resists production of a selection made from own client documents, it is a matter for the court's discretion whether to order production.[78]

5–037 Eady J. had to address a number of submissions in *Imerman v Tchenguiz* where the "trend of advice" authorities were prayed in aid. He said:

> "I should make it clear, however, that I do not accept the proposition that underlining or highlighting of documents would, in themselves, give rise to legal professional privilege. The appropriate test to apply is that of whether or not the markings in question would 'give a clue' to the trend of advice being proffered to the clients by the lawyers: see e.g. *Lyell v Kennedy (No 3)* (1884) 27 Ch.D 1, 26 *per* Cotton LJ. There are all sorts of reasons why solicitors or counsel might underline or highlight a document and, save in very specific circumstances, one would not be able to draw any inference as to the trend of advice being proffered. Another argument has been raised to the effect that, because some pages have been annotated by counsel (no doubt often different pages by different counsel), it would be possible to infer from such pages as were *not* annotated that these were considered not to be significant—thereby giving some clue as to the nature of the advice being given or strategy recommended. I would reject any such general argument. First, it is a matter simply of common sense that an unmarked page cannot reveal anything to a reader apart from its contents. It is far–fetched to suggest that advice has been given by counsel or solicitors to their clients to the effect (say) that a page should be regarded as of no significance, merely by reason of the fact that it has not been annotated. Secondly, it is important to recognise that the Defendants cannot in this context gain succour from the observations of the Court of Appeal in *Lyell v Kennedy*, cited above, in relation to the selection of documents. That case concerned circumstances in which certain extracts had been copied from public registers and in which the very act of selecting those extracts could be taken as indicating the trend of legal advice or 'giving a clue'. One can readily understand that there may be circumstances in which that would be so. But that does not apply when addressing documents which were in the relevant party's possession any way. They were not in that party's possession by virtue of any act of selection or rejection. The principle discussed in *Lyell v Kennedy* has been construed in recent times more narrowly: see e.g. *Sumitomo Corp v Credit Lyonnais Rouse Ltd*…Thus, the 'selection' doctrine addressed in *Lyell v Kennedy* does not assist the Defendants in relation to the documents in question here, since they did not come into their possession by a process of selection. It would provide no excuse for refusing to deliver up either annotated or unmarked pages. The only relevant justification would be in respect of any actual annotations made by lawyers or any expert consulted by them…"[79]

[78] [2001] EWCA Civ 1152, [2002] 1 W.L.R. 479 at 497, at [79]. Although decided under the former RSC O.24, similar considerations will apply in the context of CPR Pt 31.

[79] [2009] EWHC 2902 (QB) at [16]–[19].

CHAPTER 6

JOINT AND COMMON INTERESTS

1. INTRODUCTION

6–001 This Chapter examines how the law treats a privileged communication that concerns two or more parties who establish a joint or common interest in the subject matter of such a communication which is made contemporaneously with the existence of that interest.[1] In broad terms, where such an interest is established, then privileged communications can be shared between the parties to the shared interest without losing the ability to assert privilege in those documents against any third party. While there are recognised categories of joint interests and broadly workable tests for identifying a common interest, the real challenge in this area is to recognise the category of relationship that entitles one party to the shared interest (be it a joint or common interest) to demand access to the privileged communication relating to that interest where the communication is held only by one party thereto. Where a joint interest exists, then the right to demand access usually also exists, at least all the while the parties' interests are aligned; where there is merely a common interest—or, as judges are wont to say, a "community of interest"—one has to distinguish between the type of relationship that merely allows the sharing of privileged material (usually referred to as "common interest privilege"), and that which confers the additional entitlement to demand access. In the latter case, there is some confusion caused by the fact that the cases tend to talk interchangeably of "joint interests", "common interests" and "a community of interests". This makes categorisation of the case law more challenging than perhaps it needs to be. In addition, the case law in this area is still developing to an extent, especially in relation to common interest privilege. This Chapter attempts to identify some basic principles that can be extracted from the case law.

6–002 With these caveats in mind then, generally, where a *joint* interest in the subject matter of a privileged communication, or in the subject matter of litigation to which it relates, is established, then these consequences will usually follow:

[1] It hardly needs saying that when considering privilege in the context of such interests, it should be borne in mind that, for example, (per H.H. Judge Parkes QC in *WXY v Henry Gewanter, Public Profile Ltd, Mark Burby* [2012] EWHC 1071 (QB): "…common interest privilege is not a free–standing head of privilege but is parasitic on orthodox legal privilege." In other words, the communication over which the joint or common interest is asserted must be one which is already covered either by advice or litigation privilege irrespective of the interest claimed over it.

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- First, privilege cannot be asserted as between the parties who enjoy the joint interest in respect of that communication, notwithstanding that all those parties are entitled to assert privilege over it as against the rest of the world;
- Secondly, a privileged document can accordingly be shared between the parties who enjoy the joint interest without risking their entitlement to assert privilege in respect of that document against the rest of the world (this is sometimes referred to as "joint privilege")[2];
- Thirdly, privilege over a communication concerned with a joint interest can only be waived as against a third party with the agreement of all the parties who enjoy that shared interest;
- Fourthly, parties who enjoy a joint interest will usually also enjoy a right of access as against each other in respect of a privileged communication that concerns their joint interest;
- Fifthly, where the joint interest is established, one party may be unable to restrain his former solicitor from acting for another who shares the joint interest, even where that solicitor is instructed to act against own interests.

6–003 Generally, where a *common* interest in the subject matter of a privileged communication, or in litigation to which it relates, is established, then all of the consequences described in the preceding paragraph follow, save for the fourth. In relation to the right of access, while this often exists alongside the right to share privileged communications, this has to be independently established since the right of access does not exist merely as a result of a common interest that permits the sharing of privileged materials.

6–004 Accordingly, a distinction is drawn in the case law between the type of interest that also carries with it a right of access to a privileged document that exists at the time that document came into existence[3] and one in which the nature of the relationship between the parties is merely such that the parties thereto are entitled, but not obliged, to share a privileged document between themselves without there being a resultant loss of privilege.

6–005 For the purposes of the discussion below, a joint interest is usually one in which two or more parties either share in or require advice on the exact same right or interest—for example a joint or shared interest in the same property rights, such as a trust, a joint tenancy or a tenancy in common; a common interest is one whereby two or more parties are interested in legal advice given in respect of identical or at least very similar issues but in circumstances where their respective interests are distinct—for example identical tenancy rights in separate flats in the same property.

[2] It is also possible to share privileged information by agreement with a third party, even though that third party may be unable to show he enjoys a joint or common interest of the type considered in this Chapter, without privilege thereby being waived, so long as the privileged information is shared on a confidential basis. This situation is covered in Ch.7, which is concerned with waiver of privilege.
[3] Per Moore-Bick J. in *Commercial Union Assurance Company Plc v Mander* [1996] 2 Lloyd's Rep. 640 at 648.

6–006 There are three types of joint interests considered in this Chapter. The first is where the joint interest is expressly recognised by virtue of the fact the parties sharing the same interest retain the same lawyer to represent them—i.e. where there is a joint retainer; secondly, where the joint interest arises by reference to the parties' conduct, which may include the drawing of inferences as to the consequences of that conduct. Here, one also sees several recognised categories of relationship that are accepted as giving rise to a joint interest. One also sees some overlap between these first two categories in that relationships akin to a joint retainer are recognised. The third situation in which the privilege consequences summarised above arise, while arguably not strictly a joint interest, is in respect of a category of commercial relationships where either the nature of the parties' relationship or the nature of the contractual arrangements between them entitles one party to that relationship to access privileged communications held by the other. Here, one often sees in the case law interchangeable reference to joint and common interests.The reality is, it is submitted, that the distinction between these two types of interests in commercial arrangements is often not easy to define and carries little practical consequence. Such cases are treated in this Chapter primarily as ones involving joint interests, albeit aspects of these cases are also dealt with in Section 3 below concerned with common interests.

6–007 This Chapter considers each of the various types of interests summarised above and the privilege issues to which they give rise and then concludes with a brief look at successors in title and the so–called 'once privileged, always privileged' rules, which are also concerned with the sharing of another's privilege.

2. JOINT RETAINERS AND JOINT INTERESTS

6–008 **Joint retainers:** The most easily identified relationship to which the joint interest rules summarised above operate is where two or more clients retain the same lawyer to advise them in relation to the same matter. In such cases, the law does not require a detailed examination of the precise nature of the joint interest, the Courts usually being satisfied that the fact of a joint instruction—in circumstances where, after all, professional conduct rules should prevent the lawyer accepting such an instruction if there is a risk of an actual or potential conflict of interest between them at the point of instruction—is sufficient to bring the privilege sharing rules into play.[4] So, in such cases, all of the clients to the joint retainer are entitled both to enjoy the benefit of any privileged communication made in the course of their retainer,[5] and to have disclosed to them any such communication which may not have been disclosed to them at the time it was made, for example, an advice from the lawyer addressed to one only of the clients, or instructions to the lawyer given by one of his clients alone. A joint retainer should be distinguished from the employment of a common solicitor

[4] As will be seen, the ability to instruct the same lawyer was once seen as an essential element of the availability of common interest privilege, a requirement which has since fallen away: see paras 6–072ff below.
[5] See, for example, *Rochefocauld v Boustead* (1896) 65 LJ Ch. 794.

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who advises more than one client in their separate capacities, as where the vendor and purchaser of the same property employ the same solicitor.[6]

6–009 The consequences of a joint retainer, so far as concerns privileged information, were succinctly described by Rix J. in *The 'Sagheera'*[7]:

> "Parties who grant a joint retainer to solicitors of course retain no confidence as against one another: if they subsequently fall out and sue one another, they cannot claim privilege. But against all the rest of the world, they can maintain a claim to privilege for documents otherwise within the ambit of legal professional privilege; and because their privilege is a joint one, it can only be waived jointly, and not by one party alone."[8]

6–010 In *The 'Sagheera'*, the joint retainer arose because vessel owners and their war risk underwriters both needed to investigate the circumstances in which the insured vessel sank, for which purpose they jointly retained the same firm of solicitors. Both clients were able to enjoy the benefits of advice and litigation privileges attaching to qualifying communications made during the course of their joint retainer of the firm concerned. Consequently, both could assert the privileges attaching to such communications in subsequent litigation with the vessel's hull and machinery underwriters.[9]

6–011 A more common example of a joint retainer is where a husband and wife jointly instruct a solicitor in relation to a property transaction. In the event of proceedings between them, neither can claim privilege over any communication made in the course of their joint retainer: see *Re Konigsberg (a bankrupt), Ex p. the Trustee v Konigsberg and Others*.[10]

6–012 Despite the existence of a joint retainer, it is possible for one of the clients to consult the common lawyer on an individual basis on the subject matter of the retainer and in circumstances where their communications are privileged as against the other parties to the joint retainer. This is so even though the lawyer is likely to be subject to a conflict of interest. The existence of the conflict

[6] An old case on the retainer of the same solicitor in a conveyancing context is revealing. In *Perry v Smith* (1842) 9 M&W 681, a lawyer was jointly instructed by vendor and purchaser. The latter told the lawyer he would not have the purchase money ready to complete and objected to evidence of this conversation being given in subsequent proceedings. Parke B held that their communication was made in his adverse character of attorney for the vendor and therefore he stood in the character of an ordinary witness.

[7] [1997] 1 Lloyd's Rep. 160 at 165–166. This passage was cited with approval in the New South Wales Supreme Court decision of *Doran Constructions Pty Ltd (in liquidation)* [2002] NSWSC 215.

[8] See also *Rochefocauld v Boustead* (1896) 65 LJ Ch 794, *Minter v Priest* [1930] AC 558, *CIA Barca de Panama SA v George Wimpey & Co Ltd* [1980] 1 Lloyd's Rep. 598 and *BBGP Managing General Partner v Babcock & Brown Global Partners* [2010] EWHC 2176 (Ch). Waiver of privilege is covered in Ch.7.

[9] As Rix J. further noted, there is no need to invoke common interest privilege in circumstances where both claimants shared a joint retainer of common solicitors and where they could jointly rely on legal advice and litigation privilege in that context. He added ([1997] 1 Lloyd's Rep. 160 at 167): "It may be that common interest privilege would be necessary where, for instance, common solicitors were separately retained, or where the parties might have been but were not in fact, advised by the same solicitors, or where only one of the solicitors sued."

[10] [1989] 1 W.L.R. 1257. No doubt the situation is the same where the solicitor is jointly instructed by cohabitees.

apparently does not prevent the separate privilege arising: see, for example, the New Zealand Court of Appeal's decision in *Morgan & Banks Ltd v S Sullivan and Others*.[11]

6–013 **Joint interests and recognised joint interest relationships:** Similar consequences follow with respect to the treatment of a privileged communication where a joint interest is established in the subject matter of that communication, even though one only of the parties to the joint interest may have instructed a lawyer to advise him: the absence of a joint retainer, even if there could have been one, being irrelevant to the existence of the joint interest. Once a joint interest is established, then all the parties to that joint interest will have a right of access in litigation between them to each other's privileged communications relating to the subject matter of the joint interest, so long as the communications occurred while that interest subsisted; in addition, all will be entitled to assert privilege over those communications, as against persons not party to the joint interest, once they have obtained access to them—and indeed they will all be obliged to do so unless they all jointly waive the privilege.

6–014 There are many ways in which a joint interest can be established for the purposes of sharing privileged material. Sometimes, a joint interest will be found in a relationship akin to a joint retainer, so that the lawyer is entitled or even obliged to share the privileged communications with his client with the joint interest holder. In most cases, the lawyer's retainer letter should make clear whether or not he is acting pursuant to a formal joint retainer on behalf of two or more clients who share a joint interest. But this does not always happen, and disputes arise as to whether the scope of a lawyer's retainer, even though not formally documented, entitles others beyond the named client to share in the client's privilege. Ultimately, the courts have to undertake a factual enquiry to determine whether a joint interest exists. In *R. (Ford) v The Financial Services Authority and Others* Burnett J. said:

> "The circumstances in which joint privilege may arise are legion. In corporate bodies with a tight controlling management the legal interests of the company and its directors and senior employees will often coincide or overlap. This case arises in the context of financial regulation, yet very similar considerations might arise in other regulatory environments. For example, the possibility of regulatory action in the health and safety or environmental fields often engages legal questions for companies and potentially their directors personally. Public bodies take legal advice in contexts which engage the potential liabilities of officials and elected representatives. Corporate bodies seeking advice in connection with public inquiries

[11] [2000] NZCA 390. See also *Harris v Harris* [1931] P 10, where a solicitor was separately consulted by a husband and wife about their marital differences. The husband's attempt to call the solicitor to prove an admission of adultery made by the wife was refused on the ground that the occasion of the alleged admission was made pursuant to a separate solicitor–client relationship. And note Norris J. in *BBGP Managing General Partner Ltd and others v Babcock & Brown Global Partners* [2010] EWHC 2176 (Ch), [2011] Ch. 296 who said at [52], p.315: "I consider that the authorities establish that where a solicitor accepts a joint retainer from parties with potentially conflicting interests one client cannot insist as against the other that legal professional privilege attaches to any of what passes between the solicitor and that client during the currency and in the course of the retainer: *Baugh v Cradocke* (1832) 1 Mood & R 182; *Perry v Smith* (1842) 9 M & W 681; *Shore v Bedford* (1843) 5 Man & G 271; *Ross v Gibbs* (1869) LR 8 Eq 522 and *Re Konigsberg* [1989] 1 W.L.R. 1257."

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CHAPTER 10

WITHOUT PREJUDICE COMMUNICATIONS

1. INTRODUCTION

10–001 Chapter 10 examines the without prejudice privilege. This privilege enjoys similarities with legal professional privilege in terms of its effect, in that communications made on a without prejudice basis are inadmissible in evidence before the English courts.[1] However, although its juridical basis, like that of legal professional privilege, is rooted in public policy considerations, the without prejudice privilege differs from legal professional privilege in several respects. Not only is it not a fundamental right[2] that is therefore immune from statutory powers of information gathering, but there are also several recognised exceptions to this privilege. Furthermore, and perhaps most strikingly, the without prejudice privilege arises in respect of communications between parties who are in dispute[3]—and therefore the privilege can only be waived with the consent of both parties to the protected communications. Herein lies the essence of the without prejudice privilege, which broadly operates so as to exclude evidence of all negotiations—whether oral or written—genuinely aimed at the settlement of a dispute between the parties to those negotiations from being given in evidence, whether in proceedings between those parties or in proceedings involving others, at least where the same or related issues arise.

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[1] As will be seen, whether their admission in overseas proceedings can be restrained by order of the English court depends upon the basis upon which the claim to without prejudice privilege is made: see Section 2 below.

[2] Indeed, seemingly the courts have not been concerned with whether the without prejudice privilege is a rule of evidence or something more substantive. In *Reed Executives Plc v Reed Business Information Ltd* [2004] EWCA Civ 887, Jacob L.J. said (at [19]) that it is a rule of law with some analogy with legal professional privilege, the difference being that without prejudice communications are admissible only if both parties waive their right to the privilege. See further on the question of whether the privilege is a fundamental right, the discussion at para.10–221.

[3] As has been considered in the preceding chapters, legal professional privilege cannot arise in respect of communications between opponents to litigation. See especially Chs 2 and 7. Note, however, the Court of Appeal's decision in *Feuerheerd v London General Omnibus Co* [1918] 2 K.B. 565, a curious and exceptional example of legal professional privilege arising in respect of adversarial communications. The decision is discussed in Chs.3 and 7 and has recently been doubted.

2. WITHOUT PREJUDICE: GENERAL PRINCIPLES

Basis of the rule

10–002 Communications made between the parties to a dispute[4] that are written or made with the aim of genuinely attempting to settle that dispute cannot usually be admitted in evidence, nor made the subject of a disclosure order, whether in the proceedings (if any) to which the dispute gives rise, or in any other litigation in which similar or related issues arise. There is no privilege over the fact that such communications have occurred, rather the privilege is limited to the contents of such communications.[5]

10–003 It is fundamental to the operation of the without prejudice rule that such communications are made for these purposes, since the courts will not apply this privilege to communications which have a purpose other than settlement of the dispute,[6] such as the 'opening shot' in negotiations where there is no underlying dispute (as to which see Section 3 below).

10–004 The rationale and the public policy considerations behind the without prejudice rule are intended to enable the parties to a dispute to communicate more frankly than perhaps they would do in 'open' correspondence, which is potentially admissible in evidence against them, so as to maximise the opportunity for compromising their dispute. This enables the parties, for example, to make concessions or admissions aimed at facilitating settlement that they would not ordinarily make in open correspondence because of the risk that they would be admitted in evidence against them in respect of liability, quantum or remedy issues.[7] As it has been put by the High Court of Australia,

> "It is, of course, clear that if during a dispute an offer of compromise is made 'without prejudice' and is accepted *simpliciter*, the fact that the offer was made without prejudice ceases to have any significance. The common sense view and the view of the law is that the offeror is saying: 'I will make you this offer in the hope of avoiding legal proceedings between us. If you accept it, we shall both be bound. But I make no admissions, and if you do not accept it, our legal position remains unaffected'."[8]

[4] And communications with a mediator who is enlisted to help parties in dispute reach a settlement, particularly matrimonial disputes: see Section 4 below.

[5] See Knox J. in *Independent Research Services v Catterall* [1993] I.C.R. 1: "the existence of 'without prejudice' in any negotiations is not cloaked by the privilege and it would be entirely proper in our view for the Industrial Tribunal to be aware of the existence as opposed to the terms of 'without prejudice' correspondence…". In *RWE Npower Plc v Alstom Power Ltd* (2009) Claim No. 9BS90329, 2009 WL 5641217, Judge Havelock-Allan QC held (at [54]) that since the privilege attaches to the content of the exchanges rather than to the fact that they took place, then there is nothing to stop a party relying on the fact that negotiations had taken place. The judge declined (at [55]) to express any view on the argument that the exception (discussed at paras 10–098ff below) which permits an examination of without prejudice communications in order to determine whether a concluded compromise has been reached, applies so as also to permit examination of such communications in order to determine whether a dispute exists which is capable of being referred to adjudication or arbitration. He said that the two situations were not necessarily analogous.

[6] *Re Daintrey, Ex p. Holt* [1893] 2 Q.B. 116 at 120, per Vaughan Williams J.

[7] The without prejudice privilege not only protects the parties to the dispute but also their solicitor who makes a without prejudice communication on their behalf: *La Roche v Armstrong* [1922] 1 K.B. 485. As to quantum issues, see *Bradford & Bingley Plc v Rashid* [2006] UKHL 37, [2006] 1 W.L.R. 2066 at [75], p.2089.

10–005 The English version of this viewpoint was expressed as follows in *The Stax Claimants v The Bank of Nova Scotia Channel Islands Limited, The Bank of Nova Scotia Trust Company Channel Islands Limited, Barclays Private Bank and Trust Limited, Additional Parties:*

> "Parties are to be encouraged to settle their disputes without recourse to litigation and should not be discouraged from doing so by a fear that anything they say might later be used to their prejudice in litigation if negotiations fail to reach a compromise."[9]

10–006 **Public policy considerations** The justification for the without prejudice rule is largely rooted in public policy considerations. However, more recent decisions concerning the privilege, following the Court of Appeal decision in 1984 in *Cutts v Head*,[10] demonstrate that this privilege can also be justified by reference to an implied contract between the parties to the without prejudice negotiations to the effect that their communications in the course of those negotiations should not be admissible in evidence if, despite the negotiations, a contested hearing ensues. In fact, there is now broad acceptance that there is often (but not always) a dual justification—public policy and implied contract—for the privilege—at least as between the negotiating parties.

10–007 To the extent that the privilege is justified by reference to public interest considerations then, like legal professional privilege, it is the product of the balancing of two competing public interests, namely 'the public interest in promoting settlements and the public interest in full discovery between parties to litigation.'[11] As noted, unlike legal professional privilege, the without prejudice privilege is not absolute and is subject to a number of recognised exceptions considered in Section 4 below.

10–008 The public policy aspect of the without prejudice rule was described by Lord Griffiths in the House of Lords' decision in *Rush & Tompkins Ltd v Greater London Council* by reference to the equally important decision in *Cutts v Head*:

> "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 no more clearly expressed than in the judgment of Oliver LJ 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 enquiry is the nature of the underlying policy. It is that parties should be encouraged so far possible to settle their disputes without resorting 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 Paperworks Ltd* (1927) 44 RPC 155, 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

[8] Per Dixon C.J. and Fullagar J in *Tallerman & Co Pty Ltd v Nathan's Merchandise (Victoria) Pty Ltd* [1957] HCA 10; [1957] HCA 10; (1957) 98 C.L.R. 93 at 110.

[9] [2007] EWHC 1153 (Ch) at [13].

[10] [1984] 1 Ch 290.

[11] Per Lord Griffiths, *Rush & Tompkins Ltd v Greater London Council* [1989] A.C. 1280 at 1300.

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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.'"[12]

10–009 **Implied contract** As will be seen, the application of the without prejudice rule in *Rush & Tompkins* was firmly based on public policy considerations alone. In contrast, the decision in *Cutts v Head* demonstrated that the rule can also be based on an implied agreement that enables the parties to without prejudice negotiations to vary the application of the public policy basis of the rule, by extending or limiting its reach.[13]

10–010 *Cutts v Head* was concerned with the question of whether a without prejudice offer was admissible, not in respect of liability, but in the making of a post–trial costs order. The context in which this arose was a challenge to the spread of the common practice first developed in the Family Courts of making a '*Calderbank* offer', whereby a settlement proposal is expressly advanced on a 'without prejudice save as to costs' basis.[14] Such an offer could not, in accordance with the public policy considerations behind the privilege, be admitted in evidence in respect of liability issues, but it could be used, once the liability issues to which it related had been disposed of, to help determine disputes over costs. The practice of using *Calderbank* offers had become widespread in other divisions of the High Court by the time the Court of Appeal came to consider the legitimacy of this practice for the first time in 1984.[15]

10–011 The basis of the challenge to the use of *Calderbank* letters was that the practice appeared to run contrary to an 1889 Court of Appeal decision in *Walker v Wilsher*,[16] in which the court seemed to have been prepared to assume that an inability to refer to without prejudice correspondence on a question of costs, after judgment, would encourage settlement. Analysing that decision by reference to the conventional public policy justification for the without prejudice privilege, Oliver L.J. in *Cutts v Head* said that if the protection against disclosure rested solely upon a public policy to encourage out of court settlement of disputes, then *Walker v Wilsher* was not readily intelligible:

> "As a practical matter, consciousness of a risk as to costs if reasonable offers are refused can only encourage settlement whilst, on the other hand, it is hard to imagine anything more calculated to encourage obstinacy and unreasonableness than the comfortable knowledge that a litigant can refuse with impunity whatever may be offered to him even if it is as much as or more than everything to which he is entitled in the action. The public policy justification, in

[12] [1989] A.C. 1280 at 1299.
[13] Per Robert Walker L.J. in *Unilever Plc v Proctor & Gamble Co* [2000] 1 W.L.R. 2436 at 2445. He also noted that the agreement can be an express one. Mediation agreements now routinely provide expressly that the entirety of the mediation process is to be conducted on a without prejudice basis.
[14] As first approved, albeit without argument, by the Court of Appeal in *Calderbank v Calderbank* [1976] Fam 93.
As will be seen at paras 10–160ff below, the effectiveness of *Calderbank* offers has been curtailed.
[15] *Calderbank* offers were abolished in ancillary relief proceedings when The Family Proceedings (Amendment) Rules 2006 (SI 2006/352) came into effect on April 3, 2006: see a helpful article on the topic, *Farewell Calderbanks, Hello open offers: The new costs rules* [2006] Fam. Law 276.
[16] (1889) 23 Q.B.D. 335.

> 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 questions of liability."[17]

10–012 That justification could not therefore have any application once the trial of the issues in the action were at an end and the matter of costs came to be argued, for there were no further issues of fact to be determined upon which admissions might be relevant. But that compelled the need to seek an additional basis for the refusal in *Walker v Wilsher* to consider without prejudice correspondence in respect of the issue of costs. Oliver L.J. found that justification in an implied agreement imported from the marking of a letter merely 'without prejudice' that it shall not be referred to at all.[18]

10–013 What, then, would be the effect of additionally marking a letter 'without prejudice save as to costs'? Since there was no public policy objection to the court having brought to its attention details of offers made and refused when it came to dealing with costs, Oliver L.J. went on to test whether there was any logical reason why, in appropriate circumstances, the conventional meaning of the without prejudice phrase should not be modified—as in the addition of the words 'save as to costs'—so long as this intended modification was clearly expressed and brought to the attention of the recipient.

10–014 Noting that *Calderbank* letters had been in frequent use in all divisions of the court without challenge for some time, Oliver L.J. held that if the protection of without prejudice correspondence as regards costs rested on the conventional import of the words, then a wide and continued practice adopted and recognised, albeit without challenge, in all divisions of the court showed that the conventional meaning had become capable of modification where express reservation is made at the time of the offer, without infringing the public policy which protects negotiations from disclosure whilst liability is still in issue.[19]

10–015 In the same decision, Fox L.J. held that the question of what meaning is given to the words 'without prejudice' is a matter of interpretation which is capable of variation according to usage in the profession:

> "It seems to me that, no issue of public policy being involved, it would be wrong to say that the words were given a meaning in 1889 which is immutable ever after, …I think that the wide body of practice which undoubtedly exists must be treated as indicating that the meaning to be given to the words is altered if the offer contains the reservation relating to the use of the offer in relation to costs."[20]

10–016 **Public policy as against implied contact justification:** The alternative bases for the justification of the without prejudice privilege are now well established and have been endorsed in many subsequent cases. So, in *Muller v Linsley & Mortimer* Hoffmann L.J. praised *Rush & Tompkins* and *Cutts v Head* as having

[17] [1984] 1 Ch 290 at 306.
[18] [1984] 1 Ch 290 at 307, and see also Denning L.J. in *Rabin v Mendoza & Co* [1954] 1 W.L.R. 271 at 273.
[19] [1984] 1 Ch 290 at 310.
[20] [1984] 1 Ch 290 at 316.

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