, and what both parties here must objectively be regarded as having genuinely been seeking. There is no justification for salami slicing the interviews into parts that were open and parts that were without prejudice. Such an approach would contravene the broad view required by the authorities which I have described.

25. In these circumstances, in my judgment, the entirety of the discussions at the first interview, and thereafter in correspondence and at the second interview are properly to be regarded as protected by without prejudice privilege. They were, therefore, *prima facie* at least, inadmissible in evidence, as was Ms Jackson's account of the discussions in her statement.

Has the privileged occasion been abused by Mrs Suh?

26. The landlord relies on Robert Walker LJ's description of the "abuse" exception in *Unilever Plc. v The Procter & Gamble Co. supra* at page 2444F-H, where he said:-

> "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.
> ...
> (4) Apart from any concluded contract or estoppel, one party may be allowed to give evidence of what the other said or wrote in without prejudice negotiations if the exclusion of the evidence would act as a cloak for perjury, blackmail or other "unambiguous impropriety" (the expression used by Hoffmann LJ in *Forster v Friedland*, 10 November 1992, CAT 1052). Examples (helpfully collected in Foskett's Law & Practice of Compromise, 4th ed, para 9–32) are two first-instances decisions, *Finch v Wilson* (8 May 1987) and *Hawick Jersey International v Caplan* (The Times 11 March 1988). But this court has, in *Forster v Friedland* and *Fazil-Alizadeh v Nikbin*, 1993 CAT 205, warned that the exception should be applied only in the clearest cases of abuse of a privileged occasion".

27. The abuse relied upon by the landlord includes the "clear admissions at the meeting that Mrs Suh had not signed numerous pleadings and witness statements which ostensibly bore her signature". She was, it is said, using the cloak of "without prejudice" discussions for what the judge found to be lies contained in her own (Mrs Suh's) statement.

28. I cannot accept this submission. I do not think there is any evidence to suppose that Mrs Suh even knew what the term "without prejudice" meant, let alone that she was calculating the use of it to tell lies. Mrs Suh was, on any analysis, an innocent abroad in litigation terms.

29. Even more importantly in this regard, however, Mrs Suh did nothing even arguably dishonest in the course of the privileged discussions. It is the landlord's case that she told the truth. This was not the kind of case, like those mentioned by Hoffmann LJ in *Forster v. Friedland supra*, where the person seeking protection for the discussions was threatening the other party, in the course of a conversation for which privilege is

claimed, that he would give perjured evidence or blackmail the other party unless he agreed to the proposed settlement. What is alleged here is that Mrs Suh later denied the admissions she had allegedly made. That is not an attempt to use the exclusion of the evidence as a cloak for perjury, blackmail or other unambiguous impropriety.

30. Whether or not the judge was justified in saying that she had lied in denying her earlier admissions, that does not affect the fact that this was not a clear case of an abuse of a privileged occasion.

Did Mrs Suh waive the privilege?

31. The landlord relies in this regard on the three documents that I have already described: the tenants' counsel's email dated 10th February 2014 saying that no case management hearing was needed as it was a credibility issue for the trial judge, the promulgation of Mrs Suh's witness statement dated 20th February 2014, and the tenants' application notice dated 3rd March 2014 to cancel the hearing to decide admissibility.

32. These three documents need, in my judgment, to be seen in the light of 4 other documents: first, Ms Jackson's letters to Mr Suh and separately to Mrs Suh dated 29th January 2014 saying that the court's guidance was required "as to how matters are to proceed to trial" in the light of the attendance notes of the interviews; secondly, the landlord's application notice dated 10th February 2014 seeking to rely on Ms Jackson's statement; and thirdly Mr Suh's email to Ms Jackson dated 5th March 2014 which expressly stated that the tenants did not agree to the landlord relying on Ms Jackson's statement.

33. The test of waiver is not the same for legal professional privilege as it is for without prejudice privilege. As Hoffmann LJ said in *Forster v. Friedland* unreported 10th November 1992:-

> "The fact that a party cannot or does not claim privilege from production does not necessarily mean that the document will be admissible. In the nature of things without prejudice communications will usually be within the knowledge of, and if in writing in the possession of, both parties. They are nevertheless inadmissible unless their exclusion is waived by both parties.
>
> Mr Wingate-Saul again relied upon the analogy of legal professional privilege. Once again I think the analogy is a false one. Legal professional privilege is the right of a client to withhold documents or to refuse to divulge communications. But subject to the equitable principles of confidentiality, as exemplified by the case of *Lord Ashburton v Pape*, there is no rule that such documents or communication cannot be adduced in evidence by someone else. It follows that a waiver of legal professional privilege against production will automatically entitle the opposing party to use the document in evidence. A communication without prejudice, however, remains inadmissible whether tendered by plaintiff or defendant. Even if the opposing party has the document, as he - usually will, he can make no use of it.

> … It follows that in my judgment the fact that the document has been produced on discovery, or indeed simply handed over to the plaintiff, does not itself constitute a waiver of objection to its admissibility".

34. The question here, therefore, is whether the tenants' conduct, taken in the context of the purpose of the without prejudice privilege itself, constituted a waiver of it. The landlord has obviously waived its right to rely on the privilege by filing Ms Jackson's statement in the proceedings and making it plain they intended to rely for all purposes on the content of the interviews (see the *obiter dictum* of Smith LJ (giving the judgment of the Court of Appeal) at paragraph 40 in *Brunel University v. Vaseghi* [2007] EWCA Civ 482).

35. We were not referred to much authority on waiver of this kind. In the same *obiter dictum* in *Brunel University supra*, Smith LJ suggested that waiver of the without prejudice privilege by deploying material in tribunal documents was not irrevocable in that it might be retracted by an application to amend those documents. There has been a series of cases in which, the courts have considered whether without prejudice communications might be admitted for interlocutory purposes (e.g. to explain delay) without waiving the privilege for the purpose of the trial (see *Derby v. Weldon (No. 10)* [1991] 1 WLR 660, *Family Housing Association (Manchester) v. Michael Hyde & Partners* [1993] 1 WLR 354, and *Somatra v. Sinclair Roche and Temperley* [2002] 2 Lloyd's Rep. 673 per Clarke LJ at paragraphs 33-4). None of these cases was cited to us in oral argument.

36. The landlord submits that there is an analogy with waiver by landlord of the right to forfeit a lease. All the landlord needs to know is the facts before he can waive. It does not matter whether the landlord knows that there is a right to forfeit. By analogy here, the landlord argues that Mrs Suh knew what she was alleged to have admitted, and by agreeing to put the matter before the court, she must be taken to have waived any reliance on a without prejudice privilege even if she did not know such a privilege existed.

37. In my judgment, the issue of waiver in the circumstances of this case requires an objective evaluation of the tenants' conduct, in the context of the purpose of the without prejudice privilege. That evaluation should be aimed at determining whether it would be unjust, in the light of the tenants' conduct, for them to argue that the admissions made in the interviews were privileged from production to the court at the trial. This, I think, requires detailed attention to the precise course of relevant events.

38. The order of events was that Ms Jackson wrote to Mr Suh on 24th and 29th January 2014 enclosing her attendance notes, inviting him to discontinue the claim in the light of Mrs Suh's admissions, and saying in the later letter (and in a letter of even date to Mrs Suh) that guidance was needed from the court. Next, on 10th February 2014, the tenants' counsel emailed Ms Jackson saying she had seen Mrs Suh that day, and that she would be providing a witness statement, and suggesting that it was not "necessary or appropriate to have the matter listed for a case management hearing as the issue at hand goes to credibility which is a matter ultimately for the trial judge to decide upon hearing evidence". It had plainly not yet occurred to the tenant that the admissions might be protected by without prejudice privilege. Conversely, it seems likely that the landlord's solicitor was already aware that there might be such an issue, since the

other suggested reasons for wanting the urgent guidance of the court seem all to turn on whether the admissions were truly admissible at the trial in the first place.

39. On the same day, Ms Jackson issued an application seeking an urgent case management conference, raising questions as to the signature of documents by Mrs Suh, but not directly raising the question of whether the admissions were covered by a without prejudice privilege. It is important to examine the precise contents of that application notice, because it is Mrs Suh's responses to it that are primarily said to constitute her waiver of the without prejudice privilege. The application sought (i) an urgent CMC to "address important matters arising from" Ms Jackson's attendance notes of the interviews, (ii) permission to adduce Ms Jackson's statement at trial, (iii) appropriate directions as to the matters dealt with in the attendance notes, which were said to raise issues as to: (a) Mrs Suh no longer wishing to be a party, (b) questions as to who signed which court documents for the tenants, (c) a dispute between Mr and Mrs Suh as to who signed what, (d) the possibility of the need for separate representation for Mr and Mrs Suh, and (e) revisiting existing directions for, e.g., disclosure.

40. On 20th February 2014, the tenants put forward Mrs Suh's witness statement in answer to Ms Jackson's statement and supporting their case that the admissions had not been made, but not saying that they were not admissible as having been made in a situation covered by a without prejudice privilege. On 3rd March 2014, the tenants issued their own application asking for the case management hearing then fixed for 14th March 2014 (3 days before the date fixed for trial) to be cancelled but not directly referring to or raising the alleged without prejudice privilege. The application did, however, say expressly that the hearing on 14th March 2014 was unnecessary as the issues raised by Ms Jackson's application were "trial issues", and that Mrs Suh disputed the contents of Ms Jackson's statement, relying on Mrs Suh's attached statement. Mr Suh emailed Ms Jackson on 5th March 2014 saying the tenants did not agree to the landlord relying on Ms Jackson's statement. Only on 10th March 2014 did the tenants' counsel email Ms Jackson to say that she would argue that the admissions were privileged from production as they related to without prejudice discussions.

41. In my judgment, the question does not turn on whether or not the tenants knew of the existence of the without prejudice privilege when they conducted themselves as they did. The species of waiver concerned here is as unlike a landlord's waiver of a right to forfeit a lease as it is of a waiver of legal professional privilege. Waiver here is concerned with justice and with the protection of the privilege itself, as the several exceptions to the rule enumerated by Walker LJ in *Unilever supra* demonstrate. It will, therefore, be more than usually concerned with the particular circumstances of this case.

42. Once it is clear that the admissions in question were indeed covered by the without prejudice privilege, it would, I think, be a violation of that privilege to hold that the tenants' conduct here amounted to a waiver by which they were bound. I say this for the following reasons. First, as regards the tenants' response to the landlord's application notice of 10th February 2014, it is important to evaluate what they were responding to. The application notice raised, in essence, for consideration what should be done about the dispute over whether Mrs Suh had made relevant admissions. The tenants had to respond to the notice. The landlord had already

brought the alleged admissions to court. The fact that the tenants' response was not as quick-thinking as it might have been should not be held against them. It would hardly protect the privilege and its overarching purpose if the party seeking to overcome it could secure its waiver by forcing the opposing party to respond to an application it was making to the court. Moreover, the landlord's application notice did not even suggest that the admissions relied upon might be covered by a without prejudice privilege.

43. Neither Mrs Suh's witness statement in answer to Ms Jackson's statement, nor the tenant's own application mentioned or waived any right to rely on the without prejudice privilege. Although the tenants' application did say that the hearing on 14th March 2014 was unnecessary because the issues raised by the landlord's application were "trial issues", that suggestion was provoked by the landlord's attempt to introduce privileged material. It should not, therefore, in justice, be regarded as itself a waiver of the privilege which is intended to protect without prejudice discussions from production to the court.

44. The next question is whether the tenants' counsel had already waived the without prejudice privilege in her 10th February 2014 email that was sent just before the landlord's application notice was issued. She said, in that email, that the issue at hand went to credibility which was for the trial judge to determine upon hearing evidence. But she was actually addressing the question of whether the matters raised by the landlord in Ms Jackson's letters to each of Mr and Mrs Suh dated 29th January 2014 should be raised at a case management hearing before the trial or at the trial itself. The matter raised was the "the court's guidance … as to how matters are to proceed to trial". The tenants' counsel was, therefore, simply saying, perhaps misguidedly, that she thought the admissions did not need to be raised at a pre-trial hearing because they went to credibility, which was a matter for the trial judge. I can see that in some circumstances such a statement might amount to a waiver of the without prejudice privilege, since it appears to be an unequivocal proposal that the trial judge should hear about the admissions in determining Mrs Suh's credibility.

45. In my judgment, however, the tenants' counsel's email was also a reaction to the landlord's attempt to rely on the admissions, which were themselves covered by privilege. Accordingly, the landlord had already indicated that it intended to ignore that privilege by bringing the admissions to the attention of the court. It would, therefore, be unjust and contrary to the requirement for the privilege to be protected to hold that the tenants' unguarded response to the landlord's conduct amounts to a waiver of the privilege itself. As with the later events, the tenants' response was provoked by the landlord's actions in attempting to ignore the privilege that has now been held to exist.

46. This analysis avoids the need to consider whether it would have been possible to waive the without prejudice privilege for the purposes of the case management hearing, but not for the substantive hearing at the trial. That question can await further consideration in a case in which it arises directly.

47. In my judgment, therefore, the required objective evaluation of the tenants' conduct, in the context of the purpose of the without prejudice privilege, leads to the conclusion that it would be unjust to prevent the tenants from arguing that the admissions made in the interviews were privileged from production to the court. In

these circumstances, it does not seem to me that the tenants waived their right to rely on a without prejudice privilege by any of the three documents relied upon by the landlord.

48. I would therefore reject the landlord's submission that the without prejudice privilege was waived and cannot be relied upon.

Disposal

49. The landlord attempted to argue that it would have obviously made no difference to the outcome of the trial, had the trial judge refused to admit the evidence of the alleged admissions made by Mrs Suh. I cannot accept that contention. It seems to me to be clear from the structure and reasoning adopted by the trial judge that she placed some reliance on the admissions in deciding the crucial questions of which specific alleged rent payments had been made and which had not. It is impossible to disentangle what she might have decided on each payment had the admissions not been admissible on the substantive issues to be determined at the trial.

50. In these circumstances, it seems to me that we have no choice but to allow the appeal, order that the admissions, relied upon by the landlord and recorded in the attendance notes and in Ms Jackson's statement and referred to in Mrs Suh's statement, were inadmissible at trial as being covered by an un-waived without prejudice privilege, and to order a re-trial of the substantive issues between the parties before a different judge. It would obviously be preferable if the new judge were not referred either to the alleged without prejudice admissions or to the contents of Ms Jackson's or Mrs Suh's statements.

Beatson LJ:

51. I agree.