CA on appeal from QBD, Official Referees Business (HHJ Hicks QC) before Evans LJ; Hobhouse LJ; Mummercy LJ. 27th January 1997.

JUDGMENT : LORD JUSTICE EVANS:

1. This is an appeal against an interlocutory ruling given by His Honour Judge Hicks QC, Official Referee, on 20th January 1997. That is Monday of last week. The ruling was concerned in general terms with the status of certain documents which have been disclosed in these proceedings in the circumstances which will be described below. In effect, the question is whether or not these documents may be used in the proceedings.

2. The question has arisen in the course of a substantial action which is before His Honour Judge Newman QC on a number of issues which are regarded as preliminary to a trial which is fixed presently for 1999. The first plaintiffs, TBV Power Limited (TBV), are the contractors for the construction of an electricity generating plant at Wolverhampton which uses, among other things, old motor car tyres for fuel. The employers were the first defendants, Elm Energy and Recycling (UK) Limited. The contract was dated 3rd March 1992. It provided for a completion date in 1993. There were, however, two contracts of variation. In the result, the plant was taken over by the employer on 15th December 1994. The contract then provided for a six month testing period which continued until 30th June 1995. The regime for testing involved for present purposes three different stages. There was to be a first electrical output test, which I will call the first EOT, to be taken within the first 30 days of the six months or availability period. The test was required to demonstrate, inter alia, the ability of the plant to generate an average of at least 20 megawatts an hour of electricity over a continuous 8 hour period. The second test was to take place for the same purpose and on the same basis during the last 30 days of the six months availability period; that is to say, during the 30 days expiring on 30th June. The third test was called an availability/reliability test which was to demonstrate the ability of the plant to generate on average per hour over the whole of the availability period not less than 80.65 per cent of the average output per hour achieved over both the EOTs. If the tests were not completed satisfactorily, then the engineer was to certify accordingly and the employers were entitled to reject the plant. The immediate consequence of such rejection was that the employers became entitled to repayment of the sums which they had paid to the contractors. There were other provisions as to what procedures should follow subsequently. It is unnecessary to discuss them here.

3. Such a certificate was issued. TBV, the plaintiffs in the action, have claimed declarations to the effect that that certificate was invalid. The defendants, Elm, contend that it was valid on the grounds that none of the three tests was satisfied. The issue as regards the first E O T is not relevant for present purposes. As regards the second E O T, that was not carried out in fact, and the defendants submit, therefore, that that test was failed or, conversely, that the contractual requirement in relation to it was not satisfied.

4. The position with regard to the availability/reliability test (ART) is rather more complex. It is agreed apparently that that test was not satisfied "on the data"; in other words, that the requisite output was not achieved in fact. The plaintiffs say that this failure was the responsibility of the defendants, not themselves, for a number of reasons which need not be detailed here. On the evidence before us without prejudice negotiations began in May 1995 and perhaps earlier as to what the consequences would be if Elm were in due course, in other words, after 30th June, to reject the plant. Put more broadly, the negotiations were an attempt to resolve the whole of what appeared to be likely to be a pending dispute which would involve substantial legal cost.

5. It is important to stress what is common ground between the parties, that these throughout were without prejudice negotiations . The effect of that in law is that nothing said in the course of them can be relied upon by the other party as an admission of the truth of any such statement made. By an amendment to the statement of claim the plaintiffs, T B V, alleged that the defendants, Elm, had agreed at a meeting on 9th June 1995 that the second E O T should be dispensed with. That would mean, and did mean, according to the plaintiffs, that the defendants could not, as employers, rely upon the plaintiffs' failure to complete that test as justification for their subsequent rejection of the plant. The relevant pleading is in the following terms: *"At a meeting held on the 9th June 1995 . . . attended by the following: . . . it was orally agreed between David Stevenson on behalf of TBV and Mark Wyckoff on behalf of Elm that the second EOT would not proceed, but that Elm would not rely upon the absence of the second E O T. This agreement is evidenced by..."*

6. There follow three references and then in conclusion: *"Upon a true construction of the agreement, Elm agreed to waive any requirement for TBV to take a second EOT."*

7. The defendants agree that that meeting was one of the without prejudice series which had begun in May and which continued after 9th June. Their pleading in paragraph 82 A of the amended defence is as follows:

   "As to paragraph 94 A :

   (i) It is admitted that a meeting was held on 9 June 1995. . . attended by the persons listed.

   (ii) At the said meeting it was orally agreed by TBV and Elm that as TBV had failed the ARP tests (as was expressly acknowledged by Mr Waters of TBV) there was no point in TBV attempting the second EOT: That an agreement to that effect (containing inter alia the said acknowledgement of failure) would have to be put into writing; and that Elm would forward to TBV a document to be agreed by the parties. Mr Fisher of Elm expressly stated that until the document was agreed all parties would maintain their contractual rights. In the premises such agreement was expressly or impliedly´subject to contract'. If (which is denied) there was a concluded agreement one of the terms was that TBV had failed the ARP tests alternatively the agreement was conditional upon TBV's said acknowledgement of failure either of which entails that TBV can never be entitled to an Acceptance and

Completion Certificate. Alternatively in reaching such agreement (which is denied) the parties acted upon the basis of common understanding and assumption that TBV had failed the ARP test and it would be inequitable unfair and unconscionable for TBV to resile from that and/or it is not possible for it to seek to take the benefit of what was said as regards the second EOT without also taking the burden of what was said as regards TBV's failure of the ARP tests."

8. The pleading then refers to subsequent correspondence which sought to record such an agreement in writing but which did not succeed in doing so. In short, what the defendants say is that they accept that there was an agreement. They say that if it was not subject to contract, then it was part of a wider agreement which included the plaintiffs' acceptance that the ARP tests had been or strictly inevitably would be failed.

9. In this way it became an issue in the proceedings whether (1) there was a concluded agreement on 9th June; (2) if so, was it subject to contract, in which case it never was finalized, or (3) if it was enforceable, what were its terms? As the plaintiffs said, was it simply that the second EOT would be dispensed with or, as the defendants said, did it involve the plaintiffs' acceptance of the impossibility of satisfying the second EOT? The plaintiffs accepted that it was unnecessary to carry out the second EOT because it was inevitable that they would nevertheless fail the ART.

10. It is perhaps worth observing that stating the issues in that order is in fact in the reverse order of priority so far as the defendants are concerned. If there was an enforceable agreement which had the wider effect for which they contend, then that would be tantamount to an admission that they were entitled to reject the plant. That is speaking so far as the issues known to us are concerned.

11. The plaintiffs are clearly entitled to rely on such a contract even if it was reached in the course of without prejudice negotiations. Such a plea having been made, it becomes necessary for the court to consider both documentary and oral evidence which would otherwise be excluded. The reason is simple. Whatever exchanges took place between the parties are relevant to the question whether an agreement was made and, if so, what were its terms or, more generally, what was its scope. That question is quite distinct from the possible issue as to whether any statements made at the meetings were true or not. The present question is, therefore, remote from any allegation that those statements contained admissions of fact which became binding upon the parties in subsequent litigation. This distinction was referred to and explained with great clarity by Hoffmann L.J. in the unreported decision of this court in ***Muller and Muller v Lindsley and Mortimer*** (QBENI 93/1518/E, judgment given on 30th November 1994). At page 8 of the transcript of his judgment, Hoffmann L.J. says this:

"If one analyses the relationship between the without prejudice rule and the other rules of evidence, it seems to me that the privilege operates as an exception to the general rule on admissions (which can itself be regarded as an exception to the rule against hearsay) that the statement or conduct of a party is always admissible against him to prove any fact which is thereby expressly or impliedly asserted or admitted. The public policy aspect of the rule is not in my judgment concerned with the admissibility of statements which are relevant otherwise than as admissions, i.e. independently of the truth of the facts alleged to have been admitted.

Many of the alleged exceptions to the rule will be found on analysis to be cases in which the relevance of the communication lies not in the truth of any fact which it asserts or admits, but simply in the fact that it was made. Thus, when the issue is whether without prejudice letters have resulted in an agreed settlement, the correspondence is admissible because the relevance of the letters has nothing to do with the truth of any facts which the writers may have expressly or impliedly admitted. They are relevant because they contain the offer and acceptance forming a contract which has replaced the cause of action previously in dispute."

12. The right to object to evidence of without prejudice communications or, more generally, to without prejudice material, is commonly referred to as a form of privilege, but it should be carefully borne in mind, in my judgment, that that is something distinct from other forms of privilege; for example legal professional privilege, which may justify non-disclosure of a document or more strictly, the non-production of documents, the existence of which must be disclosed. Most without prejudice material consists in any event of communications between the parties and the question of production does not arise. Privilege in this sense means not admissible in evidence and in particular, for the reasons noted by Hoffmann L.J., not admissible for the purpose of proving the truth of statements which have been made so that those statements can be relied upon as admissions of fact.

13. In the present case, the plaintiffs accepted that their plea made it necessary for the court to consider whether an agreement was reached on 9th June and, if so, what were its terms. Minutes of that meeting and other documents have been produced. No objection is taken so far as those documents are concerned. To avoid lengthy and costly disputes regarding the scope of the discovery which had become necessary, the plaintiffs' solicitors undertook that they would produce all documents which might conceivably be regarded as relevant, leaving it to the parties' solicitors to prepare an agreed list but leaving it open to the solicitors to reserve their objections, if any, as regards specific documents. That undertaking was recorded in the order of His Honour Judge Newman QC granting leave to amend the statement of claim in the following terms: *"Upon the plaintiff's solicitors undertaking to give full access to... [the] documents relating to the... alleged waiver and thereafter listing, subject to objections, the documents either side shall consider relevant to the issues raised by the amendment"* by the date given.

14. We have been referred to a number of pages of the transcript of the submissions made to the judge. It is sufficient to say that there was no express reference to the future status of documents which might be produced, but then either agreed or ordered to be not relevant, in the sense in which that word was being used. In particular, there was no reference to the question whether such documents, if so excluded, could be used thereafter for the purposes of cross-examining individual witnesses as to their credit. The documents so produced

included the notes of two other meetings which had taken place as part of the without prejudice series on 8th June and 23rd June. By the judgment under appeal His Honour Judge Hicks held that these particular documents were not relevant, as he put it, for the purposes of discovery, but, secondly, that they could be used for the purpose of cross-examining the plaintiffs' witnesses. The judgment dealt with the specific documents in the following passages. At page 10 the learned judge said: *"Mr Walton" that is counsel for the defendant-- "says that he does not seek to rely on them, and it will not be in issue for present purposes whether the contents of these documents amount to or involve, expressly or by implication, admissions on that substantive dispute. He seeks to rely on them only for the purpose of supporting - and this can only be by way of admission since they are the plaintiffs' documents and clearly hearsay - the defendant's version of the narrower agreement pleaded by the plaintiffs as having been reached on 9th June as to the non-performance of the second EOT test."*

15. A little later he said. *"It is apparent from those quotations from Mr. Monty's affidavit that the defendant's application so far as that group of documents is concerned hangs effectively on silence; the submission is that, in the course of the meeting on 23rd June, had there been any point to be made by the plaintiffs that the reasons for the failure of the availability/reliability test lay otherwise than at their door, or even that that was a matter that was the subject of dispute between the parties, the natural thing would have been to say so, and the absence of any reference to that was tantamount to an admission that no such contention was live. It seems to me, however, that the absence of any such reference is entirely natural in a context in which the parties had on 9th June plainly, as both agree, had some discussion the result of which was that both contemplated that there would not be a second EOT test and following which, without in any way prejudging the issues between them, they were as a matter of fact and history in correspondence in an attempt, albeit eventually unsuccessful, to produce a written agreement which would be the record of what on that basis had been agreed on 9th June."*

16. Finally, the learned judge said this: *"I must remind myself that I am not considering how I would decide inferences to be drawn from an issue as to these documents and from the alleged omissions in them; I have got to go as far as saying that there is nothing of relevance in them. That is a stiff test and a high hurdle. However, in the end, I have come to the conclusion that that test is satisfied and that any attempt to draw conclusions from the silence on this point of the documents referring to the conversation on 23rd June cannot amount to any relevant admission on the part of the plaintiffs."*

17. The learned judge said later that he applied the same reasoning as regards the meeting on 8th June.

18. The defendants appeal against the learned judge's ruling that the documents are not relevant, as he put it, for the purposes of discovery so as to enable them to be used at the trial. The plaintiffs by cross appeal say that the learned judge was wrong in permitting or envisaging that they could be used in cross-examination.

19. I, for my part, would approach the question in more general terms. The question is simply whether the disputed documents which have been produced in fact are relevant or potentially relevant to the issues raised by paragraph 94 A of the amended statement of claim and paragraph 82 of the amended defence. If so, then I would hold first that they are disclosable; secondly, that they are not protected by what is called the without prejudice privilege, for that reason; and thirdly, that they can be used in cross-examination of the plaintiffs' witnesses as to credit if and when the relevant circumstances may arise. So phrased, it seems to me that the question permits of only one answer. The question whether an agreement was made and, if so, what were its terms, are expressly raised in the amended pleading. These documents clearly are, in my judgment, relevant to that issue, nor, in my view, are they protected by any separate head of privilege. The learned judge held, as it seems to me, that because the documents might in other circumstances be used to prove an admission which could then be relied upon as part of the evidence in the proceedings, therefore they should be regarded either as non-admissible or at least as protected by the without prejudice privilege, so-called. I would hold that they are relevant because they show what may or may not have been the scope of the alleged agreement. Even if one term of the agreement constituted or may have constituted an admission, I would hold that, nevertheless, the document remains relevant to the issue which is before the court. I would add, although this matter has not been argued before us, that if properly admitted in relation to that issue, it would not follow that the defendants could rely upon the contents or the truth of the contents of any such documents as an admission of fact. But, as I say, that particular matter has not been raised or at least concluded before us.

20. For the plaintiffs, Miss Turner QC submits that the agreement of 9th June was clearly only what should be regarded, as she submits, as a minor and almost incidental part of the overall discussions which began in May and continued after 9th June. She has explained how it came about that that incidental question arose at that date. She submits, in effect, that it is unthinkable that by such an incidental agreement on 9th June the plaintiffs might have in effect conceded liability to a large extent, as the defendants submit that they did. She relies upon the fact that the without prejudice discussions were, as she puts it, at a much higher level, and that they continued to 23rd June as the documents themselves show. For the defendants, Mr. Walton relies upon the content of these other discussions on 8th and 23rd June precisely because they are silent as to what the plaintiffs say remained the central issue so far as liability was concerned. He submits that that silence is indicative of the fact that there had been some overall agreement of the kind which the defendants allege on 9th June.

21. It seems to me that both parties in effect are relying upon the contents of these documents, Mr. Walton for what they do not say and Miss Turner for what they do say. It is sufficient for present purposes, in my judgment, to say that it is clear that, for whatever reason, these documents are relevant or potentially relevant to the issues raised

by the amended pleadings. I have used the phrase potentially relevant to include the wider category of documents which are properly disclosable in accordance with the ***Peruvian Guano*** judgment.

22. For these reasons, I would hold that the learned judge's ruling was not correct, that these documents are relevant, that they are disclosable and that they can be used in cross-examination. More simply, I would put it as I began, by saying that, in my view, these documents can be used at the trial.

LORD JUSTICE HOBHOUSE:

23. I agree.

LORD JUSTICE MUMMERY:

24. I also agree.

Order: Appeal allowed; costs here and below.

MR. A. WALTON (instructed by Messrs Lovell White Durrant, London, EC1) appeared on behalf of the Appellant/First Defendant.
MISS J. TURNER Q.C. (instructed by Messrs Masons, London, EC1) appeared on behalf of the Respondent/First Plaintiff.