Neutral Citation Number: [2024] EWHC 396 (IPEC)

Claim No: IP-2021-000080

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY ENTERPRISE COURT

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: Monday, 4 March 2024

Before:

MS. PAT TREACY
SITTING AS A JUDGE OF THE CHANCERY DIVISION

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Between:

1. OCEAN ON LAND TECHNOLOGY (UK) LIMITED
2. CARIBBEAN SUSTAINABLE FISHERIES CORP **Claimants**

- and -

1. RICHARD LAND
2. DENNIS GOWLAND
3. NORTHBAY INNOVATIONS LIMITED **Defendants**

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JEREMY REED KC (instructed by Howes Percival LLP) appeared for the **Claimants**.
PAUL A. HARRIS (of **Dehns**) appeared for the **Defendants**.

Hearing date: 16 January 2024
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APPROVED JUDGMENT

DEPUTY JUDGE TREACY:

Overview

1. This judgment deals with three applications, one from the Defendants and two from the Claimants, of which one is conditional. The applications relate to the trial witness evidence. The trial is due to be heard by His Honour Judge Hacon in June. It has been listed for three days, exceeding the usual two-day hearing length in IPEC.

2. In June 2016 the First Defendant, (Mr Richard Land) and the Second Defendant (Mr Dennis Gowland) sold their shares in a company called Shellfish Hatchery Systems Limited. The transferred business related to lobster aquaculture. It was effected through two share purchase agreements (the SPAs), one for Mr Land and one for Mr Gowland respectively. The purchaser was Caribbean Sustainable Fisheries Corp (the Second Claimant). The SPAs were accompanied by the assignment of rights in patent GB2481409 owned by Mr Land and Mr Gowland (the Patent Assignment).

3. Shellfish Hatchery Systems Limited is now called Ocean on Land Technology Limited, (the First Claimant). The First and Second Claimants are part of the same group of companies, ultimately controlled by Mr Giles Cadman.

4. In October 2019 a further agreement (the Settlement Agreement) was concluded.

5. The underlying causes of action are:

   (a) claims for breach of contract arising from:

      (i) the SPAs;

      (ii) the Patent Assignment; and

      (iii) the Settlement Agreement.

   (b) trade mark infringement; and

   (c) patent infringement.

Procedural history

6. The Claim was issued in August 2021 and the CMC took place in July 2022 before HHJ Hacon. The CMC Order is dated 26 January 2023. That Order granted retrospective permission to the Claimants to file and serve Re-Amended Particulars of Claim; to the Defendants to file and serve a consequentially Amended Defence and Counterclaim; and to the Claimants to file and serve a consequentially Amended Reply and Defence to Counterclaim. The Judge directed the parties as to the issues to be dealt with at trial and as to the evidence to be served. A three-day trial was, exceptionally, deemed necessary.

7. Following a subsequent hearing before HHJ Hacon, an order dated 27 July 2023 provided that an application relating to without prejudice material should be heard by a judge other than HHJ Hacon. Originally scheduled for the week commencing 16 October 2023, the hearing took place on 16 January 2024.

The applications

8. The Claimants apply:

   (a) for certain paragraphs (and related exhibits) of the trial witness statements of both the First and the Second Defendants to be struck out; and

   (b) for permission to reply to some parts of that evidence if it is not struck out.

9. The Claimants' grounds are that parts of the Defendants' trial evidence:

   (a) improperly exhibit without prejudice correspondence, and purport to refer to the substance of without prejudice correspondence; and/or

   (b) improperly comprise expert evidence; and/or

   (c) are inadmissible and/or irrelevant.

10. The Defendants seek permission to reply to two paragraphs of the trial witness statement of Mr Giles Cadman (his second Witness Statement). The Defendants' grounds for doing so are that they regard it as necessary:

    (a) to rebut a misrepresentation in Paragraph 7 of Mr Cadman's statement; and

    (b) to reply to a mischaracterisation of Mr Gowland.

Preliminary issues

11. At the outset of the hearing the Claimants applied for an order under CPR31.22 (2) covering documents said to be subject to the without prejudice rule. Having heard brief submissions, the order applied for was made.

12. The Claimants submitted that the part of the hearing dealing with without prejudice materials should be in private to preserve the confidentiality of those documents pending the outcome. They relied on the judgment of HHJ Hodge QC, sitting as a judge of the Chancery Division in *Holyoake v Candy* [2016] EWHC 2119 (Ch), at [12]-[14] *(Holyoake)*, a case dealing with materials subject to the without prejudice rule. HHJ Hodge set out the public interest considerations that require hearings to be in public but also noted that where the object of the hearing would be defeated by holding it in public, an order under CPR 39.2(3)(a) is necessary.

13. Both advocates submitted that the portions of the hearing dealing with without prejudice materials should be heard in private.

14. Having considered the parties' submissions and given that HHJ Hacon had directed that the without prejudice material should be dealt with by another judge, I made an order under CPR 39.2(3)(a) that the portion of the hearing dealing with the without prejudice material should be held in private. The remainder of the hearing relating to expert evidence and to reply evidence was held in public.

Evidence

15. Each party had filed one Witness Statement: the Fifth Witness Statement of Ms Hannah Steggles of Howes Percival (Claimants); and the Third Witness Statement of Mr David Pountney of Dehns (Defendants).

Submissions

16. Mr Reed KC appeared for the Claimants and Mr Harris of Dehns for the Defendants.

17. In addition to the written skeleton arguments, during the hearing I requested supplemental material from the Defendants' representatives as there was not time during the hearing to understand the basis for the Defendants' application to adduce additional evidence, or the scope of the evidence for which leave was sought. The Defendants provided their comments by letter on 23 January. Mr Reed provided a short note in reply on 24 January.

18. During the hearing I also asked for clarification as to the scope of the material which the Defendants regarded as benefitting from an exception to the without prejudice rule. In correspondence on 18 January and 9 February, Dehns confirmed that the Defendants no longer sought to rely on any exception for certain paragraphs of Mr Land's witness statement or the documents referred to in those paragraphs. Those paragraphs are to be redacted and I have not considered them further.

19. The Defendants suggested that further submissions might be needed on points which, it was said, had become apparent only during the hearing, essentially in respect of the scope of Issue 5b and evidence relevant to it. This is discussed further below.

20. I am grateful to both advocates for their assistance. I am also appreciative of the marked-up copies of the evidence of Mr Land and Mr Gowland prepared by Howes Percival and attached to the Fifth Witness Statement of Ms Steggles, and the post hearing materials provided by Dehns. However, the complexity and number of the points made, the references to multiple pleadings and amended pleadings, and the multiple references during the hearing to specific paragraphs of evidence meant that a transcript would have been of significant benefit when preparing the judgment.

Initial observations

21. Complex interim hearings should be rare in IPEC. While all High Court litigation is governed by the overriding objective in CPR 1.1, and the requirements in CPR 1.2-1.4, those obligations have particular force for both the Court and the parties in this jurisdiction given the stated purpose of IPEC to provide access to justice for those who might otherwise be deterred from litigating for costs reasons.

22. As pointed out in the well-known Judgment of His Honour Judge Birss QC as he then was, *Temple Island v New English Teas* [2011] EWPCC 19 (*Temple Island*), the procedure in IPEC is '*... intended to be more streamlined, faster and more actively managed that High Court litigation*.' [32]. That case made clear that the costs cap and the costs benefit test go hand in hand. In *Liversidge v Owen Mumford* [2011] EWPCC 34, also decided by HHJ Birss QC at about the same time as *Temple Island*, the implications of the costs regime for the way in which cases should be dealt with by the

parties and the court was already clear. The Court's fundamental approach to evidence was explained as follows: '*The purpose of the Patents County Court procedure is to facilitate access to justice, in part by streamlining and controlling what is admitted into the proceedings … What is reasonable and proportionate is always important. Seeking to justify potentially complex evidence on the basis that it is the best evidence is a path which leads to increases in cost and time*'.[26]

23. As a consequence, the practice in IPEC is to permit witness evidence only where that evidence can be linked to an identified issue and where it passes the costs benefit test. Parties preparing witness evidence must bear that context in mind.

24. Both the IPEC costs benefit test and the overriding objective oblige parties to have regard to the implications of all the steps they take for costs and for the allocation of court resources. The court will have regard to unnecessary burdens placed on the court or on other litigants when assessing costs.

25. All procedural steps should be approached in the same way. So, for example, interim applications should be made only where they are likely to satisfy the cost benefit test and the court will have that test firmly in mind when dealing with applications. When an application is necessary, it should be focussed on issues that will make a difference at trial. While acknowledging the adversarial nature of litigation, parties should seek to resolve the matters which are the subject of an application as far as possible before the Court becomes involved. Where points are not pursued, this should be made clear as soon as possible to ensure that preparation time (and, in the case of the judge, scarce pre-reading time) can be devoted to matters that require resolution. There is no merit, and little point, in pursuing steps which will ultimately be irrelevant at trial, in failing to engage with sensible proposals from the other party, or in making points which will not have any meaningful impact on the outcome of the litigation.

26. To spend disproportionate time dealing with marginal points or to fail to engage meaningfully with issues raised by the other party before an application is issued will increase complexity for the Court, imposing additional demands on limited court resources and raising costs for both parties in a way which is incompatible with litigating in a jurisdiction which is intended to be streamlined, speedy and available to those with limited means. While the cost capping regime may mean that some of the adverse costs consequences of litigating may be mitigated, this provides protection only against adverse costs orders, it does not assist with the costs that may need to be incurred in dealing with unnecessary points and which may not be recoverable, even by a winning party, much less the unsuccessful litigant.

The Defendants' Application

27. The Defendants sought permission to reply to two paragraphs of the second Witness Statement of Mr Giles Cadman: paragraph 7 and paragraph 18. Mr Harris' skeleton argument said very little about this application. Mr Reed said rather more, noting that inter-partes correspondence had not greatly clarified the Defendants' concerns. He also referred to witness evidence filed by Ms Steggles of Howes Percival to which, he said, no meaningful response had been received and further noted that compromise language on one aspect of Mr Cadman's evidence had been proposed by the Claimants, but no response had been received to that either.

28. The application in respect of paragraph 18 was not pursued at the hearing.

29. Given timing constraints and the lack of clarity about the extent of the evidence for which permission was sought, I asked the Defendants to provide further information, including details of the evidence they wished to adduce. Dehns did so on 23 January 2024. Mr Reed filed supplemental written submissions on 24 January.

30. It is regrettable that this issue had not been properly explained in advance. One purpose of inter-solicitor correspondence and witness evidence in this jurisdiction is for the parties to clarify and resolve issues where possible so that when the Court needs to intervene only real points of contention remain to be resolved. The Defendants fell short of that ideal in respect of this application.

31. Following the post-hearing exchanges, I understand that the Defendants' position is that paragraph 7 of Mr Cadman's second witness statement misrepresented the purpose of a visit made by Mr Land and Mr Gowland to the British Virgin Islands in the summer of 2012. The paragraph is also said to contradict other statements made by Mr Cadman or materials already in evidence. The Defendants seek permission to serve a short witness statement and to exhibit a copy of a report of the 2012 visit.

32. Mr Reed submits that the statements objected to form part only of the background and do not go to any of the issues to be determined at trial. In view of that position, the Claimants offered to remove certain words from Mr Cadman's statement to avoid any potential concern that they misrepresent the purpose of the 2012 trip.

Misrepresentation

33. Issues and evidence should where possible be simple, and limited to what is necessary. The proportionate and cost-effective way of dealing with the alleged misrepresentation in paragraph 7 is to order it to be removed in line with the proposal made in paragraph 12(4)(a) of Mr Reed's written submissions after the hearing.

Contradictions

34. The Defendants seek permission in respect of two alleged contradictions arising from Mr Cadman's comments in paragraph 7. These are: (i) said to contradict subsequent comments made by Mr Cadman about the capabilities of Mr Land and Mr Gowland; and (ii) said to contradict section 7 of Mr Land's Settlement Agreement.

35. Mr Reed submitted that: neither is a contradiction; neither goes to a material issue; and the Defendants have not explained what evidence they wish to adduce in reply.

36. To grant permission for reply evidence on (i) above would simply lead to greater costs and would not assist the trial judge. This is background contextual material which provides a subjective recollection of Mr Cadman's view at the time in question. To the extent that it appears to be inconsistent with later material, the trial judge will be able to view the statements in context and assess the weight to be given to them. The evidence from both parties already goes beyond what is required to resolve issues of fact at trial. I will not permit further evidence unless it is clearly necessary.

37. The second alleged inconsistency is said to arise between a comment in paragraph 7 of Mr Cadman's statement and the contents of the Settlement Agreement. The Settlement

Agreement is already available. The alleged inconsistency can be addressed during trial if it is sufficiently relevant to the issues. In the absence of a draft witness statement or outline of evidence, it is difficult to understand what further factual evidence might usefully add.

38. Mr Reed suggested a form of words that might be included in an order permitting limited evidence. I do not know if the Defendants believe that this suggestion would help. Given the general position that evidence should be likely to assist the trial judge, I will not permit further evidence in reply to paragraph 7 of Mr Cadman's Second Witness Statement and the Defendants' application is dismissed.

The Claimants' Applications

39. The Claimants apply for a number of paragraphs (and related exhibits) of the Defendants' trial witness statements to be excluded, asserting that they: amount to expert evidence and are thus inadmissible; and/or are without prejudice and thus inadmissible; and/or are inadmissible on other grounds; and/or are in any event irrelevant.

40. The Claimants' starting position is that the Defendants' evidence is 'excessive'. Mr Reed relied on CPR 63.23(1) and paragraph 29 of PD 63. He submitted that permission for fact evidence in IPEC is granted only for evidence; relevant to specific and limited issues; which satisfies the costs benefit test; and which is otherwise admissible.

41. It is for the Claimants to establish that the evidence to which they object is inadmissible, save for material subject to the without prejudice rule. It is for the party seeking to rely on such evidence (in this instance the Defendants) to show that the evidence falls within an exception to that rule.

42. The Claimants submit that any inadmissible evidence should be excluded now, to reduce the time and costs required to prepare for trial and cross-examination and the time that will be required to deal with disputes about evidence during the trial.

43. The Defendants disagree with the Claimants' substantive points on the evidence. Mr Harris also submitted that it would be preferable for issues of admissibility or irrelevance to be determined by the trial judge, with the trial judge considering whether or not to hear argument or give specific evidence any weight.

44. A hearing on evidence is required in this matter because of the dispute relating to the without prejudice rule. Some evidence which is said to fall within the without prejudice regime is also attacked on other grounds. As the judge dealing with the without prejudice issues must consider some of the evidence in any event, it is in accordance with the costs benefit test to deal with other substantive disputes about evidence at the same time as far as is sensible and proportionate.

45. A distinction can be drawn between evidence which is inadmissible irrespective of its relevance, and evidence which it is said should be excluded only because it is not sufficiently relevant. A dispute relating to the first type of evidence can usually be assessed by reference to general principles, while the second requires a more granular review of the specific issues to be resolved at trial. In IPEC this involves consideration of the pleadings and of the issues by reference to which evidence is to be adduced.

Where objections relate to relevance, it may be more cost effective for the trial judge to deal with them. The trial judge will have greater familiarity with the issues that are important to resolving the dispute and the overall state of the evidence. In IPEC, as in this case, the trial judge may also have dealt with the CMC and thus have been directly involved in settling the list of issues.

Relevance

46. It is clear that the parties disagree about the scope of the issues to be determined at trial. This underlies the dispute about the relevance of the material (including without prejudice material) on which the Defendants wish to rely.

47. The Claimants' position is that the list of issues settled by the Judge following the CMC is determinative of the evidence which may be adduced. Anything that falls outside that envelope is said to be irrelevant. The Claimants have therefore applied to have significant portions of the evidence of Mr Land and Mr Gowland removed as it does not, in their view, relate to any issue in the list of issues.

48. The Defendants accepted the importance of the list of issues in IPEC proceedings but did not agree that evidence on a matter not explicitly referred to in that list was automatically irrelevant. Mr Harris submitted that the list of issues is not determinative of everything that might need to be resolved at trial. He relied on paragraph 4.6 of the IPEC Guide (October 2022 edition). That paragraph reads:

> ***The issues***
>
> *The issues in dispute. These should clearly emerge from the statements of case. The parties must draw up a list of issues which the court will have to resolve at trial. It is not necessary to list every sub-issue that may arise and this should not be done.* ***The parties will be permitted to argue at trial any point which is both covered by the pleadings and which the opposing side should reasonably contemplate as falling within one or more of the listed issues.*** *The trial judge may refuse to hear argument at trial on a point which does not satisfy those criteria.* (emphasis added by Mr Harris in his skeleton argument)

49. The Defendants disputed the Claimants' characterisation of the scope of the list of issues (and the pleadings). The principal differences related to Issues 5 and 6.

50. Issue 5 reads:

> '*Whether the First Defendant has breached clause 7.5 of the Settlement Agreement, and in particular:*
>
> *a. Whether the First Defendant has sought to sell to or solicit business using intellectual property relating to up-wellers and square/rectangle tanks; and*
>
> *b. Whether that included intellectual property that had been developed by or on behalf of the First Claimant during the First Defendant's consultancy arrangement for the benefit of the First Claimant.*'

51. Issue 6 reads: '*Whether the use complained of impaired the origin or advertising functions of the First Claimant's Marks (without prejudice as to which party has the burden of proof on this issue)*'.

52. The principal dispute on Issue 5 was as to the meaning of the phrase 'consultancy arrangement' as used in the pleadings and in Issue 5. As I understood the parties' positions, the Claimants take the view that Issue 5b) relates not only to the period during which the First Defendant was a party to an express consultancy agreement with the First Claimant, but also the period during which the First Defendant was employed by another company part of the same group and controlled by Mr Cadman. The Claimants also say that the important point is not who the engaging party was, but whether the work was carried out '*for the benefit of the First Claimant*'.

53. The Defendants say that the duration and nature of the obligations on the First Defendant and to whom those obligations were owed is a live issue. They say that Issue 5b) is not to be understood as explained by Mr Reed and that it would be inappropriate to limit the evidence by reference only to the phrasing used in the list of issues. The Defendants' position is that the phrase 'consultancy arrangement', properly understood, refers only to the period of the Consultancy Agreement and not to any subsequent employment relationship between Mr Land and any other company. The Defendants also submitted that the words '*for the benefit of the First Claimant*' do not have the meaning suggested by the Claimants.

54. The Defendants' position during the hearing was that they had properly pleaded: (i) that the intellectual property said to have been developed in breach of clause 7.5 was developed after their respective consultancies had ended; (ii) that neither Defendant's consultancy ended with the Settlement Agreement; (iii) in particular the First Defendant's consultancy ended when his Consultancy Agreement with the First Claimant ended and he was then employed by the Second Claimant through an affiliate company; and (iv) that it was this agreement that was terminated by the Settlement Agreement.

55. Both parties addressed me on the sequence of events leading to the list of issues being annexed to the CMC order. They disagreed whether some aspects of the Defendants' Re-Amended Defence and Counterclaim were consequential amendments for which permission had been given. The Defendants suggested after the hearing that further submissions might be required on this topic and particularly the scope of Issue 5b).

56. I agree with Mr Harris that the list of issues is not intended to operate as a straitjacket for the parties or the trial judge.

57. Clause 7.5 of the Settlement Agreement will need to be construed at trial. The wording of Issue 5b) reflects language used by both parties in their pleadings. The potential for dispute over the implications of the parties' pleaded positions is not unforeseen. The existence of a 'c*onsultancy arrangement and employment*' is pleaded at paragraph 12 of the original Defence and Counterclaim. The evidence contains references to Mr Land's employment, over and above those which are challenged by the Claimants. It will be for the trial judge to decide whether the Defendants' pleading is sufficient to bear the weight they seek to place on it, or whether, for example, relevant admissions have been made. It will be for the trial judge then to construe Clause 7.5 of the Settlement Agreement.

58. If excluding evidence on relevance grounds requires substantive interpretation of the pleadings which might effectively determine a contested issue it is not appropriate to do so after an interim hearing of this nature unless the position is very clear.

59. Having read the parties' submissions and after oral argument, including as to the evolution of the pleadings, I conclude that the construction of Issue 5 is not sufficiently clear to grant the Claimants' application. Evidence said by the Defendants to go to Issue 5 and within the parties' pleaded cases will not be excluded on grounds of irrelevance, although it may be inadmissible or excluded on other grounds.

60. Issue 6 is the only trademark matter that appears in the list of issues. It is limited to the origin or advertising function of the mark. No other potentially relevant trademark issues are referred to in the list of issues, despite appearing in the pleadings.

61. Mr Reed submitted that the material from Mr Land's evidence (paragraphs 96 and 97) which the Defendants say is relevant to the trademark dispute does not go to the origin or advertising function of the mark as it relates to comments made by Mr Cadman in private correspondence. Mr Reed made the same submission in respect of paragraph 45 of Mr Gowland's evidence.

62. Paragraphs 96 and 97 of Mr Land's evidence were also said by Mr Pountney in evidence to be relevant to Issue 2 (patent validity). Mr Reed submitted that this was surprising given the limited scope of Issue 2. Mr Harris did not substantively address this matter in oral submissions although he did extensively quote from the pleadings in his written skeleton.

63. The limitation of Issue 6 to the origin or advertising function of the mark is clear. I will exclude evidence included only to address other aspects of the trademark dispute, even if covered by the pleadings. Such matters are not reasonably to be regarded as falling within one or more of the listed issues to be dealt with at trial or in respect of which evidence is required.

Irrelevance – character, conduct, full and coherent narrative

64. The Claimants object to aspects of the Defendants' evidence which are said to criticise Mr Cadman and to be irrelevant to the issues to be tried.

65. The Defendants' position is that the evidence objected to is part of Mr Land's narrative, provides a full and coherent account of events or is relevant background, and that evidence as to the character and conduct of Mr Cadman is in any event both relevant and admissible.

66. Mr Reed submitted that the character and credibility of individual witnesses was not an issue for trial and should not be in issue in factual witness evidence. He further submitted that describing such material as part of a full and coherent narrative was merely an attempt to obscure its real effect.

67. Mr Harris dealt only briefly with this issue in his skeleton argument. It was his view that, as with all other matters relating to relevance and admissibility, such considerations were a matter for the trial judge.

68. I agree with the Claimants' primary position in principle. If evidence is irrelevant and will not assist in resolving the issues, that evidence should not have been served and is liable to be excluded. However, this will often be more suited for adjudication by the trial judge. In this case, most of the disputes about relevance fall within that category.

To decide otherwise would be to encourage the proliferation of time consuming, inefficient and costly satellite disputes. The trial judge will be best placed to deal with such disputes and to give such evidence whatever weight is appropriate at trial. If the trial judge concludes that a party has served irrelevant and unnecessary evidence the judge will be able to reflect that in costs, whether within the overall costs cap or, exceptionally, above it. While I accept that such evidence may cause the other party to expend time and effort, it is open to that party to choose how to deal with material which it regards as wholly irrelevant.

69. Nevertheless, evidence which is prejudicial in nature and not directly linked to an issue to be resolved may in some circumstances sensibly be reviewed before trial, for example as part of a wider hearing, as here. However, the basis for objection must be clear. Comments about other parties which may cause upset are not uncommon in witness evidence, and discomfort is not a sufficient ground for seeking to exclude evidence. A party seeking exclusion should be clear about the reasons for objecting, explain why the passage is considered truly prejudicial, and why it is not of assistance. It is not helpful to say something general along the lines of '*I believe that these passages are all inadmissible and irrelevant as well as being prejudicial*'.

70. In the light of the above, having reviewed the material which the Claimants say is prejudicial and unjustified, and considered the evidence in the round, including in the light of Mr Pountney's explanations, I conclude that the following passages should be removed from Mr Land's witness statement: paragraph 23, other than the first sentence; the last three sentences of paragraph 45; the last sentence of paragraph 48; paragraph 50; and paragraph 94(f). I also conclude that the following passages should be removed from Mr Gowland's witness statement: the final sentence of paragraph 23; the second sentence of paragraph 25; the second half of the final sentence in paragraph 26, starting after the dash.

71. The Claimants have applied for permission to serve evidence in reply on the basis that it is prejudicial and that the Claimants are entitled to respond. Granting permission would serve no purpose other than to expand the dispute and generate further costs. It does not satisfy the costs benefit test. The Claimants' conditional application, to the extent it is maintained, is dismissed.

Expert evidence

72. The Claimants object to three paragraphs of Mr Gowland's evidence as expert, rather than fact, evidence.

73. Paragraph 14 describes the life cycle of lobsters. The description is said to be scientific expert evidence which should not be given by a witness of fact. The Claimants say that to find otherwise would be unfair, potentially leading to the need for cross-examination of two witnesses on technical issues.

74. Paragraphs 48 and 49 are objected to on the basis: (i) that they address technical issues such as the functioning and age of technology; and (ii) that they are not evidence for which permission has been given by reference to the list of issues.

75. Mr Harris submitted that Mr Gowland was doing no more than explain what he has done (paragraph 14); and what he and Mr Land did, and their underlying thought

processes (paragraphs 48 and 49). Those passages are, in his view, less open to objection than paragraph 25 of Mr Cadman's evidence discussing 'improvements'.

76. This is the type of dispute about evidence which should be avoided where possible in IPEC. There is always a balance to be struck between trimming the evidence before trial to avoid unnecessary disputes at trial (and the unnecessary costs of dealing with extraneous material during trial preparation), and the costs and time required to prepare, bring and argue applications. Expanding applications to cover a range of relatively minor issues, taking up court and party time should be avoided.

77. Paragraph 14 of Mr Gowland's evidence explains, from Mr Gowland's experience, how lobster hatcheries function. It sets the scene briefly for the paragraphs which follow. While scene-setting should be limited, it cannot be completely avoided if written evidence is to be coherent. Leaving this short passage in the fact evidence will not materially disadvantage the Claimants as long as the single expert gives evidence on the matters technically relevant to the issues in dispute at trial. The trial judge will be able to direct what cross-examination is appropriate.

78. Paragraphs 48 and 49 also need to be seen in context. They are part of a passage explaining Mr Gowland's perception of what he and Mr Land sought to do and the underlying considerations they had in mind. Some of what is objected to repeats material which already forms part of Mr Gowland's evidence (for example, the use of upwelling technology by MAFF in the late 1970s is referred to in paragraph 47 (2)) or explains what he and Mr Land had previously done.

79. There is no basis to object to object to the whole of those paragraphs. While Mr Gowland's evidence comments on the attributes of the Aquahive and the Lobster Cube at lines 5 to 10 of paragraph 49 and in the last two sentences of that paragraph, this is in the context of explaining from his perspective the issues that he and Mr Land sought to resolve. The trial judge will be able to distinguish between the explanations of Mr Gowland and expert evidence. Trial counsel will doubtless take a view of what cross-examination is appropriate with guidance from the trial judge.

80. This aspect of the Claimants' application is dismissed.

Inadmissible evidence

81. Apart from the discrete issue on expert evidence, the disputes over the Defendants' evidence often involved several separate objections to a single document or passage. This requires a careful assessment of the test to be applied to each objection. I have dealt above with arguments based only on relevance. The remaining objections are: (i) certain types of evidence are not admissible to assist in contractual construction; and (ii) evidence incorporating or discussing without prejudice material is not admissible unless it is within an exception to the without prejudice rule.

Contractual construction

82. Mr Reed submitted (i) that the subjective opinion of a party about the meaning of a particular clause is inadmissible as evidence on the construction of that clause; and (ii) that draft agreements and related discussions between parties during negotiations are ordinarily inadmissible in evidence. Mr Harris said little about this issue in his

skeleton argument, other than that it should be a matter for the trial judge. Neither party engaged substantively with the law during the hearing.

83. Ms Steggles' evidence stated that some passages of the Defendants' evidence served only to comment on draft materials or to provide the subjective views of a party on construction and identified the passages in question. Mr Pountney's comments on those passages were, in summary, that the passages objected to were either: (i) part of a full and coherent account of matters as the witness understood them; or (ii) relevant to interpretation of the contractual relationship.

84. While neither party addressed the cases on contractual construction, they are well-known and the main principles relevant to this application are clear:

    (i) Contractual interpretation is an objective exercise. *Wood v Capita* [2017] UKSC 24 per Lord Hodge JSC: '*The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement*'.

    (ii) As a corollary, evidence of the parties' intentions or their subjective understanding of the contract is not admissible: *Prenn v Simmonds* [1971] 1 WLR 1381 per Lord Wilberforce: '*evidence of negotiations, or of the parties' intentions, ought not to be received*', affirmed by Lord Neuberger in *Arnold v. Britton* [2015] UKSC 36 '*subjective evidence of any party's intentions*' is to be disregarded [15].

    (iii) The factual context or matrix in which a contract was concluded is relevant, but only if it shows the genesis of a transaction or that a relevant fact was known to the parties: *Prenn v Simmonds* [1971] 1 WLR 1381 per Lord Wilberforce: '*evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the 'genesis' and objectively the 'aim' of the transaction*', affirmed by Lord Hoffman *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38: '*The rule excludes evidence of what was said or done during the course of negotiating the agreement for the purpose of drawing inferences about what the contract meant. It does not exclude the use of such evidence for other purposes: for example, to establish that a fact which may be relevant as background was known to the parties, or to support a claim for rectification or estoppel. These are not exceptions to the rule. They operate outside it.*'[42].

85. In brief, evidence relied on to show one or other or both parties' intentions as to, or subjective understanding of, the meaning of a contract or part of it is inadmissible.

86. Pre-contractual negotiation materials may be relied on to show the overall aim of a transaction or its genesis. They may also be relied on to establish a relevant background fact known to both parties, but not to establish the specific meaning of provisions in the contract.

87. In the light of the above, I will exclude from evidence any passage which goes only to the subjective understanding of a party as to the meaning of a contractual provision (contrary to (i) and (ii) above): namely, paragraph 25 and paragraphs 94 (c)-(i) of Mr Land's evidence (insofar as those passages remain in evidence) and paragraph 32 of Mr Gowland's evidence.

Without prejudice material

88. The Claimants' position is that Mr Land's witness statement refers to the content of without prejudice communications and exhibits such communications. As the application of the without prejudice rule is automatic, material within the scope of the rule and not within one of the exceptions must be excluded.

89. The Defendants accept that the material identified by the Claimants is covered by the without prejudice rule. They assert that it is nevertheless admissible because it falls within one or more of the recognised exceptions to that rule. The exceptions relied on by the Defendants are that:

(i) the Claimants were using the without prejudice rule to cloak '*unambiguous impropriety*' as discussed in the judgment of Robert Walker LJ in *Unilever Plc v Proctor & Gamble Co* [2000] 1 WLR 2436 (*Unilever*);

(ii) by putting the Settlement Agreement in issue the Claimants had waived the protection of the rule for surrounding documents, relying on *Muller v Linsley and Mortimer* [1994] EWCA Civ 39 (*Muller*); and

(iii) some or all of the material fell within the exception in *Oceanbulk Shipping SA v TMT Ltd* [2010] UKSC 44 (*Oceanbulk*), described by Lord Clarke as the '*interpretation exception*' [46].

90. Mr Harris submitted that if the Defendants were successfully to establish that any exception to the without prejudice rule applied to any part of the without prejudice material, then all of that material would be admissible in evidence. Mr Harris relied primarily on the following passage from *Unilever* in which Robert Walker LJ was considering the practical effects of the without prejudice rule*:*

'*In those circumstances I consider that this court should, in determining this appeal, give effect to the principles stated in the modern cases, especially Cutts v Head, Rush & Tompkins and Muller. Whatever difficulties there are in a complete reconciliation of those cases, they make clear that the without prejudice rule is founded partly in public policy and partly in the agreement of the parties. They show that the protection of admissions against interest is the most important practical effect of the rule. But to dissect out identifiable admissions and withhold protection from the rest of without prejudice communications (except for a special reason) would not only create huge practical difficulties but would be contrary to the underlying objective of giving protection to the parties (in the words of Lord Griffiths in [Rush & Tomkins Ltd. v Greater London Council [1989] AC 1280,] at p.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.'

91. As I understood his argument, Mr Harris concluded that because the inclusion of parts of without prejudice correspondence was not regarded as practical, with the consequence that admissions clearly covered by the rule and other aspects of the without prejudice correspondence in that case should be dealt with as a whole and excluded, a similar approach should be taken when parts of without prejudice correspondence are deemed to be admissible meaning that all without prejudice materials would then be included and fall to be considered as part of the admissible evidence. Mr Harris submitted that this interpretation was supported by *Muller*, referred to in the judgment of Robert Walker LJ.

92. Mr Reed stated that Mr Harris' view was clearly incorrect and arose from a misreading of the authorities, not least the general concern to avoid undermining the without prejudice rule.

93. In *Muller*, Swinton Thomas LJ reiterated the statement of Lord Griffiths in *Rush & Tompkins* that: '*It would, as a matter of generality, place a serious fetter on negotiations ... if the parties knew that everything that passed between them would ultimately have to be revealed*', and then continued '*However, different considerations apply to the present case.*'

94. The passage from *Unilever* on which Mr Harris primarily relies does not establish a general rule that once any part of a body of materials subject to the without prejudice rule falls within an exception then all without prejudice material loses protection. The second half of that passage sets out clearly the concerns that would arise if the protection of the without prejudice rule were to be too easily or too broadly removed. The approach contended for by Mr Harris would mean that parties would be greatly constrained when trying to compromise litigation. If any slip might mean the loss of protection, this would certainly lead to a situation where '*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*.'

95. This view is supported by *Ofulue v Bossaert* [2009] UKHL 16 (*Ofulue*). There, Lord Walker considered the implications of *Rush v Tompkins* [1989] AC 1280 and Lord Griffiths' recognition that the without prejudice rule is not absolute, but subject to exceptions when justice demands it. Lord Walker stated '*As a matter of principle I would not restrict the without prejudice rule unless justice clearly demands it.*' [57].

96. I conclude that the various exceptions relied on must be applied to the without prejudice materials on their individual merits, subject only to the possibility that a series of related materials may be covered by the same exception.

97. As it is the Defendants who seek to rely on the exceptions to the without prejudice rule, they bear the burden of showing that an exception applies.

Unambiguous impropriety – the scope of the exception

98. During oral submissions, Mr Harris did not engage in detail with the substantive test but his written skeleton cited the portion of the Judgment of Roth J in *Berkeley Square Holdings Ltd and ors v Lancer Property Asset Management Ltd and ors* [2020] EWHC 1015 (Ch) (*Berkeley Square*) which summarised the authorities. Mr Harris relied on the judgment of Robert Walker LJ in *Unilever*:

'*(4) Apart from any concluded contract or estoppel, one party may be allowed to give evidence of what the other said or wrote in without prejudice negotiations if the exclusion of the evidence would act as a cloak for perjury, blackmail or other "unambiguous impropriety" (the expression used by Hoffmann LJ in Foster v Friedland, 10 November 1992, CAT 1052). ... But this court has, in Foster v Friedland and Fazil-Alizadeh v Nikbin, 1993 CAT 205, warned that the exception should be applied only in the clearest cases of abuse of a privileged occasion.*'

99. Mr Reed submitted that any allegation of unambiguous impropriety needed to have been made in evidence. The evidence served by the Defendants on this point is discussed below. Mr Reed referred me to the judgment in *Holyoake* in which the key issues as identified by HHJ Hodge [2], were allegations of tortious conspiracy carried out by unlawful means including fraudulent misrepresentations, duress, intimidation, undue influence, extortion and blackmail. The defence was that the claims were entirely without foundation and a 'shakedown'. The scope of the unambiguous impropriety exception, which was referred to as *'well-established and uncontroversial'* was discussed from [18] onwards. It included at [19] a reference to the passage from *Unilever*, cited above.

100. Mr Reed relied on [22]-[24] of *Holyoake.* He submitted that these paragraphs (which discuss the previous judgment of Lord Justice Rix in *Savings & Investment Bank Limited v Fincken* [2003] EWCA Civ 1630) (*Fincken*) showed that the unambiguous impropriety exception should not be widely applied. In particular, he submitted that:

- Mere inconsistency between an admission and a pleaded or stated position, or even '*the mere possibility that such a case or position, if persisted in might lead to perjury*' [22] does not lead to the loss of privilege. The privilege must itself be abused.

- There are '*... powerful policy reasons for admitting in evidence as exceptions to the without prejudice rule only the very clearest cases.*' [23] (citing the Judgment of Rix LJ, quoting Lord Justice Simon Brown in *Fincken).*

- The public interest which underpins the without prejudice rule is '*very great and not to be sacrificed save in truly exceptional and needy circumstances*' [24] (citing the Judgment of Rix LJ in *Fincken).*

101. Mr Reed submitted that without prejudice material may be admitted as evidence only if the party relying on the without prejudice rule was acting in a manner which was utterly improper and abusing the rule by seeking to keep the improper conduct from the Court. He further submitted that statements made during negotiations or when seeking to settle litigation would need clearly to go beyond what is proper to establish the unambiguous impropriety exception.

102. Having reviewed the authorities, I agree with Mr Reed's submissions on the scope of the exception. In summary:

- Owing to the public policy rationale which underpins the without prejudice rule and the context in which it operates – often involving those who are not legally qualified and who are speaking and writing in situations of considerable tension

– the rule requires broad protection for statements made when seeking to settle a dispute and narrow application of any exceptions.

- Inconsistencies between materials covered by the without prejudice rule and those which are not are insufficient to remove the protection of the rule. Even the possibility of perjury does not suffice. It is necessary that the without prejudice rule is being used to cloak wholly improper conduct (for example, the making of unambiguously improper threats, such as to commence criminal proceedings and seeking to conceal that fact from the court).

- Conduct or statements which do not go beyond the bounds of what is to be expected in negotiation are not within the scope of the exception.

Waiver – the scope of the exception

103. Neither advocate addressed the legal test for waiver in detail. I understood Mr Harris to rely on Lord Justice Leggatt's judgment in *Muller* as authority that where a party has put in evidence something upon which it relies to establish a specific pleaded allegation, that party has waived any privilege in the without prejudice communications which surround the document relied on. The passage on which Mr Harris relied reads: '*In any event, partial disclosure of privileged documents is a concept as implausible as the curate's egg. I consider that production of the letter before action and of the compromise agreement impliedly waived any privilege that might exist in relation to all the other documents relating to settlement.*' per Leggatt LJ, *Muller*, penultimate paragraph.

104. Mr Reed submitted that *Muller* was a specific ruling in the circumstances of that case, which did not establish any general principle and that the passage relied on by Mr Harris must be considered in context. He further submitted that privilege (including the protection of the without prejudice rule) cannot be unilaterally waived. In Mr Reed's submission, this means that for waiver to occur the waiving party must itself have deployed without prejudice material and the other party must have consented to the use of that material and deployed further without prejudice material in response.

105. Mr Reed relied on the discussion of waiver generally, and *Muller* in particular, in Thanki on The Law of Privilege. Paragraph 7.42 gives an overview of waiver of without prejudice protection. That overview is in line with Mr Reed's submissions. Paragraph 7.44 suggests that *Muller* does not, properly understood, relate to waiver at all but rather to an exception to the without prejudice rule. Thanki goes on to say that to the extent that *Property Alliance Group Ltd v Royal Bank of Scotland Plc* [2016] 1 WLR 361 (Ch) might be said to suggest that a party waives privilege merely by putting in issue a matter to which a privileged document may be relevant, it is inconsistent with authority and should be regarded as wrongly decided, citing *Berg v IML London Ltd* [2002] 1WLR 3271.

106. The disputed material in *Muller* related to without prejudice communications leading to a settlement. The settlement agreement was then deployed in subsequent litigation arising from the same events but involving a different party as defendant. The claimant party relied on the settlement agreement as evidence of reasonable mitigation of loss. That party refused to disclose materials relating to that settlement, despite having put its reasonableness in issue in a dispute with a third party. The documents leading to the settlement agreement were held to be relevant in the subsequent dispute because, in the

words of Leggatt LJ, '*... the plaintiffs rely not only on the fact of the settlement agreement, but also on the reasonableness of it*.' and if disclosure were to be withheld in those circumstances '*... public policy might be used as a guise for concealing what happened in the earlier action and that might result in double recovery. It would be inequitable not to order discovery*.'

107. *Muller* does not establish that a party seeking to enforce the terms of an open settlement agreement, and pleading those terms, waives the without prejudice status of documents relating to the negotiation of the settlement.

108. In summary, documents within the scope of the without prejudice rule and comments on those documents in evidence will fall within the waiver exception only if the Claimants have deployed without prejudice material in their pleadings or evidence to advance their case on the merits.

<u>*Oceanbulk* – the scope of the 'interpretation' exception</u>

109. Mr Harris referred to a passage from the judgment of Roth J in *Berkeley Square* to establish the basis for what he referred to as 'the *Oceanbulk* exception'. Roth J explains: '*In <u>Oceanbulk Shipping</u>, the Supreme Court accepted as correct the parties' recognition that another exception was rectification*'. [45] and '*In that case, the Supreme Court held that an exception would also apply to admit objective facts which emerge during the course of WP negotiations which form part of the factual matrix relevant to the correct interpretation of a contract.*' [46]. Only the 'interpretation exception' is relevant here.

110. Mr Harris relied particularly on paragraphs [36]-[40] of *Oceanbulk*. He submitted that the exception would apply if the without prejudice material was necessary to allow the court to understand an objective fact going to the factual matrix surrounding a contract. He accepted that the exception would reflect the relevant authorities on construction and extend only to those parts of any without prejudice material that established the objective factual matrix.

111. Mr Reed accepted that *Oceanbulk* involved an incremental expansion of the existing exception developed by Walker LJ in *Unilever*. He noted that in *Berkeley Square* Roth J explained that Lord Clarke saw this as necessary to avoid introducing, '*"... an unprincipled distinction" between that kind of case and the case of rectification or the first exception identified by Robert Walker LJ in Unilever (i.e. to determine whether an agreement had been reached).*' [46]. Mr Reed cautioned against further expansion and submitted that the exception must be applied only where the material that would be admitted would be of '*significant probative value*', relying on Lord Clarke's summing up in *Oceanbulk*, '*... the interpretation exception should be recognised as an exception to the without prejudice rule ... because ... justice clearly demands it. ... I would, however stress that I am not seeking either to underplay the importance of the without prejudice rule or to extend the exception beyond evidence which is admissible to explain the factual matrix ... . In particular, nothing in this judgment is intended otherwise to encourage the admission of pre-contractual negotiations*.'[46].

112. Mr Reed also referred to Lord Phillips' short summary of the principle to be derived from *Oceanbulk:* '*When construing a contract between two parties, evidence of facts within their common knowledge is admissible where those facts have a bearing on the meaning that should be given to the words of the contract. This is so even where the*

knowledge of those facts is conveyed by one party to the other in the course of negotiations that are conducted without prejudice.' [48].

113. Finally, Mr Reed submitted that the context was important when seeking to understand the scope of the exception in *Oceanbulk*. He noted that the facts said to be within the common knowledge of the parties and relevant to construction formed part of the pleadings and were summarised by the parties in the agreed statement of facts and issues. There could be no doubt that they were relevant to the trial court's task. He submitted that caution is required in relaxing the protection of the without prejudice rule where it is not clear that the materials are relevant to the pleaded issues or that they will be of real probative value when construing the contract.

114. In summary, both parties recognised the *Oceanbulk* exception and agreed broadly on its scope. Mr Reed stressed the need to apply it cautiously in the light of the guidance given in the judgments of the Supreme Court in that case itself and, more generally, by the courts when applying exceptions to the without prejudice rule. *Oceanbulk* establishes:

- there is a further, principled exception which goes beyond rectification;
- it applies when without prejudice materials would, in the absence of the without prejudice rule, be admissible to assist in construing a contract;
- given the without prejudice context, material will fall within the exception only when it clearly satisfies the criteria for admissibility of precontractual materials;
- the material must be evidence of facts within the common knowledge of the parties forming part of the factual matrix relevant to construction.

<u>The application of the exceptions – evidence, argument and law – preliminary points</u>

115. The following key considerations flow from the discussion of the law above:

- As the Defendants seek to rely on the exceptions to the without prejudice rule, it is for them to establish that the material is within any exception; and
- The rationale which underpins the without prejudice rule means that exceptions must be narrowly applied, but with regard to the requirements of justice.

116. The hearing would have been more productive if the Defendants had been clear in advance that the application of the without prejudice rule was not contested. The Defendants should also have identified in advance the exceptions to that rule on which they intended to rely and how. Where allegations as to unambiguous impropriety or waiver were to be relied on, the factual basis should have been clearly set out in evidence and the legal analysis explained in the Defendants' skeleton argument. This would have helped in understanding the Defendants' position before and during the hearing. It would also have enabled Mr Reed to devote more time to the relevant exceptions in his skeleton argument and to be better prepared to assist the Court during the hearing.

117. The without prejudice objection to portions of Mr Land's evidence has been live since at least March 2023. The Claimants' evidence in support of their application was served on 18 September 2023 and the Defendants' evidence in reply on 26 September 2023.

There has been ample time for the issues to be better defined so as to make efficient use of Court resources. It is regrettable that the Defendants did not make the Claimants aware in advance that their original position, disputing the application of the without prejudice rule, would not be maintained.

118. The evidence served by the Defendants did not explain how any exception would in practice apply to specific evidence nor how the exclusion of that evidence would prejudice the Defendants. Mr Pountney's witness statement explained only that the paragraphs and documents relied on were relevant to Issues 2 (patent validity), 5 (breach of Clause 7.5 of the settlement agreement) and 6 (trademark infringement) and '*either does not properly fall within the scope of the 'without prejudice' rule, or alternatively falls under one of the exceptions to the 'without prejudice' rule*.'

119. Mr Harris' written skeleton was more informative (although it still did not make clear that the application of the without prejudice rule was accepted). It indicated that unambiguous impropriety; waiver; and the *Oceanbulk* interpretation exception all applied to much of the without prejudice material relied on. During oral argument, Mr Harris discussed the particular exceptions but, in the time available, was unable to explain how each exception might apply to each piece of without prejudice material.

120. The evidence served by the Claimants helpfully listed and summarised the paragraphs of Mr Land's evidence objected to under the without prejudice rule. The colour coded version of the witness statements prepared by the Claimants' solicitors also helped identify which passages were objected to, and for what reason. The Claimants' evidence did not engage with potential exceptions.

121. Mr Reed's written skeleton concentrated on whether the materials in issue were within the without prejudice rule. Having had sight of Mr Harris' skeleton and therefore with a greater understanding of the Defendants' position, Mr Reed's oral submissions engaged substantively with the various exceptions, which was helpful.

Unambiguous impropriety

122. To recap, to fall within the exception, it is necessary to show that the without prejudice rule is being used to cloak wholly improper conduct and the possibility of perjury will not suffice. Conduct or statements which do not go beyond the bounds of what is to be expected in negotiation will not fall within the scope of the exception.

123. The passages of evidence containing without prejudice material which Mr Harris identified as covered by the unambiguous impropriety exception were:

(i) Mr Cadman's comments when providing the Settlement Agreement to Mr Land (pages 188-200 Exhibit RL1, referred to in paragraphs 73-82, 84 and 85 of Mr Land's witness statement) which Mr Harris suggested amounted to unfair threats; and

(ii) The emails attached to page 196 of Exhibit RL1, referred to at paragraphs 81-82 and 84-85 of Mr Land's witness statement. These are said to give rise to the possibility of perjury during Mr Cadman's oral evidence.

124. Mr Reed submitted that the documents in (i) did not demonstrate any impropriety but were entirely normal in the context of a negotiation seeking to settle a dispute. His position on the documents in (ii) was that they did not expose Mr Cadman to the risk of perjury; that there was no clearcut inconsistency between Mr Cadman's statements in those documents and his trial evidence which was not explicable; and that even if some 'hard-edged' inconsistency could be identified, it would not fall within the exception unless seeking to cloak it under the without prejudice rule was itself abusive, requiring '*truly exceptional and needy circumstances*'.

125. Having reviewed that material in its context, I conclude that neither Mr Land's evidence commenting on the documents referred to above, nor any of the underlying documents are covered by the unambiguous impropriety exception. The materials in (i) go no further than would be expected when seeking to settle a dispute. Those in (ii) do not satisfy the requirements discussed in *Holyoake*, applying *Fincken.*

Waiver

126. The Defendants' evidence did not identify which documents or evidence were said to be excepted through alleged waiver or how the waiver was said to arise.

127. Mr Harris' skeleton argument identified waiver as relevant to pages 188-200 Exhibit RL1, referred to at paragraphs 73-82 and 84-85 of Mr Land's witness statement; and the emails at page 196 of Exhibit RL1, referred to at paragraphs 81-82 and 84-85 of Mr Land's witness statement. During oral submissions, Mr Harris stated that the Claimants had raised issues to which the without prejudice material was relevant, particularly by relying on the Settlement Agreement in paragraph 14 of the Particulars of Claim and in Mr Cadman's related evidence. He submitted that by doing so the Claimants had waived without prejudice protection.

128. Mr Reed submitted that the protection of the without prejudice rule would have been waived only if the Claimants had deployed without prejudice material in their pleadings or evidence to advance their case on the merits. While some of the without prejudice materials might, in general terms, be relevant to some of the issues raised in the pleadings or evidence, that was not sufficient to establish a waiver. Mr Reed's position was that neither the pleadings (in particular paragraph 14 of the Particulars of Claim as amended) nor the paragraphs from the witness statement of Mr Cadman referred to by Mr Harris (essentially paragraphs 31-34) refer directly or indirectly to without prejudice material.

129. The Settlement Agreement is open. As it is the Settlement Agreement which is relied on in the Claimants' pleading, Mr Reed submitted that there is no waiver of protection. Further, as Mr Cadman's evidence neither refers to nor relies on any without prejudice material Mr Reed submitted that there is no waiver there either.

130. In the light of my summary above of the relevant legal principles, I do not accept Mr Harris' submissions. He has not identified authority supporting his assertion that merely putting something in issue waives without prejudice protection in any document relevant to that issue. Such a position would mean that as soon as the interpretation of any agreement was placed in issue between the parties to that agreement, any protection under the without prejudice rule for all the underlying negotiations would be lost merely because they are in some way relevant to it.

The *Oceanbulk* interpretation exception

131. As I understood Mr Harris' written skeleton, his position is that the objective facts known to both parties which form part of the factual matrix relevant to the interpretation of the Settlement Agreement and which are capable of being established by the without prejudice material discussed in Mr Land's evidence and the related underlying documents are: (i) the First Claimant was not a proper party to the Settlement Agreement; (ii) the inclusion of various companies on the front page of the Settlement Agreement was improperly imposed on Mr Land; (iii) the date on which Mr Land commenced his employment with Cadman Fine Wines; and (iv) the scope of the intellectual property covered by clause 7.5 of the Settlement Agreement.

132. During oral argument, Mr Harris submitted that *Oceanbulk* applied because the without prejudice material would help the trial judge understand the relationship between the parties, which was relevant to the interpretation of the contract. His position was that without the inclusion of the material relied on, which went to the overall factual matrix, the judge would not have sufficient evidence to enable the relationship between the parties to be understood. His submission was not precise as to which facts known to both parties could be established by particular passages of the without prejudice material.

133. Mr Reed's primary position was that several of the matters referred to by Mr Harris simply were not relevant to the issues to be decided at trial.

134. As stated above, I do not regard it as appropriate to take a definitive position on the scope of the issues to be dealt with at trial. I therefore proceed on the basis that the Defendants' position is correct. If I conclude that some or all of the without prejudice material falls within the *Oceanbulk* exception in relation to one of the disputed issues, that material can be redacted from one version of the witness evidence but included in an alternative version to be provided to the trial judge as appropriate.

135. Mr Reed further submitted that none of the material in any event satisfied the requirements of the limited exception provided by *Oceanbulk*, bearing in mind that it is for the Defendants to establish that exception applies; that it must be applied restrictively; that only real probative value justifies the admission of without prejudice material; and that such material must, in any event, be evidence of a relevant background fact known to both parties.

136. Mr Reed submitted that none of the material which Mr Harris contended to be covered by the *Oceanbulk* exception went unambiguously to a relevant background fact known to both parties. To the extent that the material could be said to be relevant to any facts, it was not of significant probative value.

137. I have reviewed the without prejudice material referred to in the witness statement of Mr Land. I agree that it is broadly relevant to the context surrounding the conclusion of the Settlement Agreement. However, I do not agree that it satisfies the requirements for the *Oceanbulk* exception.

138. It is not necessary to rely on the without prejudice material to establish the fact of an employment contract between Mr Land and Cadman Fine Wines. Mr Land's evidence refers to it in several passages not covered by the without prejudice rule. Despite the

fact that Mr Cadman's evidence does not refer to Mr Land's employment by Cadman Fine Wines, preferring to discuss Mr Land's engagement with various related entities in broad terms, the existence of the employment contract is not disputed. Indeed, its existence is recited in the preamble to the Settlement Agreement.

139. Several companies are listed on the front page of the Settlement Agreement. That is clear on the face of the document. How that came about is not an objective fact known to both parties. The *Oceanbulk* exception does not permit without prejudice material to be deployed to explore the underlying issues. It is also unclear what additional probative value such material would have. It is clear on the face of the Settlement Agreement that there is a difference between the companies named on the cover page and the Parties as identified on the first page of the Agreement. It is for the trial judge to construe the Settlement Agreement and identify the parties to that agreement by reviewing the document in its context applying normal principles of construction.

140. The Settlement Agreement recites that Mr Land's employment contract was concluded in April 2017. The Defendants' Re-amended Defence and Counterclaim pleads that Mr Land's employment began in April 2017. While noting that there is a dispute about the status of this part of the Defendants' pleading I am not sure that it makes a difference on this issue as it adds nothing to the April date recited in the Settlement Agreement itself. Mr Land's uncontested evidence (at paragraph 43 of his Witness Statement) is that he was offered an employment contract with Cadman Fine Wines beginning on 3 April 2017. The without prejudice material contains no more precise information about the date on which the employment contract entered into effect and it was not argued that the precise date was important. I conclude that there is no justification under the *Oceanbulk* principle to disapply the without prejudice rule for material relevant only to the existence of an employment contract between Mr Land and Cadman Fine Wines or to the date of that contract.

141. The final reason put forward by Mr Harris for allowing the Defendants to adduce without prejudice material under the *Oceanbulk* exception was that it shed relevant light on the factual matrix surrounding the scope of the intellectual property in issue under Paragraph 7.5 of the Settlement Agreement. The without prejudice material in question is to be found at page 196 of exhibit RL1 and is an email from Mr Cadman to Mr Land's employment solicitor. I have considered the content of the third paragraph of that email, together with material from an earlier email from Mr Cadman to Mr Land [B216-B217]. Mr Harris seeks to draw the conclusion that this material establishes the underlying facts necessary to show that there is no relevant intellectual property.

142. I disagree with Mr Harris. The material in question is not evidence that the parties had a common understanding of a fact relevant to the factual matrix in which the Settlement Agreement was concluded. If anything, this material appears to indicate a potential disagreement between the parties on an issue that might affect the construction of a particular phrase in the Settlement Agreement. Without prejudice material is not admissible to construe a particular phrase or concept in a contract. This material is not within the scope of the *Oceanbulk* exception.

143. In summary, I conclude that the Defendants have not established that the *Oceanbulk* exception applies to any of the without prejudice material discussed in Mr Land's evidence or exhibited to his witness statement.

Consequential issues

144. The conclusions I have reached above, plus the various voluntary changes to the witness evidence, mean that amended statements need to be prepared to give effect to those findings. I should be grateful if the parties would prepare drafts for review and approval. I will liaise separately with the parties about the timing for the provision of these draft revised statements and a draft order.

145. Both parties submitted costs schedules before the hearing. It will save time if I explain that I have concluded that the appropriate order is for costs to be reserved to be dealt with by the trial judge at the conclusion of the trial. In deciding not to depart from the normal position in IPEC I have had regard to my conclusions and to the ability of the trial judge to review the costs and impact of these applications in the context of the overall action and the IPEC costs cap.

146. In view of the without prejudice considerations and the fact that part of the hearing was held in private I provided a copy of this judgment to the parties in draft and asked them to identify any necessary redactions, bearing in mind that, as stated by HHJ Hodge QC in *Holyoake*, the Court's published judgment should not reveal material to which the without prejudice principle applies.