JUDGMENT HIS HONOUR JUDGE HAVELOCK-ALLAN Q.C. QBD. Bristol Mercantile Court. 26th October 2001

1. This is a Judgment on two preliminary issues arising out of a claim to recover the amount of two Judgments entered against the Defendant in the U.S. District Court for the District of Arizona on 12th March 1993 and 23rd July 1993 respectively. Both Judgments were entered in favour of a company called Resolution Trust Corporation ("RTC") as receiver for another company called Sentinel Federal Savings and Loan Association ("Sentinel Federal"). The first Judgment was for a sum of US$1,465,574.40 together with interest and costs. The second Judgment was for sums of US$7,000 and US$186.21 representing the reasonable attorney's fees and expenses awarded to RTC on 12th March 1993. Since the second Judgment is really no more than an adjunct of the first, the argument on the preliminary issues has proceeded by reference to the claim in respect of the first Judgment alone.

2. The Claimant is a company incorporated under the laws of the State of Ohio. The business of the Claimant is the factoring of debts. On or about 22nd August 1994 RTC assigned all of its right, title and interest in the Arizona Judgments to a Delaware Limited Partnership called Premier Financial Services-West L.P. ("Premier"). In due course, on 2nd March 1999, Premier assigned all of its right, title and interest in the Judgments to the Claimant. By virtue of these assignments, the Claimant is entitled to bring this action, which it commenced on 29th October 1999.

3. The first Arizona Judgment (which hereafter I shall refer to simply as "the Judgment") was given on an Unconditional Guaranty ("the guarantee") executed by the Defendant on 15th June 1988 in favour of Sentinel Savings and Loan Association of Arizona ("Old Sentinel") in order to secure payment to Old Sentinel and its assigns of all indebtedness owed by the Defendant's company, Hearley Commercial Properties Inc., to Old Sentinel under a Promissory Note issued on 3`d June 1988. The Promissory Note, which was a Promissory Note secured by a Deed of Trust, was for a principal amount of US$1,550,000 with interest on sums becoming due under it and a Default Rate of Interest in the event that any such sums were not paid within 10 days. By reason of interest accruing at the Default Rate, the claim had grown to a sum of US$3,665,265.25 by 22nd October 1999. It has been increasing at a daily rate of US$724.72 since that date.

4. It is common ground between the Claimant and the Defendant that, since this action was commenced more than six years after the Judgment was delivered, any cause of action in England to recover the amount of the Judgment debt is, in principle, statute barred. However the Claimant contends that the Judgment debt was acknowledged by the Defendant with the result that the cause of action accrued afresh within six years prior to the Claim Form being issued. The acknowledgment is said to have been made in either or both of two letters written on behalf of the Defendant by an attorney, Mr Neil Hiller of Ehrmann & Hiller PC to another attorney, Mr Alan Costello of Ridenour, Swenson Cleere & Evans PC. Both firms of attorneys were based in Phoenix, Arizona. The letters were written on 1st May 1997 and 4th June 1997. At that time Mr Hiller's firm was acting as the Defendant's U.S. attorneys and Mr Costello's firm was acting as attorneys for Premier, who were the then assignees of the Judgment debts.

5. The Defendant maintains that the letters were written impliedly "without prejudice" and as such are not admissible in evidence. If they are admissible, he denies that they contain any acknowledgment of the Judgment debt. By consent, it was ordered on 10th July 2001 that these issues should be determined as preliminary issues. The issues are framed in the Order in the following terms:
   (1) Whether the letters dated 1st May 1997 and 4th June 1997 referred to in paragraph 12 of the Amended Particulars of Claim are admissible.
   (2) If so, whether their contents are sufficient for limitation purposes to constitute an acknowledgment.

6. If the Claimant succeeds in obtaining an affirmative answer to both of these questions, I am told that there are likely to be other defences raised to the claim. One of these is that the debt on which the Judgment is based has been extinguished by the fact that the Defendant filed for bankruptcy in Ontario on 17th July 1991. It would appear that neither RTC nor Sentinel Federal sought to claim in the bankruptcy. The Defendant applied to be discharged in April 1992 but the application was

successfully opposed by another of his creditors and he has still not been discharged from the bankruptcy. The bankruptcy in Ontario is of some background relevance to the preliminary issues: but it is not necessary at this juncture to examine its effect or the validity of any defences which may be derived from it.

7. It is convenient to take the acknowledgment issue first. Section 29 of the Limitation Act 1980 is headed "Fresh accrual of action on acknowledgment or part payment". Section 29(5) provides:
"... where any right of action has accrued to recover
(a) any debt or other liquidated pecuniary claim; ...
and the person liable or accountable for the claim acknowledges the claim or makes any payment in respect of it the right shall be treated as having accrued on and not before the date of the acknowledgment or payment."
Section 30 of the Act is headed "Formal provisions as to acknowledgments and part payments" and provides as follows:
"(1) To be effective for the purposes of section 29 of this Act, an acknowledgment must be in writing and signed by the person making it.
(2) For the purposes of section 29, any acknowledgment or payment
(a) may be made by the agent of the person by whom it is required to be made under that section; and
(b) shall be made to the person, or to an agent of the person, whose title or claim is being acknowledged or, as the case may be, in respect of whose claim the payment is being made."

8. There is now no dispute that Mr Hiller had authority to write the two letters in question and was therefore acting as the Defendant's agent in doing so. It is also not in issue that Mr Costello received the two letters as the agent of the person (Premier) who was entitled to claim if any valid debt existed. So the requirements of section 30 are satisfied.

9. I come next to the two letters. They were both headed with reference to the Arizona proceedings in which the Judgment had been obtained by RTC. The letter of 1st May 1997 was written at a time when Premier was attempting to enforce the Judgment by garnisheeing Wells Fargo bank accounts in Arizona in the name of the Defendant. One of those accounts was an Individual Retirement Account, which is a form of pension saving account. According to the Wells Fargo Statement for that account, which was enclosed with the letter, the account contained a current balance of US$4,413.44. The other account was an ordinary account, which seems to have contained only US$196.92. The full text of the letter is as follows:
"Re: RTC vs. Hearley Commercial Properties Inc. et al. U.S. District Court No. CV 91-1607-PHX-WPC
Dear Al,
Enclosed is a copy of the Wells Fargo statement as of December 31, 1996 for Frank Hearley's Individual Retirement Account, No. 088-411533. As you can see, the statement indicates that the account is a retirement account,
identified as an IRA and reported to the IRS as such. In addition, the Answer of Garnishee filed by Wells Fargo identifies the account as a "Investment Retirement Account.
As you know, IRAs are exempt from execution pursuant to ARS Section 33-1126B. Please also note that $150 from Account 0822-964342 is also exempt as reported by Wells Fargo.
I would be willing to stipulate to an Order releasing the IRA and $150 from the Writ and awarding the remaining $46.92 from Account 0822-964342 to your client.
Cordially,
EHMANN & Hiller P.C., Neil H. Hiller"

10. In English law there is a rule which precludes an unassignable pension from being the subject of attachment by a garnishee order. It would appear that a similar but broader rule, exempting pension monies from attachment in garnishee proceedings, operates in Arizona. Mr Hiller was offering to consent to an Order removing from the ambit of the Writ of Attachment the sums in the Defendant's Individual Retirement Account and a protected sum of $150 in the Defendant's ordinary account and awarding the unprotected balance to Premier.

11. The letter of 4th June 1997 was in the following terms:
"*Re: RTC vs. Hearley Commercial Properties Inc. et al.*
U.S. District Court No. CV 91-1607-PHX-WPC
Dear Al,

I wrote to Frank Hearley after we spoke about the status of your garnishment of his bank accounts and the possibility that your client might entertain a settlement proposal.
In response, Mr Hearley advises me that there is a pending bankruptcy, Estate No. 32049140, District of Ontario, Canada. Although I have no pleadings from the bankruptcy court, Mr Hearley assures me that RTC was notified therein as a creditor and it is his understanding that RTC is precluded from seeking to enforce its judgment as it would be in a U.S. bankruptcy.
Apparently, one creditor (which subsequently did not renew its judgment) objected to Mr Hearley's discharge. Due to his absence from Canada and the U.S., Mr Hearley has not pursued his discharge. I do not pretend to know the ramifications of doing so, but Mr Hearley would consider paying your client $500 in complete satisfaction of the judgment as an alternative to returning to the bankruptcy court to secure his discharge.
Please let me know if such an arrangement is feasible. In the meantime, it is my understanding that the pending bankruptcy precludes your client from taking any further action.
Cordially,
EHMANN & Hiller P.C. Neil H. Hiller"

12. Mr Philip Moser, who appeared on behalf of the Claimant, drew my attention to a Statement made by the Defendant at an earlier stage in this action in which the following evidence appears:

"8. ... I am not seeking to suggest that the Arizona judgment is invalid. I accept that, despite the view of the Canadian Court, the Arizona Court was aware of the fact of my bankruptcy at the time it entered judgment against me but, apparently, took the view that was no inhibition. I do not accept that it must follow that the matter was fully argued and there was clearly no one present to put forward any contrary argument on my behalf in any event. However, I do not seek to suggest that the judgment does not remain enforceable in Arizona.

10. So far as the alleged acknowledgment relied upon is concerned, I would make the point that the offer of payment was made at the time of the garnishee proceedings and in the context of the options open to me at that time. I had been advised ... that as a result of the Canadian bankruptcy the judgment debt was not enforceable against my assets. I had not originally obtained discharge ... and whilst recovering from my illness I did not take any further steps to obtain a discharge.

11. 1 do not recall precisely the advice I received from Mr Hiller but ... I believe I would probably have been told that, by the time of the garnishee proceedings in 1997, it was too late to challenge the judgment in Arizona. Accordingly, I believe I would have been advised not to incur the additional expense of attempting to do so.

12. I did not, at any stage, admit the debt or my obligation to satisfy the judgment although I did acknowledge the existence of the judgment, as I was bound to do in 1997. In fact, at all times I maintained that the judgment was not enforceable because of my bankruptcy. I do not believe I was in a position by this stage to assert that the judgment was void or otherwise ineffective and 1 was not advised nor did I seek to do so.

13. Mr Hiller advised me that I could take steps in 1997 to obtain my discharge and that would deal conclusively with the bankruptcy debts but that, in view of the costs of seeking such discharge, I would be better off offering to pay something in discharge of the debt, effectively outside of the bankruptcy. As I could not afford to pursue my discharge in the Canadian Courts, I decided to do that in the hope of resolving the issue without further expense."

13. Except to the extent that this evidence serves in a general sense to set the context in which the letters were sent, I do not believe that it greatly assists. Whatever may have been the Defendant's private intention in authorising Mr Hiller to say what he did to Mr Costello, I can only resolve the acknowledgment issue by reference to the terms of the letters themselves and to what a reasonably intelligent individual in the position of Mr Costello would have understood by them.

14. Mr Moser submits that the letter of 1st May 1997 contains a clear offer to pay $46.92 towards the amount of the Judgment (although, with one eye on the implication of this submission for the issue of privilege, he also argues that the offer is so derisory that it cannot be regarded as

genuine). Mr Moser emphasizes that the letter contains no suggestion that the Defendant has any defence to the Judgment, at least in Arizona. He says that the letter is only explicable on the premise that the Judgment debt is admitted. Mr Moser submits that, equally, the second letter can only be explained on the footing that the Judgment debt is admitted. It contains a proposal to settle any proceedings to enforce the judgment. It is suggested that the Defendant might be willing to pay a sum of $500 "*in complete satisfaction of the judgment*".

Both letters admit the existence of the Judgment. Mr Moser says that that is enough. The Claimant does not need to prove, in addition, an acknowledgment of liability under it.

15. It is important to focus on the cause of action which it is said is being admitted. The Claimant is assignee of the Judgment debt, not assignee of the debt arising under the guarantee. Although English law would treat the liability under the guarantee as having merged into the Judgment if the Judgment had been given by a Court in England and Wales, the doctrine of merger does not apply in respect of foreign Judgments. In the eyes of an English Court the Arizona Judgment and the guarantee still give rise to two separate causes of action. Precisely this distinction was made in the case of ***In re Flynn dec'd No. 2*** [1969] 2 Ch 403. There the plaintiff, Morgan Guaranty Trust Company, was seeking in England to recover the amount of a promissory note which the late Mr Erroll Flynn had given to it in New York. Morgan's had sued Mr Flynn for the amount of the promissory note in New York. In his defence in those proceedings Mr Flynn had admitted the note but denied that it was given for value received and denied that any sums were due and owing under it. The case came to trial in New York after Mr Flynn's death and his estate was represented at the hearing by temporary administrators. The New York Court rejected the defence and gave Judgment for Morgan's. Morgan's then commenced an action in the Chancery Division in London against the administrators of Mr Flynn's estate in this country. The claim was founded on the promissory note and on the New York Judgment. In answer to the objection raised by the U.K. administrators that the cause of action on the promissory note was statute barred, Morgan's argued that Mr Flynn had acknowledged the debt in his defence in the New York proceedings by admitting the existence of the promissory note. This argument failed: but Morgan's succeeded in its alternative cause of action on the New York Judgment.

16. On behalf of the Defendant, Mr John McDonnell Q.C. relies on this authority for two propositions. First he says that it illustrates the fact that what the Claimant in this case is really seeking to establish is that there has been an acknowledgment of liability in England on an Arizona Judgment. He submits that neither of the two letters contains any such acknowledgment. They admit the existence of the Arizona Judgment: but that is simply one of several facts which are a necessary ingredient of any cause of action on that Judgment. Second, Mr McDonnell says that the case of *Re Flynn* confirms that the acknowledgment must be an acknowledgment of an existing liability if it is to set time running afresh. That submission was made to Buckley J. in ***Re Flynn***, who (at p. 412) accepted it in these terms: *"... in my judgment, the authorities do establish the principle that the acknowledgment properly interpreted must be an acknowledgment of liability on the part of the person making the acknowledgment, and not merely an acknowledgment of certain facts which, taken in isolation, would give rise to a liability but which are alleged by the person who is said to have given an acknowledgment not to give rise to a liability by reason of other surrounding circumstances."*

17. According to Mr McDonnell the letter of 1st May 1997 merely acknowledges the fact that the Judgment is enforceable in Arizona by garnishee proceedings against the Defendant's non-exempt funds in Arizona bank accounts. It does not admit that it is enforceable against assets outside Arizona. It may be that it is enforceable against assets outside Arizona not affected by the Ontario bankruptcy, but no admission is made of the extent of that liability. Mr McDonnell also invites the Court to read the letter of 1st May 1997 as offering a sum in settlement of the garnishee proceedings, not a sum in satisfaction of the Judgment debt.

18. As for the letter of 4th June 1997, Mr McDonnell contends that it cannot amount to an acknowledgment of liability by reason of the assertion made in it by Mr Hiller that the Canadian bankruptcy prevented Premier from taking steps to enforce the Judgment. Moreover, even if that

assertion should be read as referring only to enforcement outside Arizona (which would at least be consistent with the admission made by the Defendant in paragraph 8 of his Statement although it is not obvious from the wording of the letter), the same point can be made as is made in respect of the first letter. An acknowledgment that the Judgment is valid and enforceable in Arizona is not an acknowledgment that it is valid and enforceable in England. Many foreign judgments are not enforceable in this country. Whilst the Arizona Court took the view that the bankruptcy in Ontario was no impediment to its giving Judgment against the Defendant and therefore the Judgment may well remain enforceable in Arizona, Mr McDonnell says that it is by no means plain that an English Court would take the same view. English Courts tend to regard bankruptcy Orders made in Commonwealth jurisdictions as also extending to assets of the bankrupt in England and Wales. On that ground it is possible that the English Court would not regard the Arizona Judgment as being enforceable here.

19. There is a good deal of force in Mr McDonnell's argument that the acknowledgment must be an acknowledgment of an existing liability. It was for this reason that Buckley J. held in ***Re Flynn*** that Mr Flynn's defence in the New York proceedings, which amounted to a confession and avoidance of the claim, could not be regarded as an acknowledgment of liability. It follows from his reasoning in that case that a statement which admits the transaction alleged to give rise to the debt but contends that the transaction is liable to be set aside is not a sufficient acknowledgment for the purposes of the Limitation Act. Nor is a statement which admits the debt but raises a set-off (see Kerr J. in ***Surrendra Overseas Limited v Government of Sri Lanka*** [1977] 1 WLR 565 at 573-575}. By the same token, a statement admitting the existence of a Judgment but maintaining that for some reason the Judgment is not enforceable is not a sufficient acknowledgment of the Judgment debt for limitation purposes. As I read it, the letter of 4th June 1997 falls into this latter category. The offer of £500 was an offer to dispose of Premier's claim for a nuisance value. It was not an admission of liability to satisfy the claim, because the letter clearly stated the Defendant's belief that the Judgment was unenforceable. That assertion differentiates the present case from the case of ***Phillips v Rogers*** [1945] 2 WWR 53, a case decided in Alberta to which Mr Moser referred by way of analogy. In ***Phillips v Rogers*** the defendant wrote a letter to the plaintiff saying that he did not have the funds to meet the plaintiff's proposal of settlement. It was held that the letter contained a clear recognition of an indebtedness sufficient to amount to an acknowledgment under the relevant statute of limitation. But it is one thing for a defendant to say that he cannot afford to pay: it is quite another for the defendant to say that he need not pay, or will only pay a nominal sum, because the claim is unenforceable. The letter of 4th June 1997 maintained that the Judgment was unenforceable. I therefore do not consider that it contained an acknowledgment of a liability to pay the Judgment debt either here or in Arizona.

20. The same reasoning does not apply to the letter of 1st May 1997. That letter contains a clear recognition of the enforceability of the Judgment by garnishee proceedings and to that extent, at least, acknowledges a liability to satisfy the Judgment debt. I do not think it is permissible to read the letter as offering a sum in settlement of the garnishee proceedings and not a sum in satisfaction of the Judgment. The two are inextricably linked. Garnishee proceedings are brought to enforce Judgments. An offer to settle garnishee proceedings is an offer to settle liability arising out of the Judgment sought to be enforced by those proceedings. The more difficult question is whether the acknowledgment in the letter of 1st May 1997 is an acknowledgment of liability in Arizona only or an acknowledgment of liability generally. If it is a general acknowledgment, time runs afresh on the cause of action to sue on the Judgment debt in England: but it has not been argued that the Defendant would thereby be precluded from raising any defence to enforcement which is open to him under English conflicts rules (see *Dicey & Morris, The Conflict of Laws, 13th ed. Rules 35* to 45). If it is an acknowledgment confined to the effect of the Judgment in Arizona, then there is no acknowledgment sufficient for the purposes of the Limitation Act 1980 and the time bar in England holds good.

21. I think the answer lies in the wording of the letter itself and in an objective assessment of what Mr Costello would have understood it to mean. No doubt it would be possible for a debtor to qualify

an acknowledgment of a debt by saying, in terms, "*I admit you have a claim which you can enforce against me in e.g. India but I do not accept that it is enforceable against me anywhere else*". I agree that a statement so worded might well be insufficient to set time running afresh in respect of a cause of action to enforce the claim in England. But a qualified acknowledgment of that kind would be rare. It presupposes that the debtor is conscious of the fact (1) that an attempt might be made to enforce the claim against him in other legal jurisdictions, and (2) that there are different rules that may apply to the enforceability of the debt in those other jurisdictions. The letter of 1st May 1997 is not so qualified. Although the letter must be construed in the context in which it was sent, namely, garnishee proceedings by the creditor in Arizona, I think it is over-subtle to imply into the acknowledgment that it was acknowledging a liability in Arizona alone. The Defendant was not taking conflict of laws points. He knew nothing about the conflict of laws. Mr McDonnell argues that he knew nothing about section 29(5) of the Limitation Act either. He therefore submits that the Defendant cannot have intended his letter to be an acknowledgment of liability on a cause of action in England. But to my mind this point cuts equally well the other way. The Defendant had no intention of limiting what was said in the letter to acknowledging liability for the Judgment debt in Arizona rather than in England, because he did not have enforcement in England in mind. In the end the Defendant's intentions can only be deduced from an interpretation of what he allowed Mr Hiller to say in the context in which he said it. In my judgment the letter of 1st May 1997 can only have been understood by Mr Costello as acknowledging that the Judgment was valid and gave rise to an existing liability of the Defendant which, aside from any other remedies that might be available, could be enforced by garnishee proceedings against the Defendant's nonexempt bank balances in Arizona. Nothing was said in the letter to alert Mr Costello to the possibility that the acknowledgment of liability was intended to be restricted to the garnishee proceedings or to other enforcement measures in Arizona. If that was the Defendant's true intention, it was not expressed.

22. I would therefore hold that, if the letters are admissible, the first letter contains an acknowledgment of the Judgment debt sufficient to set time running afresh under section 29(5) of the Limitation Act 1950, whilst the second letter does not. In my judgment, it is irrelevant that within 5 weeks of the sending of the first letter, the Defendant appears, in the second letter, to have had second thoughts. It was not argued, in my view rightly, that the letters should be read together so that the second letter negated the effect of the first.

23. I turn therefore to the question whether the letters are admissible. I shall deal with both letters although, strictly, on the conclusions I have reached thus far, this issue does not arise in relation to the letter of 4th June. Whether the letters are admissible in this action is a matter of English law because questions of the admissibility of evidence are governed by the law of the forum *(Dicey & Morris, op. cit. Rule 17, paragraph 1-016).*

24. The rationale of the "without prejudice" rule in English law is well expressed in the following passage from the judgment of Oliver LJ in **Cutts *v Head*** [1984] Ch 290 at 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, as it was expressed by Clauson J. in* ***Scott Paper C. v Drayton Paper Works Ltd*** *(1927) 44 R.P.C. 151, 156, be encouraged fully and frankly to put their cards on the table. ... The public policy justification, in truth, essentially rests on the desirability of 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."*

25. The above passage was cited with approval by Lord Griffiths *in* ***Rush & Tompkins Ltd v Greater London Council*** *[1989] AC* 1280 at 1299-1300, where he made the following additional observations: *"The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence. A competent solicitor will always head any negotiating correspondence*

"without prejudice" to make clear beyond doubt that in the event of the negotiations being unsuccessful they are not to be referred to at the subsequent trial. However, the application of the rule is not dependent upon the use of the phrase "without prejudice" and if it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those negotiations will, as a general rule, not be admissible at the trial and cannot be used to establish an admission or partial admission. I cannot therefore agree with the Court of Appeal that the problem in the present case should be resolved by a linguistic approach to the meaning of the phrase "without prejudice". I believe that the question has to be looked at more broadly and resolved by balancing two different public interests namely the public interest in promoting settlements and the public interest in full discovery between parties to litigation."

26. Lord Griffiths went on to conclude (at 1301) that: *"as a general rule the "without prejudice" rule renders inadmissible in any subsequent litigation connected with the same subject matter proof of any admissions made in a genuine attempt to reach a settlement'.*

27. The Court of Appeal has since held, in ***Muller v Linsley and Mortimer*** *[1996]* 1 PNLR 74, that there are really two justifications for the "without prejudice" rule. The first is public policy, and the decision in ***Rush & Tompkins*** is said to be an example of the rule being applied on public policy grounds. The second is implied agreement between negotiating parties as to what are commonly understood to be the consequences of conducting negotiations on a "without prejudice" basis. The decision in ***Cutts v Head*** is said to rest on this basis.

28. The "without prejudice" rule is not absolute. Communications which at first sight are "without prejudice" may nevertheless be admitted when the justice of the case requires it (see Lord Griffiths again in ***Rush & Tompkins*** at 1300). The best known exceptions are that "without prejudice" material will be admissible (1) if the issue is whether or not the negotiations resulted in an agreed settlement (see e.g. ***Tomlin v Standard Telephone & Cables Ltd*** [1969] 1 WLR 1378), (2) where the document in question may prejudice the person to whom it is addressed if he does not accept the offer made in it (see e.g. ***In re Daintrey, ex parte Holt*** [1893] 2 QB 116), (3) in order to determine a question of costs after judgment has been given (see e.g. ***Cutts v Head*** supra) and (4) in order to prove an independent fact in no way connected with the merits of the cause (e.g. to prove, on an application to dismiss a claim for want of prosecution, that there was an exchange of correspondence). Certain communications, which would otherwise be treated as inadmissible, fall outside the "without prejudice" rule where there is a strong countervailing public policy in favour of their admissibility. A good example is that "without prejudice" privilege cannot be claimed for communications made in furtherance of a crime or fraud (***Hawick Jersey International Limited v Caplan*** Mr A.T. May QC, The Times 11th March 1988). Mr Moser submitted that this latter principle extended to any communication which, if not disclosed, might lead to an abuse of process.

29. The legal burden rests on the Claimant to prove, by reference to the two letters, that the Defendant has acknowledged the Judgment debt. Since the two letters appear, at first sight, to be open letters, neither being marked "without prejudice", it is for the Defendant to rebut the inference that they are admissible by establishing that, in truth, they are "without prejudice" communications. Mr Moser submits that the Defendant cannot do so. His primary case is that neither letter was part of a genuine negotiation. The letter of 1st May 1997 was not part of any negotiation because there was nothing to negotiate about. The Defendant admitted that the Judgment was enforceable against his non-exempt bank balances with Wells Fargo. Moreover, the offer of $46.92 was so derisory that it cannot be regarded as a genuine offer. Mr Moser concedes that the letter of 4th June 1997 did purport to be responding to a settlement overture, but he says that the offer of $500 made in that letter was so derisory as not to be a sincere attempt at compromising the claim. I cannot accept either of these submissions. Taking first the letter of 4th June 1997, I do not think the offer of $500 can be categorised as so facetious as not to be genuine given (a) the Defendant's stated belief that the Judgment was not enforceable and (b) his meagre resources, as evidenced by the small sums in his Arizona bank accounts and the fact that he was, at the time, an undischarged bankrupt in Canada. Since the letter was admittedly sent in response to an intimation

from Mr Costello that his client was willing to entertain a settlement proposal, it has all the classic hallmarks of a communication that was intended to be made "without prejudice". The status of the letter of 15' May is not so obvious. First, it appears to have been unprompted by any suggestion from Mr Costello of a willingness to compromise. Nevertheless the "without prejudice" privilege extends to all documents which form part of a negotiation, whether or not they are themselves offers and even if they are merely an "opening shot" (see Parker LJ in ***South Shropshire District Council v Amos*** *[1986] 1* WLR 1271 at 1277-1278). The letter of 1st May is not therefore disqualified because it may have been unsolicited. It also contains an offer to stipulate (i.e. consent) to an Order in the garnishee proceedings awarding US$46.92 to Premier and freeing the remaining monies in the Wells Fargo accounts from attachment. It is true that Mr Hiller may have had little option but to make the proposal he did, but that does not deprive it of its essential quality of being an offer to forego any further challenge to the garnishee proceedings. Nor do I think that the meagre amount of the sum conceded by Mr Hiller means that the offer was not genuine. The offer makes plain that the sum conceded was the only non-exempt money in the two bank accounts. It is also immaterial to the status of the letter that it may not have received a reply. An "opening shot" which does not receive a response may nevertheless be privileged if its contents included anything in the nature of a concession. There is no evidence, one way or the other as to whether Mr Costello replied to the letter of 1st May but, if it matters, I find that he probably did. In my judgment the letter of 1st May, like that of 4th June, was a negotiating letter which proposed a compromise. As such it is entitled to be treated as having been written under cover of "without prejudice" privilege, unless other factors suggest that that privilege should not apply.

30. Mr Moser submits that there are indeed other factors which dictate that the privilege does not apply. He advances two arguments in this connection. The first is that, even if the two letters have the characteristics of communications which were intended to be "without prejudice", it would be an abuse of the process of the Court if the Defendant were permitted to take advantage of the privilege which at first sight attaches to them. According to Mr Moser, the Defendant has deliberately chosen to remain an undischarged bankrupt for more than a decade in order to escape liability to pay the Judgment. He now wishes, in addition, to shelter under the umbrella of "without prejudice" privilege so as to avoid the legal consequences of his plain admission of liability for the Judgment debt. Mr Moser says that this is a reprehensible, if not indeed a deceitful, tactic. He invites an analogy to be drawn between this case and the principle that "without prejudice" privilege cannot be invoked to protect communications made in furtherance of a crime or fraud (see ***Hawick Jersey International Ltd v Caplan*** supra). He further argues that it is possible to discern in section 29(5) of the Limitation Act a public policy that defendants should not be entitled to rely on a defence of limitation where they have acknowledged the debt in question less than 6 years before the proceedings began. According to Mr Moser, that countervailing public policy, in the circumstances of this case, outweighs the public interest in protecting from disclosure admissions made in the course of settlement negotiations. For all of these reasons, Mr Moser submits that the two letters should not be held to be privileged under the "without prejudice" rule.

31. I am unable to accept this argument. The evidence, such as it is, discloses that, following the collapse of Hearley Commercial Properties Inc., the Defendant became an alcoholic and suffered from depression. In consequence he was unable to handle his business affairs for a considerable period and, in view of the bankruptcy, lacked the means with which to do so. The Defendant says that he attempted suicide twice and that it was only with the help of Alcoholics Anonymous that he was able to start rebuilding his life. It is not clear exactly when he turned the corner on the road to recovery but it would appear to have been sometime in the second half of 1996 or the first half of 1997. I have already quoted from the Defendant's Statement where he deals with the legal advice he had received at the time the two letters were written by Mr Hiller in May and June of 1997. I do not think that that evidence justifies a finding that the Defendant has chosen to remain an undischarged bankrupt for tactical reasons. Moreover the Claimant is not precluded by the fact that the Defendant remains an undischarged bankrupt from arguing that the Judgment debt has not

been extinguished by the bankruptcy proceedings. If the claim to enforce the Judgment debt in England is not statute barred, it is the Claimant's case that the bankruptcy proceedings in Ontario have not extinguished the Judgment debt and that the Defendant is still liable to satisfy it. As for public policy, I detect no particular policy underlying section 29(5). Section 29 is simply part of the statutory code governing limitation. The public policy of the Limitation Act 1980 is, no more and no less, the prevention of stale claims from being litigated.

32. Mr Moser's second and final argument is that, in truth, the two letters are not covered by the "without prejudice" rule at all. They are admissible in evidence in any event because the Claimant seeks to rely on them solely in order to prove the fact that they were written, not in order to prove the truth of their contents or the validity of the offers they contained. The reasoning is that the letters are only explicable on the footing that liability to satisfy the Judgment was admitted by the Defendant. The letters make no sense at all without that premise. Thus, says Mr Moser, the mere fact of the letters being written demonstrates an acknowledgment of the debt. He submits that the present case is analogous to that of ***In re Daintrey, ex parte Holt*** [1893] 2 QB 116. In that case, a debtor sent a letter to one of his creditors containing an offer to compound the debt which he owed him. The debtor stated in the letter that he was unable to pay all of his debts and threatened to suspend payment unless the composition was accepted. The creditor sought to rely on the letter to support a bankruptcy petition against the creditor, notwithstanding that it was expressly headed "Without Prejudice". Vaughan Williams J., giving the Judgment of the Divisional Court, held that the creditor could do so. He explained why the letter was not covered by the "without prejudice" rule in the following terms (at p. 116): *"... we think that the rule has no application to a document which, in its nature, may prejudice the person to whom it is addressed. It may be that the words "without prejudice" are intended to mean without prejudice to the writer if the offer is rejected; but, in our opinion, the writer is not entitled to make this reservation in respect of a document which, from its character, may prejudice the person to whom it is addressed if he should reject the offer, ..."*

33. The letter in ***Re Daintrey*** contained an act of bankruptcy. It was obvious that the creditor would be disadvantaged if he could not rely upon the letter to found a petition for bankruptcy, whether or not he accepted the composition which the letter proposed. The two letters sent by Mr Hiller do not have the same character. They were sent at a time when the causes of action to enforce the Judgment debt in England, in Canada and in Arizona were not statute barred. I infer that Premier did not accept the offers which the letters contained. If that is right, I cannot see that Premier suffered any prejudice by declining to do so, even if the letters were privileged. Premier was not deprived of an opportunity to exercise its statutory rights. Premier was not prejudiced in any way. As the assignee of Premier, the Claimant is in no different position. It follows that I am against Mr Moser's second argument insofar as it is based on the decision in ***Re Daintrey***. *I* am also against the argument insofar as it seeks to bring the present case within the exception to the "without prejudice" rule that the privilege does not preclude proof of independent facts "in no way connected with the merits of the cause" (Lord Griffiths ***Rush & Tompkins v GLC*** at 1300). The reality is that the Claimant only attaches significance to the fact that the letters were written because of their contents. The Claimant is seeking to rely on the letters for the fact that they allegedly contain an acknowledgment of liability to satisfy the claim. Plainly, that is not "an independent fact in no way connected with the merits of the cause". The exception does not apply.

34. However Mr Moser relies on two Scottish cases for a broader proposition. The proposition is that if a "without prejudice" communication contains an unequivocal admission of liability, the admission is not privileged and can be used in evidence. The first of the two Scottish cases is ***Daks Simpson Group plc v Kuiper*** *1994 SLT* 689. This was a decision of Lord Sutherland in the Outer House of the Court of Session on 16th December *1993*. The pursuers, Daks Simpson Group, brought a claim against one of its former directors, Mr Kuiper, for count, reckoning and payment of secret commissions which had been received by him from customers of the company, and also to recover the value of work done to Mr Kuiper's property at the company's expense. The company estimated that the amount of the secret commissions which Mr Kuiper had received was

£850,000. After Mr Kuiper's resignation from the Board, the company's solicitors had entered into negotiations with Mr Kuiper's solicitors with a view to recovering the money. The negotiations reached a stage where the company's solicitors sent a draft settlement agreement to Mr Kuiper's solicitors. Attached to the draft agreement was a schedule listing a number of alleged secret commission payments. Mr Kuiper's solicitors replied in a letter dated 20th April 1993, which commented on the draft agreement. In this letter, Mr Kuiper's solicitors stated that their client accepted that the first four payments listed in the company's schedule were correct. These totalled £564,441. The letter then queried the figure given for another payment from a customer called Bara, and stated that Mr Kuiper accepted that the sum he had received from Bara was only £17,000. The remaining payments in the schedule, which were earlier in point of time, were not accepted: but Mr Kuiper's solicitors said that their client had conducted a reconciliation of the earlier payments he had received and now accepted five other payments totalling £108,056. The letter concluded with the words "without prejudice".

35. The company moved the Court for summary decree against Mr Kuiper in a sum of £689,497, being the total of the three amounts admitted in the letter of 20th April 1993. Counsel for the company conceded that if he could not rely on that letter the motion was bound to fail. However he submitted that the words "without prejudice" did not mean that there was an absolute ban on looking at anything contained in the correspondence. His argument is summarised in the judgment of Lord Sutherland as follows:

"[Counsel for the pursuers] argued that if plain statements of fact were made in the course of a letter ... marked ["without prejudice"], these could be looked at. What could not be looked at in a letter so marked was some hypothetical admission or concession or arrangement for the purpose of securing a settlement. Anything put forward as a bargaining counter in the course of the letter would be protected from further scrutiny, but a plain straightforward statement of fact or admission could be looked at because this was not something which was being used for the purposes of negotiation.

Counsel referred to the decision of Lord Wylie in ***Watson-Towers Ltd v McPhail*** *[1986 SLT 617]. In that case there was a letter from the defender which referred to "plates of steel which were in stock at 7 November 1983 and which remain unpaid". This statement came in a letter which offered a certain sum to the pursuers and it ewas said in the letter "this offer is made without prejudice and would be in full and final settlement of your reservation of title claim". It was held that the value of those plates of steel could be recovered by way of summary decree. In referring to the part of the letter which I have quoted, Lord Wylie said (at pp. 618-619): "These terms do not, in my view, infer a hypothetical admission or concession for the purpose of securing a settlement but are statements of fact. The use of the expression "without prejudice" does not in my view protect the letter from subsequent use as an admission of fact".*

A very similar view was taken in the Canadian case of ***Kirschbaum v "Our Voices" Publishing Co***. [19711 OR 737], where it was said:

"Correspondence without prejudice is one of the exclusionary rules. Contrary to popular belief in some quarters, that the shibboleth "without prejudice" written on a letter protects it from subsequent use as an admission is not accurate: see 4 Wigmore 2 Ed paras 1060-1062. That learned authority points out that the basis of the exclusion is a hypothetical admission or concession for the purpose of securing peace or settlement; and since it does not represent the parties' true belief it cannot be taken as a true admission. Therefore, the question to be considered is, what was the view and intention of the party in making the admission; whether it was to concede a fact hypothetically, in order to effect a settlement, or to declare a fact really to exist."

Counsel contended that looking at the letter of 20 April 1993 in this light, it was clear that there was an admission of fact that the first four payments were correct, that the Bara payment was £17,000 and that the earlier payments were in the sum stated therein. This was not some form of hypothetical admission or concession for the purpose of securing a settlement but was a simple statement of fact. If these could be looked at as admissions, there was no conceivable defence to this part of the pursuers' claim and accordingly summary decree should be pronounced."

36. The contrary submission made on behalf of Mr Kuiper was that the letter of 20th April 1993 was sent in the course of genuine settlement negotiations and was privileged. Mr Kuiper's counsel cited the passage from the judgment of Oliver L.J. in ***Cutts v Head***, to which I have already referred, as indicating the public policy justification for the privilege. He also cited another Scottish case (***Bell v Lothiansure Ltd*** 1990 SLT 58) in which Lord McCluskey had declined to admit in evidence a statement made in the context of an offer advanced in the course of negotiations and had expressed the view that the "without prejudice" rule was of general application both in England and Scotland.

37. Having rehearsed the arguments, Lord Sutherland expressed his conclusion in these terms (at 692B-E):

"In my opinion the argument advanced by the pursuers is correct. The general principle underlying the rule is that if offers, suggestions, concessions or whatever are made for the purposes of negotiating a settlement, these cannot be converted into admissions of fact. I do not read Oliver LJ's statement as saying anything beyond that. The observations in Bell were made in the context of the averment being that solicitors for the insurers offered to settle the pursuers' claims and all other claims arising from the same cause for the sum of £250,000, but the letter proceeded on the narrative that the claims were against the first defenders and did not concern the insurers and expressing the view that any loss was not covered under the policies but nevertheless the insurers were prepared to make an ex gratia offer. Quite plainly, in my view, that could not be converted into some form of admission. "Without prejudice" in my view means, without prejudice to the whole rights and pleas of the person making the statement. If, however, someone makes a clear and unequivocal admission or statement of fact, it is difficult to see what rights or please could be attached to such a statement or admission other perhaps than to deny the truth of the admission which was made. I see no objection in principle to a clear admission being used in subsequent proceedings, even though the communication in which it appears is stated to be without prejudice. l would adopt what is said by Lord Wylie in Watson-Towers and the Canadian view expressed in Kirschbaum."

38. Lord Sutherland's judgment in ***Daks Simpson Group plc v Kuiper*** was cited and followed in ***Richardson v Quercus Limited*** *1999 SC* 278. This is the second of the two Scottish authorities relied on by Mr Moser. The pursuer, Mr Richardson, was the owner of the second and top floors of a tenement building in Edinburgh. He sued Quercus Limited, who owned the basement and ground floors of the same building, for damages resulting from structural building works which Quercus had carried out between *1987* and mid 1988. The action was commenced in May *1995* and one defence raised by Quercus was that the claim was barred by prescription. The judge rejected that defence and awarded damages to Mr Richardson. Quercus appealed by way of a reclaiming motion to an Extra Division of the Court of Session (Lords Prosser, Abernethy and Johnston), who refused the motion and dismissed the appeal on 24th December 1998.

39. The appeal was confined to the judge's conclusion on the issue of prescription. The relevant statutory provisions were contained in section 6(1) and section 10(1) of the Prescription and Limitation (Scotland) Act 1973. Those sections provide as follows:

Section 6(1) "If, after the appropriate date, an obligation to which this section applies has subsisted for a continuous period of five years - (a) without any relevant claim having been made in relation to the obligation, and (b) without the subsistence of the obligation having been relevantly acknowledged, then as from the expiration of that period the obligation shall be extinguished",

Section 10(l) *"The subsistence of an obligation shall be regarded for the purposes of sections 6, 7 and 8A of the Act as having been relevantly acknowledged if, and only if, either of the following conditions is satisfied, namely - (a) that there has been such performance by or on behalf of the debtor towards implement of the obligation as clearly indicates that the obligation still subsists; (b) that there has been made by or on behalf of the debtor to the creditor or his agent an unequivocal written admission clearly acknowledging that the obligation still subsists."*

It was common ground that the "appropriate date" in terms of section 6(1) was sometime in mid-1988 when the structural works had been completed. There was no dispute that Mr Richardson had made no relevant claim between mid 1988 and May 1995. So, unless the obligation owed to

him by Quercus in respect of remedial works had been "relevantly acknowledged" before mid 1993, the claim was extinguished by prescription. The judge held that Quercus had acknowledged the claim both by performance (s. 10(1)(a)) and by an unequivocal admission in writing (s. 10(1)(b)). In reaching the latter conclusion, the judge had relied on a series of four letters, each headed "Without prejudice to liability", which a firm of Loss adjusters representing Quercus had written to Mr Richardson's solicitor. The first of these letters had been sent on 29th May 1987 and the last of them was dated 2nd June 1992. The judge held that, read together, they contained statements which amounted to an unequivocal admission of the obligation and that he was not constrained from looking at them by the "without prejudice" marking. The Extra Division broadly agreed. Lord Prosser, who delivered the leading judgment, held that it was permissible to interpret what was said in the later letters, in particular that of 2nd June 1992, in the context of what had been said in the earlier letters. Adopting that approach, there had clearly been an admission by Quercus, after mid 1988, of the obligation to perform or pay for remedial works to Mr Richardson's property. On the admissibility of the letters, Lord Prosser (at p. 283D) did not dissent from the submission of counsel for Quercus that the principles set out in ***Daks Simpson Group plc v Kuiper*** provided the appropriate test. Lord Johnston, in his concurring judgment, expressed his entire agreement with the reasoning of Lord Sutherland in the *Daks* case as to what was to be regarded as protected by the phrase "without prejudice" (290F). Since all three judges of the Extra Division agreed with the trial judge that the letters contained an unequivocal admission of the obligation, they had no difficulty in agreeing that the letters were admissible in evidence.

40. Mr Moser says that these Scottish cases are highly persuasive, even if they are not strictly binding. He submits that this Court ought to follow them. I disagree. I am not persuaded that they represent the current state of English law as to the ambit of the "without prejudice" rule. Certainly, no English decision was cited to me, and I am not aware of any such decision myself, that holds that an unequivocal admission made in the course of "without prejudice" negotiations is not privileged. If such a decision exists I am confident that it would have been unearthed by Mr Moser's diligent researches. The most recent English case cited in argument, where a factual admission was in issue, was ***Buckinghamshire County Council v Moran*** *(1990]* Ch 623. In that case the county council sued to recover possession of a piece of land adjacent to Mr Moran's property. Mr Moran resisted the claim on the ground that he had been in adverse possession for more than 12 years before the proceedings were commenced in 1985. The county council wished to rely on a letter which Mr Moran had written to it less than 12 years before the start of the action, in which Mr Moran had expressly acknowledged that he knew that the land had been acquired by the council for the building of a by-pass at some future date but that, for the time being, the council had no use for it. The letter was marked "without prejudice". If it could be referred to in evidence, it substantially undermined Mr Moran's case that his occupation of the land amounted to dispossession. Hoffman J. held that the letter was privileged. He did so on the basis that it was an "opening shot" in negotiations with the council aimed at compromising the dispute. He therefore dismissed the council's claim and declared Mr Moran to be the freehold owner of the plot in question. The Court of Appeal (Slade, Nourse and Butler-Sloss LJJ) reversed this decision. It held that the letter could not properly be characterised as one which initiated any negotiation. It was not therefore privileged. It did not occur to anyone to argue, or to the Court of Appeal to hold, that even if the letter *had* initiated a negotiation, the factual admissions made in it were not privileged.

41. ***Buckinghamshire County Council v Moran*** was decided in February 1989, which was well before the decision in the *Daks* case. Nevertheless Mr McDonnell submits that the approach of Hoffman J. and of the Court of Appeal is inconsistent with that in the two Scottish cases and is binding on me as reflecting the current state of English law as to what is and is not covered by "without prejudice" privilege. There can be no doubt that ***Buckinghamshire County Council v Moran*** is binding on this Court for what it decides; but I am less sure that it is binding for a proposition which was not addressed in argument and which was not therefore decided. However, assuming I am free to do so, I would be reluctant to adopt the reasoning of Lord Sutherland in the Dab case.

That reasoning appears largely to be founded on the judgment of Lord Wylie in ***Watson-Towers Ltd v McPhail*** and the decision of the Ontario Court in ***Kirschbaum v "Our Voices" Publishing*** **Co..** From the language used by Lord Wylie in the passage from his judgment quoted by Lord Sutherland, it is plain that Lord Wylie was influenced in his decision, as much as was the Ontario Court, by the description of the "without prejudice" rule in Wigmore. Wigmore is an American textbook which does not, in my view, state the position in English law. Moreover, and with all due respect, I think that if English law was to embrace the reasoning of Lord Sutherland, the result would be an undesirable extension of the presently recognised exceptions to the ambit of "without prejudice" privilege. It would inhibit parties from freely making concessions in the course of negotiations for fear that such concessions might later lead to finely balanced arguments as to whether any particular concession constituted an unequivocal admission or only a hypothetical admission or bargaining counter. Even if an admission is unequivocal, if it is made in the context of a genuine negotiation, the public policy in favour of the privilege remains. If A freely admits that he owes B £10,000, but says that B owes him £15,000 and proposes that the claim and counterclaim be settled by B paying him £2,500, no encouragement should be given to B to argue that the admission in his favour can be used in evidence even if the rest of A's communication and the response to it cannot. The reasoning in the ***Daks*** case risks inroads being made into "without prejudice" privilege based on a "plum and duff" approach. Parties will scrutinise "without prejudice" correspondence and extract, and seek to rely upon, any admission which they think they can identify as being a free-standing admission. In the context of litigation involving a number of heads of claim and counterclaim this approach could be a significant deterrent to settlement.

42. I am not therefore willing to take up Mr Moser's invitation that l should follow and apply the two Scottish decisions of ***Daks Simpson Group plc v Kuiper*** and ***Richardson v Quercus Limited***. It follows that I reject his second argument. In my judgment, the letters of 1st May 1997 and 4th June 1997 are privileged communications. The Claimant cannot bring them within any of the recognised exceptions to the "without prejudice" rule. In the result, the Claimant's claim is statute barred.

HIS HONOUR JUDGE HAVELOCK-ALLAN Q.C.

1. This judgment will be delivered in Bristol on Friday, 26th October 2001 at 10.00 pm.
2. Until then it is confidential to the parties and their legal advisers.
3. Any intended corrections to the judgment should be provided in writing to Mercantile & Chancery Listing in Bristol (fax 01179763074) by 3pm on the day prior to delivery.
4. It is directed that no official shorthand note shall be taken of this judgment and that copies of this version with any corrections made on handing down may be treated as authentic.
5. It is ordered that no recording of this judgment need be made.

Claimant: Philip Moser instructed by Bevan Ashford, Curzon House, Southernhay West, Exeter, Devon EX4 3LY.

Defendants: John McDonnell Q.C. instructed by Follett Stock. Malpas Road, Truro, Cornwall TR1 1QH.