Neutral Citation Number: [2021] EWHC 2322 (Ch)

Case No: BL-2021-000520

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Rolls Building, 7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: 23/08/2021

Before :

SIR ANTHONY MANN

- -

Between :

(1) Steve Jones **(2) Paul Cook**	**Claimants**
- and -	
(1) John Lydon **(2) Glen Matlock** **(3) Peter Button (as trustee of Simon Beverley's Artistic Estate under the will trust of Sarah Ross, decd)**	**Defendants**

- -
- -

Mr Edmund Cullen QC and **Mr Edward Granger** (instructed by **Lee & Thompson LLP**) for the **Claimants**
Mr Mark Cunningham QC and Ms Amanda Michaels (instructed by **Ince Gordon Dadds LLP**) for the **First Defendant**
The Second and Third Defendants were not represented and did not appear.

Hearing dates: 15th, 16th, 19th, 20th, 21st, 22nd and 27th July 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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SIR ANTHONY MANN

Sir Anthony Mann :

Introduction

1. This action centres around the question of whether an agreement reached in 1998 between the members of the punk band The Sex Pistols is still effective so as to bind the first defendant (Mr Lydon) to accept a majority vote of the other band members as to whether or not to consent to the use of the band's music in a TV series. The circumstances of the action appear in my main judgement on the trial ([2021] EWHC 2321 (Ch), to which reference should be made for further background. This judgment assumes a knowledge of the material in that one.

2. The case of Mr Lydon is that the agreement in question does not bind him because of various estoppels said to arise out of the history of this matter. One of the incidents out of which an estoppel is said to arise, and which is said to provide a significant context for further relevant incidents, arises out a chain of letters, all but the last one of which are marked "Without prejudice". Five letters in the chain are actually pleaded in the Defence. The most significant letter is that last one in the chain, which does not bear the rubric.

3. The claimants say that that rubric applies to the last letter and it, and the other letters, cannot be relied on. In other circumstances they would probably have been able to take the point before the trial so that, if they were successful, the matter would have been removed from the pleading, the material would not be in the bundle and it would not be referred to in evidence. However, a speedy trial has been ordered in this case, and the opportunity for a separate pre-trial hearing has not presented itself. In those circumstances the parties have accepted that I should deal with the point in the course of the trial, and therefore see the material and have Mr Lydon's case on it presented to me, accepting the evidence de bene esse if necessary, and rejecting the evidence (and therefore not have any regard to it) should I find that the material is not admissible. It was not seriously proposed by the parties that I should deal the point as a discrete application before the trial itself started, and that did not seem appealing to me either. To have done so would have required the presentation of some of the evidence prepared for the trial, but separating it out would not have been straightforward. It would have extended the overall trial time, and there might have been further delays if I had felt I had to reserve my judgment.

4. Accordingly I have seen all the material, and the parties have argued the case on the footing that it is all available in case it is held to be admissible. I cannot pretend to be enthusiastic about the course that was adopted. If I were to rule against it I would be likely to have to perform some mental gymnastics in order to remove the material from my consideration, but that is what was necessitated because of the need for an urgent trial (ordered in March). From time to time judges have to perform such exercises,

though not usually to the extent required here. The one practical expedient which seems to me to be useful to reflect the nature of exercise is to deal with the point in a separate judgment, albeit with cross-references to the main judgment. This is that separate judgment.

5. Although the prime purpose of this judgment is to make a decision as to the admissibility of the material relied on by Mr Cunningham, since I heard argument on its effectiveness assuming it to be admissible, and since I have formed a clear view as to the merits of that argument, I shall take the opportunity of making a determination on some those arguments in that judgment.

Without prejudice communications - the principles

6. I shall set out the relevant basic principles relating to without prejudice communications at this stage so that I can refer back to them when I consider the several parts of the without prejudice material on which Mr Cunningham sought to rely. As with the other legal points in the case, there was no material dispute about the relevant principles applying to communications marked "Without prejudice".

7. The relevant effect of effectively marking a communication "Without Prejudice" is that it cannot be relied on in the proceedings as part of the material deployed in evidence at trial. The basic position was set out by Lord Griffiths in *Rush & Tompkins v GLC* [1989] AC 1280 at 1299:

> *"*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 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 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…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.""

8. Of particular relevance in the present case is the reference to a failure to reply to an offer, which is as much within the protection as what is made express in the communications. As will appear, what is mainly relied on in this case is a failure to respond to a firm position adopted by Mr Lydon's solicitor Mr Grower. That was not an offer to settle the underlying dispute as such, but it was a position adopted in negotiations which, in my view, is the equivalent of Oliver LJ's "offer". Since the rubric attaches to whatever is said in the negotiations, there is no reason for a silence to be treated differently in relation to an offer from anything else.

9. The rule is based on public policy and implied agreement. In *Unilever plc v Proctor and Gamble Co* [2000] 1 WLR 2436 Robert Walker LJ said that the passage just cited:

> "... recognises the rule as being based at least in part on public policy. Its other basis or foundation is in the express or implied agreement of the parties themselves that communications in the course of their negotiations should not be admissible in evidence if, despite the negotiations, a contested hearing ensues." (p2442C-D).

10. Once a properly constituted "without prejudice" negotiation has been instituted, it continues on that basis until an intention to depart from it is clearly marked. It is not open to one party suddenly to change the negotiation to an open negotiation without making that quite clear.

> "I agree that if negotiations start off on the basis that they are being conducted without prejudice and one or other side wishes to make an open offer the change to an open basis must be bilateral in the sense that that change must be communicated to the other side and of course, I may add, cannot itself refer in any way to the earlier without prejudice discussions. However, in my judgment, if the communication is made in circumstances in which the change would be brought home to the mind of a reasonable man in the position of the recipient of that information that would be enough …
>
> In my judgment, however, where negotiations begin without prejudice, as indeed these began on 1 August, and, what is more, where they are expressly made without prejudice to begin with, which again is this case, it is incumbent on the party who changes the basis of such negotiations to spell out the change with clarity.

> It may not be enough merely to say the word "open."" (Mr Jules Sher QC, sitting as a deputy Judge of the High Court, in *Cheddar Valley Engineering Ltd v Chaddlewood Homes Ltd* [1992] 1 WLR 820 at 825-6.)

11. There are circumstances in which a matter raised in without prejudice negotiations can be relied on evidentially in subsequent proceedings, and they appear from the above authorities. So far as he needs to invoke an exception Mr Cunningham's case seems to turn on an exception identified by Walker LJ in *Unilever* at p2444E:

> "(3) Even if there is no concluded compromise, a clear statement which is made by one party to negotiations and on which the other party is intended to act and does in fact act may be admissible as giving rise to an estoppel. That was the view of Neuberger J. in *Hodgkinson & Corby Ltd. v. Wards Mobility Services Ltd.* [1997] F.S.R. 178, 191 and his view on that point was not disapproved by this court on appeal."

12. In *Hodgkinson at 190-191* Neuberger J referred to unconscionability:

> "As a matter of principle, it seems to me that, even where a party can in principle rely upon correspondence being "without prejudice" on contractual as well as public policy grounds, the court will not allow him to do so if it is satisfied that it would be unconscionable. […] it is in the public interest that [parties] should not be able to use the protection of "without prejudice" for the purpose of "unambiguous impropriety" […] Equally, so far as the contractual ground is concerned, a contractual right to "without prejudice" privilege should not be upheld or enforced where it is invoked for an improper purpose. […]
>
> By analogy with this line of authority, there is, to my mind, a powerful argument for saying that if a clear and unambiguous statement is made by one party in "without prejudice" correspondence, and the statement is acted on, and reasonably acted on, by the other party, an objection by the first party to the correspondence being put in evidence by the second party in order to justify the step taken by the second party would be plainly unconscionable and would not be upheld by the court."

13. Mr Cunningham relied on these exceptions, or at least the exception referred to by Neuberger J. He also relied on the decision of Roth J in *Berkeley Square Holdings v*

Lancer Property Asset Management [2020] EWHC 1015 (Ch) in relation to claims which are not "fairly justiciable" without admitting "without prejudice" material. Roth J cited the judgment of Fancourt J in *Briggs v Clay* [2019] EWHC (Ch) at para 99 of the *Briggs* judgment:

> " A claimant (or defendant) cannot at one and the same time raise an issue to be tried and rely on without prejudice privilege to prevent the court from seeing the evidence that is needed to decide it. However, this exception has not previously been held to apply in the case of without prejudice negotiations in the very claim that is before the court."

And then Roth J's remark:

> "83 …The question then arises what is meant by "fairly justiciable." This of course does not mean justiciable in the sense applied to an act of State or a claim to title over foreign land. In my judgment, it means that the evidence is so central to an issue which the party resisting disclosure has introduced that there is a serious risk that there will not be a fair trial if that evidence is excluded."

14. Care must be taken in relation to this exception. It is apparent from *Berkeley* and the cases cited in it that what had happened was that a party had raised a particular point, and it was held that, having raised that point, there could not be a fair trial if the without prejudice negotiations were not allowed in evidence. The claims in question were not based entirely on some sort of without prejudice material. The relevance of this will become apparent below.

15. In his turn Mr Cullen relied on *Berkeley* because in that case one of the alleged exceptions was said to be an estoppel arising out of a silence in the face of statements made in a without prejudice mediation. This was said to come within the estoppel exception referred to in *Unilever*. At paragraph 62 Roth J said:

> " I should add that if I have misunderstood the Defendants' case and they do indeed wish to rely also on silence by the Claimants in the mediation, I would hold that this falls outside the estoppel exception. Such silence is a very far cry from a "clear and unambiguous statement" to which Neuberger J referred. To extend this exception to an implied representation by silence would in my view impair the policy served by the WP rule, since parties seeking to compromise a dispute would then have to take

> care to controvert in the negotiations any statements made by the other side, which is not an approach conducive to open and constructive discussion."

16. Mr Cullen said that, when analysed, Mr Lydon's case fell squarely within this dictum.

17. There is one further point which is relevant to Mr Cunningham's submissions on more than one letter, which is that one should not readily and without a special reason seek to dissect a without prejudice document into privileged and non-privileged parts. In *Unilever* Robert Walker LJ said (at pp 2448-9):

> "[The cases] 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] A.C. 1280, 1300: " 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." 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."

18. As will be apparent, Mr Cunningham sought to perform such dissections, and I shall have to consider them with those remarks in mind.

The disputed material

19. A dispute arose in 2014 between Mr Button on the one hand and Mr Stevens/Mr Lydon on the other as to the division of money arising out of a T-Mobile advert showing Sid Vicious performing at a Sex Pistols concert. Mr Stevens claimed that the proceeds ought to be treated as band moneys and split accordingly. Mr Button had been treating them as the estate's alone. The start of the chain was not in evidence in the bundle, and the first email available to me is from Mr Grower (actually his p/a Sabrina Creary, but it is his email) to Mr Button, cc'd to Mr Stevens, Mr Shah and Ms Camarata on 10th September 2014. It is headed "without prejudice" in the subject line so Mr Grower used the rubric at an early stage. Thereafter all the emails, except the last (controversial) one dated 16th January 2015, were marked "without prejudice" in the subject line.

20. It would seem that at about this time the parties had groped towards some sort of agreement (not finalised) that the proceeds should be shared, and not be the estate's alone, and the dispute had moved on to one about the costs of dealing with those moneys. Mr Button was saying all the costs of the dispute should come from the proceeds (then held by Mr Shah) and Mr Stevens (through Mr Grower) was saying they should not. In these early stages Mr Button was saying that an agreement that the fees be shared was conditional on lawyers' fees on his side being taken "off the top". Mr Stevens was saying that Mr Button's costs of the original deal should come out in that way, but not the rest.

21. In an email of 26 September 2014 Mr Grower made some criticism of Ms Camarata for instructing a US attorney without consultation with Mr Stevens. Mr Button responded to this criticism in the first of the disputed emails relied on by Mr Cunningham, which is dated 26th September 2014. It is important for these purposes to appreciate that one of the things complained about in relation to the dispute was lack of consultation. Mr Button's email went on:

> "Thankfully that is now all behind us and going forward it is accepted between all members of SPR, their respective management and respective legal advisers that ALL decisions as to what the Sex Pistols do, what rights are licensed etc must involve all the members and their management; consequently Rambo will be kept fully informed by Anita [Camarata] of all approaches etc that she receives on behalf of any of her clients being SPR members (relating to Sex Pistols assets/rights) and/or in respect of the Sex Pistols generally, and likewise Anita must be kept fully informed of all such approaches received by Rambo obo John or the Sex Pistols. <u>All decisions, for instance, but without limitation, whether to even consider licensing requests/opportunities etc should be made collectively with proper consultation between the SPR members or their management/advisers on their behal</u>f.
>
> In order to now draw a line under this I am pleased to confirm that my clients (the Estate, Steve and Paul) will agree to be responsible for the payment of your fees (a total of £4320 + VAT) and my fees in relation to the "negotiations/settlement" between us, with Gary's and my fees in relation to the T-Mobile advert ($6000 and £2162) being shared equally/deducted off the top.
>
> On this basis I would appreciate you confirming the instructions to Harish [Mr Shah] given by Anita and me in this email (copied to him), on behalf of John, that he immediately distributes the

> Acura car advert fee equally between the 4 SPR members (I can confirm that neither Gary or I were instructed on that deal) and the T-Mobile fee is apportioned and distributed in accordance with the agreement reflected above."

22. The emphasis in that reproduction of that letter is mine to show the particular part of this letter on which Mr Cunningham sought to build his estoppel case, relying on that sentence being a statement about the need for unanimity in decision-making. He did not dispute that the chain originally started as a without prejudice chain with the usual protection from reliance on it at trial, but said that this letter was dealing with two topics, one of which was not covered by the without prejudice rubric. The one which was not so covered was the position going forward, which was dealt with in the paragraph with the emphasised passage in. The without prejudice protection was said to relate to the previous dispute about monies from the recording and the incidence of legal fees, so as to protect that from disclosure, but did not cover this new matter introduced by Mr Button.

23. I do not consider that that analysis is correct. I am prepared to assume for the purposes of this part of the argument that a without prejudice letter might contain material which was essentially a new matter which had nothing to do with the without prejudice negotiations so that it would obviously not be covered by the without prejudice rubric. In effect, in such a case one would treat the new material as being a separate letter. That would be a dissection within the cautionary words of Robert Walker LJ in *Unilever* and would have to be a special case were it to be allowed. What I think that means in this context is something which emerges with particular clarity so there can be little doubt that a second and separate subject is being dealt with.

24. I do not consider that this email provides a special case. Indeed, there seems to be no real case at all for saying a different subject matter is being addressed. The words on which Mr Cunningham seeks to rely are clearly something which flows from the extant dispute about shares and expenses. In the context of that dispute complaint had been made about Ms Camarata not consulting properly. The letter starts by Mr Button seeking to defend her. What the relevant paragraph does is to take up that part of the dispute and to express Mr Button's views as to what the parties seem to have established for the process going forward. It is clearly all part of the without prejudice negotiation and the dispute which led to the need for that negotiation. It is not a paragraph which can somehow be divorced from that negotiation and treated as if it started a separate line of dealing outside the scope of the without prejudice protection.

25. That being the case Mr Cunningham is not entitled to rely on that paragraph in these proceedings. It should never have been before me. The only basis on which Mr Cunningham seeks to introduce it is that the paragraph is not covered by the without prejudice protection which he accepts applies to the preceding correspondence and to the rest of the letter. The only reason he advances for being allowed to rely on it is that it is a separate matter not covered by the privilege. I disagree.

26. Having said that, it is also relevant that I should observe in this context that the reliance placed upon it in support of his case by Mr Cunningham is not justified in any event. He sought to rely upon it as amounting to some sort of representation that from the date of that letter all decisions about rights would be unanimous. In doing so he equates the word "collectively" with "unanimously". While I accept that the two words might be synonymous in some contexts I do not consider that that is always the case. A collective approach or decision can be one which is reached as a result of a collective process which allows for some disagreement at the end of the day in arriving as close as possible to something which amounts to a common decision. Furthermore, this paragraph is not, in my view, dealing with final decision-making. Bearing in mind the context of this paragraph, which is a complaint that Ms Camarata had not been consulting appropriately, Mr Button is reflecting the desirability (and apparent agreement) that each side will inform the other of approaches that have been made. He is dealing with the passing of information, not the way in which final decision should be arrived at. Bearing in mind the existence of the BMA in the background, it is inconceivable that he would be giving up the BMA rights, and even if he were then that would not bind Ms Camarata and her clients or Mr Matlock for whom he was not acting at the time. Furthermore, even if there were some sort of representation along the lines suggested by Mr Cunningham there is no evidence of any reliance on this particular one, or of any matter that would make resiling from it unconscionable, and as will be seen Mr Button soon made his position clear.

27. I therefore find that even if Mr Cunningham were allowed to rely on this email, it would not serve his purpose or advance his estoppel case.

28. The correspondence continues over a large number of emails. It is unnecessary for me to set it all out. It is sufficient to find, as I do, that it was an attempt to come to some sort of overall compromise of the disputes about division of moneys and the payment of expenses, and to establish some sort of overall co-operation for the future. It remained a genuine without prejudice negotiation. There was no finalised agreement at the time, and various remarks demonstrated that. For example, in an email dated 9th October Mr Button engaged in a debate as to what images would and would not be Sex Pistols (as opposed to third party) assets and groped towards an agreement as to how to treat image rights in the future. He said:

> "Obviously until we have agreed to this then no financial settlement has been reached."

So there was still an ongoing negotiation.

29. One of the complaints in that negotiation is one made by Mr Button to the effect that Mr Stevens had been rejecting a number of approaches for licences without any

reference to the other band members and Mr Button. That complaint is particularly articulated in another email from Mr Button to Mr Grower and relied on by Mr Cunningham, this time dated 14th November 2014. He gives various instances of this behaviour by Mr Stevens which I do not need to particularise. In that letter Mr Button says that the provisions of partnership law applied so that ordinary business decisions were decided by a majority:

> "Therefore Rambo has been acting contrary to partnership law by unilaterally rejecting requests etc. That needs to stop."

30. He goes on to repeat the point that at common law the duty of good faith between partners requires decisions to be made properly between the parties and not unilaterally as Mr Stevens had been doing.

31. This letter was relied on in cross-examination by Mr Cunningham to suggest to Mr Button that he had forgotten about the BMA and that there was no way that Mr Grower could understand that it was still in play. Mr Button said he had not forgotten about it but was simply not talking about it in that letter.

32. This letter was without prejudice and should not have been referred to. In his final submissions, in which Mr Cunningham was supposed to refer to his challenge to the effects of the without prejudice rubric, he did not seek to justify his reference to it at all. I suspect that he might have said that by now the rubric did not have effect because this point was a separate one which to that which had engaged the rubric in the first place - the same point as I have already rejected. As well as being the context of the overall dispute of which this point was a part, the email itself indicates it is part of an ongoing dispute because it ends:

> "I do wonder if perhaps you and I, and perhaps Harish, could meet next week sometime to hopefully agree how we can present this to our clients in such a way that there is a positive outcome to enable these valuable assets to be properly exploited."

33. So it was clearly part of correspondence relating to an ongoing dispute. In any event it does not assist Mr Lydon. Were it relevant so to find, I would find that this email errs in attributing partnership status to the Sex Pistols Residuals, but it does not provide material for successfully saying that Mr Button had forgotten about the BMA in the light of the rest of the evidence, much less that he had hitherto proceeded consciously on the basis of unanimity in relation to band decision-making.

34. Furthermore, if this material were somehow relevant and admissible and helpful to Mr Cunningham, it would again work only as against Mr Button. It was not made clear how it would work as against Ms Camarata and the claimants.

35. On 20th November Mr Grower emailed Mr Button saying that only Mr Lydon seemed to be concerned to protect the Sex Pistols' legacy and challenging the Partnership Act analysis on the footing that the arrangement was a bare trust and not a partnership. He proposes that what would "resolve the matter" would be for Ms Camarata to make sure that any contacts she received about using Sex Pistols material were referred to Mr Stevens.

36. That email, and another from Mr Shah, prompted a response from Mr Button on 9th December 2014 to Mr Grower (not copied to anyone else) in one of the emails which Mr Cunningham submitted provided a "watershed moment" in the relationship between the parties. He started by averring that Ms Camarata respected the need to preserve the integrity and reputation of the band and observing that there had been occasions when approaches about the use of material had not been shared in a manner which everyone would like. He observed that it seemed now to be a uniformly held view that in the future all approaches should be shared "even if it is an approach which the recipient, personally, wishes to be declined", and he invited Mr Grower to confirm that that was non-controversial. He then went on:

> "As for the legal status of Sex Pistols Residuals, I note what you and Harish say, but I believe that any differences between us may be wholly academic. I say this because the various comments that you made in your email, have caused me to look again in detail at some of the past agreements that the band have much more recently entered into, in their attempts to regulate their dealings between themselves. I have been reminded in consequence that in 1997/1998, your client, together with the other members of the band and myself, all signed the attached agreement. The circumstances in which that agreement was signed included the fact that various of the signatories (and licensees and/or assignees of rights from such signatories) were then concerned to have a mechanism in place for the future, to enable the Sex Pistol properties to be effectively exploited going forward in a way that could not be "blocked" by one or more parties against the wishes of the majority of interested parties.
>
> I refer you to clause 5 of the agreement specifically. Does this not deal completely and finally with the issues on which we have been corresponding — namely that if the majority of the interested parties want a particular instance of exploitation of Sex Pistols recordings, videos, name and likeness, artwork or

> merchandise to proceed, all parties have already agreed that such exploitation shall proceed?
>
> I can't myself see that this clause leaves any room for further debate. If that is right, then I think someone should now circulate all the pending third party requests that have come in that have not been properly rejected by majority vote and the interested parties should vote on whether they would like to proceed or not to explore and/or accept the approach.
>
> I am not willing to accept that Sid's personal image rights will be considered an SPR property unless and until (i) John, Rambo and you acknowledge that the decision of the majority shall prevail and accept that no one member may "block" any decisions regarding exploitation; and
>
> (ii) John, Steve and Paul all acknowledge that their respective personal "Sex Pistols" images will also be considered SPR property and can be exploited in the same manner adopting the same procedure regarding full and prompt disclosure of all interest, transparency and that the decisions of the majority shall prevail.
>
> Unless I receive your confirmation to the foregoing by no later than close of business this Friday I will instruct Harish to make payment to David Ross of the T-Mobile receipts after deduction of my fees, Gary's fees and Anita's commission."

37. The penultimate paragraph makes it plain, if it were otherwise unclear, that this letter is still part of the overall negotiation arising out of the dispute as to the Sid Vicious image right fees. There is no reason to separate it out, and no reason to separate out the paragraphs that I have quoted as somehow being a separate matter not covered by the without prejudice rubric (see again Robert Walker LJ in *Unilever*). Unless something happened in the future to remove the privilege, the privilege still applied.

38. Mr Grower responded in a short email (still headed "without prejudice"):

> "I will take my client's instructions in the matter although I must say Harish [Shah] is not in the UK until next Monday so it will have to wait till then.

> Having said that, I think what you say in the penultimate paragraph of your letter is a little heavy handed and will only go to cause even more disharmony in the matter.
>
> I respectfully suggest until you wait [sic] until Harish is back."

This email impliedly acknowledges that the parties are still in a "without prejudice" chain, from which one would normally infer that the response will similarly be within the chain and within the privilege.

39. It was followed up by another email, undated but probably shortly after the email just referred to, in which Mr Grower says he has spoken to Mr Lydon, Mr Stevens and Mr Shah about the email of 9th December. He asks for details of the circumstances of the BMA's coming into existence and his questions imply a challenge to its validity. The penultimate paragraph of the letter asserts (in substance) a practice of unanimity in decision taking. This email, too, is headed "Without Prejudice".

40. Mr Button sent a further email to Mr Grower on 18 December 2014 reflecting his disappointment in not having heard from Mr Grower. It is not clear whether this email preceded the undated email to which I have just referred, or whether he had not actually seen it. Whichever be the case, Mr Button makes it very clear in the email that he was not willing to accept that the Sid Vicious personal image rights should be considered to be SPR property while any one member continues to attempt to block decisions relating to the exploitation of those personal image rights. This email was copied to Mr Shah and Mr Stevens and it contained an instruction that Mr Shah should release the disputed monies to him.

41. Mr Grower responded on 19th December (without prejudice) saying that he was unable to obtain full instructions because Mr Lydon was recording an album at the time, and he had told Mr Shah not to make any payment until the matter had been resolved. On the same day Mr Button reasserted his position in which he required an acknowledgement that a majority vote should prevail.

42. There then followed an email dated 16th January 2015 from Mr Grower to which Mr Cunningham attributed great significance when coupled with a non-response from Mr Button. For the first time in this chain the letter was not headed “Without Prejudice”. It was sent to Mr Button and copied to Mr Stevens and Mr Shah. On the subject line it

contained the same Subject, merely omitting the words "Without Prejudice" - "RE: Sid Vicious Estate - T Mobile - Sex Pistols - LYD/0003/00025". It starts:

> "I have now considered this matter in detail with my clients and am able to deal with the matter on their behalf."

43. Having expressed condolences for the death of the then beneficiary of the trust, it goes on to question whether Mr Button was representing the claimants and the Sid Vicious estate, or just the estate. That, like the opening words, makes it plain that this letter is following on from the previous chain. Then it says:

> "With regard to the agreement that you have sent over can I please make the following points:-
>
> 1. Neither myself nor my clients have ever seen this agreement before although I accept it certainly has John Lydon's signature on it.
>
> 2. Chris Organ does not appear to have ever seen this agreement and when I received the files from him there was no reference to it.
>
> 3. Where is the original document. John Lydon certainly does not have it neither does anyone who is currently connected with him.
>
> 4. Can you let me know how many other agreements exist that my client is not aware of and let me have copies of the same.
>
> 5. What were the circumstances surrounding the making of this agreement. What prompted the agreement to be drawn up in I believe 1996. The agreement itself is not dated.
>
> 6. What legal advice was giving to the individual/writer/band members and in particular what advice was given to John and by whom.
>
> 7. The agreement has never been acted upon in the past so who "remembered" the existence of this agreement and in what circumstances.
>
> However I believe the agreement is of no relevance to this matter as in the past it has always been the case that consents are given unanimously by all members of Sex Pistols."

44. Then it refers to the judgment of Lord Steyn in *Republic of India v India Steam Ship Company* [1998] AC 878 setting out the principles of estoppel by convention, and goes on:

> "It was rightly accepted by counsel for both parties that a concluded agreement is not a requirement for an estoppel by convention.
>
> My view is that the Estate of Sid Vicious is estopped by convention and estopped by acquiescence in challenging the procedures that have been established. It is always the unanimous decision of the band that prevails.
>
> There are in fact at least two examples of this procedure being applied namely when Glen Matlock refused consent for "Anarchy In The UK" for use in an episode of Gordon Ramsey's Kitchen Nightmares Series 3 TV program (in 2006) and in connection with a snowboarding documentary video in 2012, These examples are documented in exchanges of faxes and emails between the various parties.
>
> Whilst I do hope it will not be necessary if the Estate is unable to accept this position I will advise my client that he should apply to the High Court for a declaration which in view of Lord Steyn's judgement I am fairly certain he will obtain.
>
> I look forward to hearing from you when you have considered the above."

45. The numbered points that were made by Mr Grower correspond to points apparently fed to him by Mr Shah in an email of 5th January 2015, in which he provided nine "Points to get across", which were largely reproduced in Mr Grower's email to Mr Button. It is apparent that Mr Shah was working with Mr Lydon's representatives to rebut the suggestion that the BMA was operative.

46. Mr Button never replied to Mr Grower's email, and gave reasons for not doing so. He says he took the view that a reply was unnecessary because he thought that Mr Grower's position was wrong, having taken advice on the point. Mr Lydon seeks to rely on this email and the failure to respond as part of his estoppel case. The Defence does not make this case particularly clear, but the Further Information says that the failure to respond amounts to a representation on behalf of the claimants that in respect of licensing deals they did not rely on the majority rules provision of the BMA and recognised that unanimity was required, it amounted to an assurance by them to that effect, and it amounted to acquiescence in Mr Lydon proceeding on the basis that unanimity was required. He is said to have relied to his detriment on those matters in an unparticularised way, save that there is a reference to his not applying for a declaration as to his rights.

47. This email from Mr Grower lies at the heart of Mr Lydon's chronological case from now on, though he still has a sort of case without it. Mr Cullen says that the letter is without prejudice and therefore it and the (non-) response cannot be relied on at all. Mr Cunningham says it is not. He says that it is obvious that the preceding email from Mr Button in which he refers to the BMA was not actually properly marked without prejudice. It did not have anything to do with the debate about how the Sid Vicious fees from use by T-Mobile should be split or with the negotiations aimed at settling that dispute.

48. I do not accept Mr Cunningham's submissions. I start with Mr Button's preceding letter. It was the latest letter in a chain which started off as being properly without prejudice (no-one suggested that the chain was not properly so marked) and it deals with the state of the dispute between the parties as it then was. True it is that the question of the splitting of the image fees had been dealt with in principle by then, but the agreement was not finalised and the dispute had expanded into a dispute about the professional fees involved in the deal and the dispute. It then acquired a further offshoot in the form of trying to establish a consultation regime for the future. Those elements were all part of the same overall dispute which the parties were trying to resolve. It was in that context that Mr Button made his remarks about the BMA. Those remarks were not in a letter dealing with something else - see the threats he made at the end of the letter, which demonstrated the inter-linking of the issues. Nor were they in part of the letter dealing with an entirely separate subject matter so as to make it severable (see *Unilever* again). They were part of the issues in play. That letter, and those remarks, are therefore properly to be treated as falling within the without prejudice protection (absent one of the exceptions applying).

49. Mr Grower's January email then followed from that. His intervening letters promised a response when he had taken instructions and those letters too were marked "without prejudice". That is important. Mr Grower's January email then expressly states itself as replying to Mr Button's email. This was therefore that response to a without prejudice letter. The subject line in the email was, as I have observed, exactly the same as the previous email but without the words "Without Prejudice". So even at that level it was a response. The natural assumption would be that it too was without prejudice as part of the chain. It continued to deal with the extant dispute, or part of it. Its content was perfectly capable of being appropriately marked without prejudice.

50. It was not disputed that a departure from the without prejudice track must be appropriately signalled (see above). The only reason for supposing that it might be an open response would be the absence of the magic words from the subject line. There was no other indication that it might be open. In my view that is nothing like enough to take this letter outside the without prejudice line bearing in mind the clarity that has to be demonstrated in order to achieve that. If Mr Grower truly wanted to make the letter open he should have done more to flag the point.

51. The Grower email therefore has to be treated as being a without prejudice communication. Accordingly, it, and any response (even silence) cannot be deployed in these proceedings unless one of the exceptions applies. The first exception argued for by Mr Cunningham was a waiver by virtue of what appears in Ms Camarata's witness statement in these proceedings, provided by her in support of an application for interim relief compelling Mr Lydon to provide his consent to the use of the music in the TV series. In paragraph 32 she refers to a letter written to Mr Lydon on behalf of the claimants requesting his consent consistently with the majority vote in favour of that use. Paragraph 33 tells the court what Mr Lydon's response was, which was a letter from his solicitors (Ince Gordon Dadds LLP). That solicitors' letter set out some history, and reasons why the claimants had no case, and in the course of that it set out verbatim Mr Grower's January 2015 letter. Mr Cunningham's submission was that Ms Camarata's exhibiting of the other side's solicitors' letter which itself contained the wording of the January 2015 letter waived the without privilege nature of the letter so that the rubric could no longer be relied on.

52. I was not shown any authorities on the "waiver" by one side of without prejudice privilege. It is not clear to me that that can be done unless the other side accepts the "waiver". However, I consider there is nothing in the point. Ms Camarata (or the claimants) were not actually deploying the material. She/they were merely setting out for the court what they understood Mr Lydon's case was said to be. They could, I suppose, have referred to the defence case in general terms, provided a redacted version of Ince Gordon Dadds LLP's letter and reserved the claimants' position on without prejudice privilege, but it is quite understandable why they would not seek to do that in the context of a first witness statement which is setting out the position for the court. The idea that by not adopting that course they were agreeing to waive the without prejudice nature of that letter (which was not really in play at the time) seems to me to be misplaced. They were not stating or agreeing that the rubric should not apply; they were describing somebody else's case.

53. The other exemption relied on by Mr Cunningham in his written final submissions is the "not fairly justiciable" point. Paragraph 1.7 of his written submissions says:

> "In the present case Cs have sought to answer Mr Lydon's estoppel defence by asserting that matters were dealt with "on a consensual basis"… The "consensuality" claim is belied by the content of the material which Cs seek to exclude by way of WP privilege. It is submitted that the attempted exclusion is unfair and renders the estoppel/consensuality issue not properly justiciable."

54. I am afraid I cannot see how this works. It is true that the case of the claimants is that things were done (as far as they were concerned) on a consensual basis rather than a confrontational majority-imposing basis. That is either true or it is not. That case is run in respect of both the pre-letter and post-letter period. Its truth or falsity depends on the transactions which occurred and the reasons the claimants give for their acts. The letter actually has very little to do with that. It seeks to put a different gloss on the narrative, but is not evidence of anything useful about consensuality. The consensuality point as such is perfectly triable without this letter.

55. In his written and oral submissions Mr Cunningham sought to say that the T-Mobile incident demonstrated that everything was not dealt with consensually - there was a serious dispute about the particular T-Mobile matter. Therefore, he submitted, I could not fairly deal with the dispute about consensuality without looking at that material. This submission misses the point about how consensuality was relied on. The claimants' witnesses' evidence was that they preferred consensuality to relying on the BMA, which was why the BMA was not deployed in the past. They were not saying there had never been a disagreement about anything. Nothing in the without prejudice correspondence goes to the question of how the claimants had preferred to deal with things in the past. A fair trial of their views as to consensuality was perfectly possible without the without prejudice material - indeed, that material is irrelevant to the point.

56. Mr Cunningham also sought to invoke the estoppel exception identified by Robert Walker LJ and referred to above, albeit (he said) under the heading of justiciability. Mr Cullen anticipated that Mr Cunningham would say that Mr Button's silence in the face of Mr Grower's January letter was in effect an acceptance of what Mr Grower was saying, so that thereafter in non-privileged dealings Mr Lydon and his agents were entitled to, and did, rely on it to their detriment. That anticipation was no doubt fostered by the fact that Mr Cunningham sought to make much of that silence in cross-examination, from which it seemed he was going to rely on the silence in the manner I have just identified. In the end I could not detect that Mr Cunningham made that case in his final submissions, but I will deal with the point nonetheless.

57. I do not consider that the exception applies. The point turns on the response of Mr Button to Mr Grower's letter, that is to say his silence. What is required for Mr Cunningham to succeed on this point is a clear and unambiguous indication by or on behalf of the claimants that a without prejudice statement or document can be relied on, with the intention that it be relied on. There was no such express statement here, so the question is whether the silence amounts to such a statement confirming the case sought to be made by Mr Grower that (putting it shortly) the BMA was dead and had never really been treated as being alive. In my view it is clear that no such implied statement was made.

58. First, it is not apparent that Mr Button was acting, or should be treated as acting, for the claimants in this respect. He was in dispute with Mr Lydon, and potentially the claimants, as to the entitlement of the band to fees and incidence of the burden of the expenses. He was acting on behalf of the estate in that respect. Although he was a little confused as to who he was acting for in the end he seemed to say in cross-examination that he was just acting for himself, and that would seem to be correct. So if the silence is significant, it is significant for him alone.

59. Second, in any event, as in *Berkeley Square Holdings*, above, this silence is not a clear unambiguous statement at all, much less is it one on which Mr Grower and his client were intended to rely on. Mr Button's evidence, which I accept, was that subjectively he did not accept Mr Grower's stated position and did not think he needed to reply to the email. So if one goes by subjective intentions then Mr Lydon's case fails at that point. However, I think it likely that it is the case that the intention has to be judged objectively, like most intentions in a legal context. Nonetheless, even if that is the case I do not consider that this silence, viewed objectively, can be taken as a statement of acceptance of Mr Grower's position which Mr Lydon was to be able to rely on for the future. Mr Button had set out his position very firmly, and more than once, in the correspondence. He was obviously keen to establish a position for the future in which there could be no blocks on deals by single individuals. It is not a sensible interpretation that he abandoned that position as a result of one challenge by Mr Grower, and then signalled it by a non-response in without prejudice correspondence which he would be likely to anticipate could not be relied on anyway. No sensible person would take that to be his position. As Aitkens LJ said in *Argo Systems FZE v Liberty Insurance Pte Ltd* [2011] EWCA Civ 1572 (in the context of considering an alleged representation in an estoppel claim):

> "Saying nothing and "standing by", ie. doing nothing, are, to my mind, equivocal actions. This court has stated that, in the absence of special circumstances, silence and inaction are, when objectively considered, equivocal and cannot, of themselves, constitute an unequivocal representation as to whether a person will or will not rely on a particular legal right in the future" (para 46)

60. Putting it another way, for Mr Cunningham to succeed it would be necessary to interpret Mr Button's silence as if he had said: "Alright, I agree. You are right. The BMA is a dead letter and we should all proceed on that footing hereafter." That is not a sustainable suggestion.

61. Third, there is good evidence that those involved on Mr Lydon's side did not treat it as an unambiguous acceptance of Mr Grower's position and did not rely on it anyway. On 22nd January 2015 Mr Grower wrote to Mr Stevens and Mr Shah (the latter of whom can be treated as being on Mr Lydon's side by now in relation to this matter):

> "Peter Button has not responded to my email of 16th of January.
>
> I do not wish to ruffle his feathers too much but do you think I should now write to him and ask him to confirm to Harish [Shah] the money should be split as originally suggested so that each member of the band receives their share.
>
> Let me know if you agree."

Later on the same day he wrote to Mr Stevens again, copied to Mr Shah:

> "Peter has not responded to me that is why I want to know whether we should chase him up. However I am not anxious to go to war with him if that will just worsen the situation.
>
> What [do] you think we should do. Let me know in due course."

62. There was no follow-up by Mr Grower. Mr Shah confirmed in cross-examination that a decision was taken not to chase Mr Button because they did not want to go to war with him. Mr Grower said that Mr Shah and Mr Stevens were happy to follow his advice not to ruffle feathers and not to go to war. Mr Stevens did not quite accept that position in his cross-examination, but I accept the truth of what Mr Grower and Mr Shah said about that. Mr Lydon's camp decided not to press the matter further, not because they considered they had the equivalent of an acceptance by Mr Button of the position that they had put forward, but because they appreciated that if they reverted to the matter it would just stir up a dispute again, including a dispute as to the subsistence of the BMA. That shows that they did not treat Mr Button's silence as being an acceptance of the position. They must have appreciated that he did not accept the position. In this connection it may be significant to note that Ince Gordon Dadds LLP, in the letter referred to above, did not refer to Mr Button's non-response, so they did not make a case for saying that that non-response was something that was relied on at the time by Mr Lydon and his team.

63. Furthermore, I find that Mr Button made his continued reliance on the BMA clear to Mr Shah at a meeting involving Mr Button, Mr Shah and Ms Camarata on 28 April 2015. Mr Button's note of that meeting, at the relevant part, reads:

> "Argued about unanimous v majority approvals
>
> Harish says that because we have not exercised majority we cannot now do so > CHECK THE LAW"

64. Mr Button's witness statement confirms that Mr Shah was saying that the rest of the band had lost its rights under the BMA while Mr Button and Ms Camarata were maintaining their position that the majority voting rules still applied. I accept the evidence of Mr Button and Ms Camarata in that respect, not least because in the end even Mr Shah accepted in cross-examination that there was an argument in which Mr Button and Ms Camarata were maintaining that position. So by this time Mr Lydon's side (which included Mr Shah for these purposes) knew that the other band members were still relying on the BMA and that Mr Button's silence in the face of Mr Grower's email could not be taken as an acceptance of the position set out in that email on which Mr Lydon was entitled to rely. Mr Shah accepted that it would have been his normal practice to report on the meeting to Mr Grower, and Mr Grower accepted that there was a strong likelihood that Mr Shah would have told him if the argument took place as I have found it did. Bearing in mind that Mr Shah seemed to have adopted Mr Lydon's line in this dispute, I think it inevitable that he would have mentioned to the others on the Lydon side of the debate that there was still a dispute about the BMA.[1]

65. I need to deal with one possible piece of contrary evidence. It was common ground that after the Grower email was sent in January 2015 Ms Camarata and Mr Stevens had various telephone calls. Those calls seem to have been on 26th and 29 January 2015. Ms Camarata's evidence was that all that was discussed in those telephone calls was a split of the T-Mobile money. Mr Lydon's case was that Ms Camarata accepted in those telephone calls that unanimous decisions were necessary, and that Mr Stevens reported that back to Mr Grower. Mr Grower has an attendance note dated 4 February 2015 which reads:

> "Telephone attendance on Rambo he said that he has spoken to and Anita a couple of times she now has accepted that it has to be a unanimous decision for all concerned but Peter Button was apparently away from the office so [she] wants to wait until Peter gets back before we can bring the matter to a close. Anita furthermore did not want to pay John's costs but Rambo said why should John pay the legal bill bearing in mind he was just fighting for what he was entitled to and it should come out of the band monies, she is going to get back to him on this point."

[1] The strongest evidence of Mr Shah's taking sides actually comes in the without prejudice material. He provided the material for most of the numbered paragraphs in Mr Grower's January email, and the subsequent emails about not wanting to go to stir up a dispute with Mr Button were cc'd to Mr Shah, again indicating which side of the debate he was on. I am, however, alive to the fact that this material is part of the material which I have found to be inadmissible. However, it is inherent in his conduct in the April meeting that he was adopting the Lydon line, and that by itself points to which side of the debate he was on.

66. Ms Camarata was adamant that she did not speak about the BMA to Mr Stevens. She had no instructions from her clients to abandon the BMA, and indeed she knew that they wished to maintain it and had instructions to that effect. Mr Button has a couple of contemporaneous notes of conversations with Ms Camarata. A note of 28th January 2015 reads (so far as relevant):

> "Telephone call with Anita re-T-Mobile issue and majority rules, you want to split T-mobile revenue between SPR while reserving position re majority rules and then agreeing criteria for a proper approval procedure. [More about approval procedures and the payment of Mr Grower's fees]."

67. A further note of the next day (29th January) reads:

> "Telephone call with Anita; Paul and Steve feel very strongly that majority rules must be reserved. Also concerned about finances. Discussions regarding all the outstanding issues."

Those notes are obviously inconsistent with the state of mind required in Ms Camarata for her to have told Mr Stevens that the BMA was abandoned.

68. I prefer Ms Camarata's version of these events. Bearing in mind her previous reliance upon the BMA, starting from when she procured it herself back in 1998, I think it inconceivable that she would give up the BMA so lightly. There was no reason why she should have done so. The letter from Mr Grower cannot have been that convincing, and she had apparently received legal advice to the effect that it was not right. There is no good reason why she should have reversed her position in those two telephone conversations.

69. In fact Mr Stevens' evidence turned out to be not quite as categorical as his principal's case suggests. What he said in his witness statement was that Ms Camarata:

> "...said something along the lines of "not to worry about that as it would be business as usual the way it was always run before."

He confirmed in cross examination that what was said was to the effect:

> " … not to worry, business as usual, the way it's always run, not to worry"; and
>
> "… not to worry. It might have been there is no reason to be concerned, that might have been not to worry, it was definitely business as usual, the way it's always run."

70. If that is what was said it does not amount to any sort of affirmation that the BMA was no longer going to be relied on. "Business as usual" as far as Ms Camarata was concerned was a situation in which the parties always tried to reach consensus and nobody forced anything on anybody else. That is not inconsistent with the BMA being in the background, as it had always been. On this footing she was trying to give reassurance to Mr Stevens that the BMA would be unlikely to make a practical difference to the way things had been run in the past, i.e. cooperatively. That does not amount to an abandonment of the BMA.

71. If that is what happened then it would be likely to be the case that Mr Stevens took Ms Camarata's statements too far and mis-reported them to Mr Grower. It makes sense of what was recorded by Mr Button as having been said to him (and I accept the accuracy of what Mr Button recorded). Mr Lydon's case as to what was said would require Ms Camarata to be saying something that she did not believe to be true, that she had no authority to say and that would be contrary to her historic and then present intentions. She would have been misleading Mr Stevens and acting contrary to the instructions and interests of her clients. That is fundamentally unlikely. It is much more likely that if she said anything (and she may have done) it was reassuring words of the kind recorded by Mr Stevens which do not go so far as abandoning reliance on the BMA and does not refer to it at all.

72. This piece of evidence therefore does not strengthen Mr Lydon's case on Mr Grower's email. It is also noteworthy that this statement was not referred to at all in a letter before action intended to set out a compelling case to the claimants. If this incident had really featured as a material representation in the minds of Mr Stevens and Mr Lydon (which is how it is now presented) then it is very strange that it was not mentioned as part of the original case presented in correspondence.

73. The net effect of all this is that Mr Button's silence in the face of Mr Grower's email cannot be taken to be an indication that thereafter Mr Lydon was entitled to rely on the email, and that Mr Lydon, Mr Stevens, Mr Shah and Mr Grower did not so rely on it. In the circumstances the estoppel exception does not apply and the without prejudice characteristic of the January email persisted.

Conclusion

74. It follows from all that that the email and Mr Button's silence in the face of it cannot be deployed in this litigation by Mr Lydon as part of an estoppel case or anything else. That material is not available to him to support his case. So far as necessary, references to that material in the evidence and pleading ought to be struck out, though it is unnecessary in the circumstances for anybody to carry out that striking-out in a physical sense.

75. It is right, however, that I should make a separate finding about the April 2015 meeting between Ms Camarata, Mr Button and Mr Shah. That does not seem to me to form part of the overall "without prejudice" transaction, and evidence can be given and received on that. A context has to be provided for it, because otherwise it would not be apparent why there should be an argument at all. However, that does not let in the whole of preceding without prejudice material. All that is necessary to provide context is to know that there had been some sort of debate about it. To that very limited extent the without prejudice material can be admitted. This would seem to be a minor version of the justiciability point.