JUDGMENT: HIS HONOUR JUDGE BOWSHER Q.C. TCC 1st February, 1999

Introduction

1. In a trial of preliminary issues, it became necessary for me to rule on the admissibility of a written Joint Statement signed by expert witnesses.

2. The plaintiff is a builder. The defendant is the employer of that builder on a project at 24B, Clifton Gardens, Maida Vale, London.

3. The plaintiff claims money alleged to be due for work done and also claims damages for loss and expense caused by alleged delay and disruption. The money claimed for work done is partly on disputed valuations of contract work, and partly for disputed variations of the contract works. During the course of the work, the plaintiff left the site and refused to complete the work, alleging that the defendant had repudiated the contract. The defendant counterclaims damages arising out of the failure of the plaintiff to finish the work.

4. The preliminary issues relate to the alleged repudiation of the contract.

5. The plaintiff alleges that the defendant was in repudiatory breach of contract and that the contract was brought to an end by acceptance of that repudiation on 19 August, 1995. The repudiatory conduct alleged consists of failure to pay sums allegedly due on interim valuations and alleged indications of inability to pay in the future.

Interlocutory history.

6. In the first Order for Directions on12th December 1997, I gave leave to the parties to call expert witnesses in the following terms:

Leave to the parties to call expert witnesses limited to two experts per party on condition that their reports shall have been offered for exchange by 15 October, 1998.

*Experts of like disciplines are to meet on a "**without prejudice**" basis to try to narrow issues and agree facts by 30 September, 1998.*

The Experts are to agree a joint statement indicating those parts of their evidence on which they are, and those on which they are not, in agreement by 30th September 1998".

7. On 30th June 1998, the parties came before me for further directions and I made further orders including:

"Experts of like disciplines are to meet to try to narrow the issues and agree facts and valuations so far as possible and to identify points of disagreement. Meetings to be concluded and agreement/disagreement recorded by reference to Scott Schedules so far as possible by 19th August 1998.

Lawyers for the parties to meet to consider the future conduct of the action and of the trial including the instruction of a court expert and trial of issues by 11 September, 1998."

8. In raising the possibility of instructing a court expert, I had in mind the most economical disposal of a large number of issues as to valuations of work. That suggestion did not commend itself to the parties. On 16 September, 1998, I made further orders for directions. The parties by consent asked for an order for the trial of preliminary issues and I made certain directions for the preparation for that preliminary trial. It was envisaged that preparation for the main trial would continue, and I made the following orders for preparation for the main trial of the action:

*"Experts to continue to meet **without prejudice** to narrow the issues and agree facts.*

Experts to agree a joint statement indicating those parts of their evidence on which they are, and which those on which they are not, in agreement by 6th November 1998. "

The experts' meetings

9. In compliance with my Order, expert Quantity Surveyors instructed by the plaintiff and the defendant respectively met on 17 occasions and had several telephone conversations and exchanged correspondence **without prejudice** to endeavour to agree the final account.

10. Evidence given on behalf of both parties shows that both experts were instructed to meet and reach agreements to give effect to all the orders of the Court. The solicitor for the plaintiffs said also that he instructed the plaintiff's expert to make compromise agreements on quantum issues. The plaintiff's solicitor also said that he instructed the plaintiff's expert not to sign an agreement **without** reference

back to him, but he did not communicate that restriction on his authority to the defendants. In the event, the plaintiff's expert did refer back to the plaintiff's solicitor and was expressly authorised to sign the agreement in the terms in which it was signed, including, in particular the caveat to which I refer below.

11. On 4 November, 1998, the experts had not completed all of their discussions, but since the time ordered for the making of a joint Statement was about to expire, they signed on that day what was headed an Interim Joint Statement of the Valuation Experts.

12. In that Interim Joint Statement, the experts recorded many points of agreement and some points of disagreement and helpfully identified some points on which a finding of the Court is required to enable a choice to be made between alternative valuations which they have recorded. It is evident that the meetings between experts, though lengthy because of the amount of material to be discussed, were most helpful in defining the issues, though not all of the ground was covered in the time available.

13. The Joint Statement contains the following paragraph:
"This Interim Joint Statement is prepared on the basis of information disclosed up to 4 November 1998. Should further information be disclosed after that date it will be considered by the Experts for the purpose of further Joint Statements."

14. Counsel for the defendants wishes to use that Joint Statement in cross-examination of the witnesses for the plaintiff. Counsel for the plaintiffs objects that the Statement is inadmissible on the grounds that it is both privileged and irrelevant.

15. Because the parties have shifted their ground, and the plaintiffs wish to amend their Statement of Claim, I have ordered that there should no longer be a trial of the Preliminary Issues and that there should be a trial of the full action shortly. The points taken on the Interim Joint Statement remain important in the conduct of this action. I have therefore ruled upon them and I now give reasons for that ruling.

Privilege

16. I have ruled that the Joint Statement signed by the experts is not privileged, even though it is said to be "Interim". The discussions and correspondence between the experts were and remain privileged.

17. I have also ruled that the Joint Statement is not binding on the parties in the same way that a contract would be binding on the parties. The existence and terms of the Joint Statement as an open document may, however, have important consequences for the parties.

18. In giving my reasons for those rulings, it is first necessary to consider the nature of the "**without prejudice**" privilege in its more general form, and then consider it more particularly in relation to "**without prejudice**" meetings of experts.

19. A recent authoritative statement regarding the "**without prejudice**" privilege is to be found in the speech of Lord Griffiths in **Rush and Tomkins Ltd. v. GLC** [1988] 3 All ER 737 at 740:

*"The '**without prejudice** rule' is a rule governing the admissibility of evidence and is founded on the public policy of encouraging litigants to settle their differences rather than litigate them to a finish. It is nowhere more clearly expressed than in the judgment of Oliver LJ in **Cutts v Head** [1984] 1 All ER 597 at 605-606, [1984] Ch 290 at 306:*

*'That the rule rests, at least in part, on 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 Clauson J in **Scott Paper Co v Drayton Paper Works Ltd** (1927) 44 RPC 151 at 157, be encouraged freely 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.'*

*1. 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 on 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."*

20. If **without prejudice** negotiations result in an agreement, the privilege does not apply to the agreement. To determine whether an agreement has been reached, it may be necessary to look at privileged material, but once it has been decided that there is an agreement, only the material containing the agreement is held not to be privileged: **Tomlin v. Standard Telephones & Cables** [1969] 3 All ER 301.

21. In **Rush and Tomkins Ltd. v. GLC**, the Court was concerned with a question whether documents containing admissions made **without prejudice** with a view to settlement of one piece of litigation should be disclosed in related litigation. The decision was therefore on totally different facts to the facts of the present case, but the statement of public policy as the basis of the "**without prejudice**" privilege is of prime importance.

22. In most of the cases in which the "**Without Prejudice**" privilege has been considered, the point of public policy either explicitly stated or implicit in the judgments has been the public interest that settlement of disputes should be encouraged. In ordering **Without Prejudice** meetings of experts, the Court has in addition a more limited immediate public interest, namely that the litigation (if it cannot be settled) should be prepared for trial and fought at trial upon issues which have been carefully limited and refined by appropriate agreements. If that objective is followed, then the action, if fought, will be fought with less cost to the parties and the public. Pursuit of this more limited objective will in fact also go far to aid the broader interest that the litigation should be settled if possible. Closer definition of the issues helps the parties to reach a settlement. Case management of litigation as conducted by the Judges of the Technology and Construction Court and by the Official Referees for many years before them is directed both to the efficient and economic eventual conduct of the trial if there is to be a trial and also to the facilitation of settlement before trial.

23. When turning to consider more specifically the **without prejudice** meetings of experts, it is important to have in mind the Rules of the Supreme Court regarding expert evidence. Of first importance among those rules is the provision that parties may only call opinion evidence by leave of the Court. The most important rules are RSC Order 38 rules 36, 37, 38, 41 and 42:

Rule 36:

(1) Except with the leave of the Court or where all parties agree, no expert evidence may be adduced at the trial or hearing of any cause or matter unless the party seeking to adduce the evidence -

(a) has applied to the Court to determine whether a direction should be given under rule 37 or 41 (whichever is appropriate) and has complied with any direction given on the application, or

Rule 37:

(1) .....where in any cause or matter an application is made under rule 36(1) in respect of oral expert evidence, then unless the Court considers that there are special reasons for not doing so, it shall direct that the substance of the evidence be disclosed in the form of a written report or reports to such other parties and within such period as the court may specify.

Rule 38:

*2. In any cause or matter the Court may, if it thinks fit, direct that there be a meeting "**without Prejudice**" of such experts within such periods before or after the disclosure of their reports as the court may specify, for the purpose of identifying those parts of their evidence which are in issue. Where such a meeting takes place the experts may prepare*

a joint statement indicating those parts of their evidence on which they are, and those on which they are not, in agreement.

Rule 41:

3. Where an application is made under rule 36 in respect of expert evidence contained in a statement and the applicant alleges that the maker of the statement cannot or should not be called as a witness, the Court may direct that the provisions of rules 20 to 23 and 25 to 33 shall apply with such modifications as the Court thinks fit.

Rule 42:

4. A party to any cause or matter may put in evidence any expert report disclosed to him by any other party in accordance with this part of this Order."

24. By the time that this action comes to be tried, new Rules will have come into force in April of this year. Part 35 of those Rules will include the following:

Experts - overriding duty to the court

35.3 (1) It is the duty of an expert to help the court on the matters within his expertise.

35.3.(2) This duty overrides any obligation to the person from whom he has received instructions or by whom he is paid.

Use by one party of expert's report disclosed by another

35.11 Where a party has disclosed an expert's report, any party may use that expert's report as evidence at the trial.

Discussions between experts

35.12(1) The court may, at any stage, direct a discussion between experts for the purpose of requiring the experts to-

(a) identify the issues in the proceedings; and

(b) where possible, reach agreement on an issue.

(2) The court may specify the issues which the experts must address

(3) The court may direct that following a discussion between the experts they must prepare a statement for the court showing-

(a) those issues on which they agree; and

(b) those issues on which they disagree and a summary of their reasons for disagreeing.

(4) The content of the discussion between the experts shall not be referred to at the trial unless the parties agree.

(5) Where experts reach agreement on an issue during their discussions, the agreement shall not bind the parties unless the parties expressly agree to be bound by the agreement.

25. The orders which I made in this action were in the form commonly made in this court for some years (and also by many arbitrators). The experts were ordered to meet to try to narrow the issues and agree facts and to record points of agreement and disagreement in a Joint Statement. That practice preceded the making of Order 38 rule 38. Rule 38 was effected in 1987 in recognition of the practice of Official Referees.

26. Experts' meetings and the communications associated with them are **without prejudice** and protected by privilege for the public policy reasons to which I have referred. Following older authority, what is agreed as a result of those **without prejudice** meetings is not privileged. It is only as an open document that the Joint Statement can serve its purpose in limiting the issues in the action.

27. **Without prejudice** meetings of experts and the status of any agreement reached at such meetings have been considered in three decisions of two Official Referees. There is some degree of apparent conflict between those decisions.

28. In **Carnell Computer Technology Ltd v. Unipart Group Limited** (1988) 45 BLR 100 Judge James Fox-Andrews Q.C. considered a case where there had been a **without prejudice** meeting of experts and although some agreement had been reached, no joint statement had been prepared. The plaintiffs wished to adduce evidence of what had been agreed at the meeting and the defendants contended that any such evidence would be inadmissible. Both parties conceded that if a joint statement had been produced, it would not have been privileged. At pages 108 and 109, Judge Fox-Andrews said:

"I find that an expert has no implied or ostensible authority to agree facts orally or in any form other than in a joint report where an order such as the one I made here exists.

.....

The importance of a written report is, it seems to me, fundamental. It obviates the possibility of conflict between experts as to what was or was not agreed. The preparation of such a report brings home to each expert the fact that he is agreeing conclusively certain facts or opinions on behalf of his client."

29. Experts meetings were considered again by Judge Fox-Andrews in **Murray Pipework Limited v. UIE Scotland Limited** (1988) 6 Cons LJ 56. In that case, Judge Fox-Andrews said:

*"The power under the rule [Order 38 rule 38] may, however, he exercised **without** the prior consent of the parties. By force of a direction given under this rule, the experts of the parties are required to meet albeit '**without prejudice**.' The rule assumes that the experts of the parties may wish or decide to remain in a state of 'confrontation' on all or some of the matters, issues or questions, and in such case, they should prepare a joint statement to the effect that they are not in agreement on the whole of their joint statement those parts of their evidence or on parts of such evidence, indicating which part or parts. On the other hand, the major objective of the rule is to produce as wide an area of consensus between the experts, in which case, they should indicate in their joint statement those parts of their evidence on which they are agreed. Such agreement will have the effect of removing the protection of '**without prejudice**' in respect of the matters agreed on.*

By this machinery, the parties will know, before the trial, the rationale and extent of the agreement or disagreement between these experts, and this may well promote a settlement between them, which will be arrived at on a fairer basis in the sense that they will be proceeding in the knowledge, rather than in ignorance, of the strength or weakness of their prospective case. Moreover, if the action should proceed to trial, the parties will be able to concentrate on the real controversies between them, on the areas on which the experts will have indicated they were unable to agree, and in that way a great deal of otherwise wasteful effort, preparatory work, labour, cost and expense should be saved. The process of the trial itself should be made more smooth, and its length significantly shortened."

30. Those decisions were considered by Judge John Newey Q.C. in **Richard Roberts Holdings Limited v. Douglas Smith Stimson Partnership** (1989) 47 BLR 113. Judge Newey expressed some disagreement with some parts of the dicta of Judge Fox-Andrews:

*"I respectfully disagree with the propositions that an order that experts should agree a statement made in reliance upon rule 38 can confer upon them an authority to bind the parties instructing them and that a joint written statement made at the conclusion of a "**without prejudice**" meeting is automatically an "open" statement.*

In my opinion there are no words in rule 38 which purport to confer upon experts power to bind anyone. If it did, then since the rule would not be dealing with procedure, but with the substantive rights of persons under the law of agency, it would, I think, be ultra vires.

*The first sentence of the rule empowers the court to direct "**without prejudice**" meetings of experts; it does not confer power to require "open" meetings. The second sentence does not authorise experts to do anything; it is, I think, no more than a sensible reminder to experts that it may be useful for them to reduce the results of their discussions to writing. There is nothing in the second sentence to state that joint statements should be "open".*

*I think it would be quite alien to the role of expert witnesses that they should have an automatic power to bind parties at the conclusion of "**without prejudice**" meetings. An "expert" does not represent a party in the way that a solicitor represents his client; he is principally a witness and his duties are to explain to the court (and no doubt to those who instruct him) technical matters and to give objective "opinion" evidence.*

*If every order for a meeting of experts were likely to result either in an agreement disposing of all or part of the case **without** either a party or his legal advisors being consulted, orders for meetings would be likely to be strongly opposed."*

In that statement, Judge Newey appears to assume that for an agreed Joint Statement to be open and admissible in evidence it must be binding on the parties. In that regard, I respectfully disagree with the late Judge Newey. That apart, the argument made by him against experts being given automatic power to bind parties to a settlement **without** express authority is compelling.

31. Those authorities have been considered by the Court of Appeal. In an action against an expert for negligence, when the immunity of experts from suit was under consideration, **Stanton v. Brian Callaghan** (1999) 15 Cons LJ 50 at page 53, Chadwick LJ, when considering an agreed statement signed by two experts after a **without prejudice** meeting said:

"In any event, the plaintiffs would have been ill- advised to call Mr Callaghan (the defendant expert) to give evidence which differed from that contained in the agreed joint statement, even if he were persuaded that the views recorded in that joint statement could no longer be supported. Once they knew of the views recorded in

the joint statement and in Mr Callaghan's final report, the plaintiffs were faced with the choice of accepting his advice or instructing another expert. .....

I have indicated that the plaintiffs would have been ill-advised to call Mr Callaghan to give evidence which differed from that in the agreed joint statement, even if he were persuaded by representations made to him between December 14, 1989 and January 1, 1990 that the views recorded in that joint statement could no longer be supported. We were referred in argument to the decisions of His Honour Judge Fox-Andrews, Q.C. in ***Murray Pipework Limited v. UIE Scotland Limited*** *(1990) 6 Const. L.J. 56 and His Honour Judge Newey, Q.C. in* ***Richard Roberts Holdings Limited v. Douglas Smith Stimson Partnership*** *(1990) 6 Const. L.J. 70. The statement could have been put to Mr Callaghan or to Mr. Kelsey if either had sought to depart from the views recorded in it. To hold otherwise would he to deprive a joint statement agreed between experts of the purpose which it was obviously intended to serve."*

Chadwick LJ plainly regarded the agreed Joint Statement as an open document not protected by privilege and admissible in the action for the purpose of which it was made.

32. In the same case, Chadwick LJ also said at page 60:

"But there does come a point at which the expert begins to take part in the management and conduct of the trial in advance of proceedings in court. In ***Landall v. Dennis Faulkner and Alsop and others*** *[1994] 5 Med. L.R. 268 Mr Justice Holland referred, at paragraph 14 in the report of his judgment, to the well known observation of Mr Justice Tomlin in* ***Graigola Merthyr Company Limited v. Swansea Corporation*** *[1928] 1 Ch. 31 at 38, that:*

'Long cases produce evils ... In every case of this kind there are generally many "irreducible and stubborn facts" upon which agreement between experts should be possible, and in my judgment the expert advisers of the parties, whether legal or scientific, are under a special duty to the Court in the preparation of such a case to limit in every possible way the contentious matters to be dealt with at the hearing. That is a duty which exists notwithstanding that it may not always be easy to discharge . . . '

Holland J. took the view that: 'given the importance to the court of agreements such as that evidenced by the impugned report, the public importance of immunity from suit for such is underlined'. I respectfully agree. It is of importance to the administration of justice, and to those members of the public who seek access to justice, that trials should take no longer than is necessary to do justice in the particular case; and that, to that end, time in court should not be taken up with a consideration of matters which are not truly in issue. It is in that context that experts are encouraged to identify, in advance of the trial, those parts of their evidence on which they are, and those on which they are not, in agreement. Provision for a joint statement, reflecting agreement after a meeting of experts has taken place, is made by RSC Ord. 38, r.38. In my view, the public interest in facilitating full and frank discussion between experts before trial does require that each should be free to make proper concessions ***without*** *fear that any departure from advice previously given to the party who has retained him will be seen as evidence of negligence. That, as it seems to me, is an area in which public policy justifies immunity. The immunity is needed in order to avoid the tension between a desire to assist the court and fear of the consequences of a departure from previous advice."*

Those references to the duty of the expert to the Court, and especially the words, "there does come a point at which the expert begins to take part in the management and conduct of the trial in advance of proceedings in court" are particularly apposite in the present case. The Joint Statement which the experts were ordered to produce is a document produced for the Court to assist the Court in case management of the litigation and also in management of the conduct of the trial. It is not a document which one party (or both parties) can withhold from the Court by a claim of privilege.

33. In the same case**, Stanton**, at page 63, Otton LJ considered the role of the expert witness:

"The ro1e of an expert witness was recently considered by Cresswell J. in the case of ***The 'Ikarian Reefer'*** *[1993] 2 Lloyd's Rep. 68 at 81-82, he said:*

'(1) Expert *evidence presented to the court should be, and should he seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of the litigation.*

(2) An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise. An expert witness in the High Court should never assume the role of an advocate.

(3) *An expert witness should state the facts or assumption upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.*

(4) *An expert witness should make it clear when a particular question or issue falls outside his expertise.*

(6) *If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason, such change of view should be communicated (through legal representatives) to the other side* ***without*** *delay and when appropriate to* the court'.

I have cited at length from the judgment of Cresswell J. because I think it important not to gloss over the responsibilities and role of an expert witness, but set them out in full. If we are to assess how the interests of the administration of justice are best served then I think it necessary to have a comprehensive understanding of the unique role played by the expert witness in achieving that.

What these comments demonstrate is that although expert witnesses have duties to their clients, they have also another, overriding, duty to the court, to assist the court in resolving the issues and coming to a just conclusion. This also is the understanding of the role of an expert witness as expressed in chapter 13 of Lord Woolf's 'Access to Justice' report, where Lord Woolf said:

'Para. 11. the expert's function is to assist the court.

Para. 25. There is wide agreement that the expert's role should be that of an independent adviser to the court ... lack of objectivity can be a serious problem.'

Lord Woolf himself saw these comments not as a fundamental shift in the role of the expert witness, but as a reaffirmation of the witness' already-existing duty:

'Para. 29. ... [the expert's responsibility is to help the court impartially on the matters within his [or her] expertise. This responsibility will override any duty to the client. The rule will reaffirm the duty which the courts have laid down as a matter of law in a number of cases, notably Whitehouse v. Jordan *[1981] 1 W.L.R. 246, when Lord Wilberforce said:*

'Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of the litigation.' "

34. In Chapter 13 of his Final Report to the Lord Chancellor, Access to Justice, Lord Woolf made some comments specifically about experts' meetings:

" Among the criticisms I made in my interim report was that the present system does not encourage narrowing of issues between opposing experts, or the elimination of peripheral issues. There has been widespread support for my suggestion that experts' meetings were a useful approach to narrowing the issues. In areas of litigation (such as Official Referees' business) where experts' meetings are already the usual practice, there is general agreement that they are helpful. In areas where they are not at present widely used, including medical negligence, the majority of respondents accept that they could be helpful. .....

Two principal reservations have been expressed, even by those who support experts' meetings in principle. The first (mentioned in my interim report) is that meetings can be futile because the experts are instructed not to agree anything; or, alternatively, are told that any points of agreement must be referred back to their instructing lawyers for ratification. This subverts the judge's intention in directing the experts to meet, because the decision as to what to agree becomes a matter for the lawyers rather than the experts. I recommended in the interim report that it should be unprofessional conduct for an expert to be given or to accept instructions not to agree, and this has been widely supported".

35. In the **Richard Roberts Case**, Judge Newey Q.C. was considering discussions between experts during the trial when considerations different from those affecting pre-trial meetings pursuant to court order may arise. The discussion in that case was marred by failure to distinguish clearly between the nature of discussions ordered by the court and discussions authorised by the parties with a view to settling the whole or part of an action. The failure to make that distinction has led to the mistaken belief that it is only when an agreement **binding on the parties** has been reached that a document containing an agreement is "open". Where there are negotiations for settlement of a dispute, it is true that it is only when the parties have reached an agreement binding upon them that the agreement is "open". The same is not true of an agreement reached as a result of discussions between experts made at "**without prejudice**" meetings ordered by the Court and followed by a Joint Statement of experts.

36. Parties may only call opinion evidence by leave of the Court or where all parties agree: RSC Order 38 rule 36. Under the new 1999 Rules, the Court's permission will be required in all cases, whether or not the parties agree: Rule 35.3.

37. Order 38 rule 36 imposes conditions on the adducing of expert evidence. For present purposes, the important pre-conditions to the adducing of expert evidence are that

(a) the party seeking to adduce the expert evidence has applied to the Court to determine whether a direction should be given that a written report should be disclosed within a stated time;

(b) that party "has complied with any direction given on the application".

38. The directions for experts meetings and Joint Statement of Experts are directions given on the application pursuant to O.38 r. 36(1)(a) and by virtue of that rule, compliance with those directions (and any later variation of them) is a condition of the expert evidence being admitted at the trial. To achieve compliance with those directions, it is necessary for the party wishing to call the expert evidence to instruct the expert to meet and make the Joint Statement as required by the Court. That was done in this case. Any interference with the experts in their compliance with the order of the Court is likely to result in non-compliance with the condition laid down by the Court with the result that there is no leave for the evidence of the expert to be adduced at the trial.

39. It has been suggested in this case that the party through his solicitor is entitled to require the expert to take instructions from the client before signing any Joint Statement and to make no agreement unless specifically authorised to do so. It was submitted that the parties do not put their case in the hands of an expert to settle the case. That latter submission is a correct statement of the usual position, but that submission is not relevant to the meetings of experts ordered by the Court. The purpose of those meetings is not to achieve a settlement of the proceedings or to produce agreements binding on the parties. That is recognised by the new Rules of Court to come into force in April, 1999:

"(5) Where experts reach agreement on an issue during their discussions, the agreement shall not bind the parties unless the parties expressly agree to be bound by the agreement.

I regard that rule as stating existing law.

40. The purpose of the experts' meetings and the Joint Statement of experts is stated in the orders. Before the Court will allow the evidence to be adduced, it is to be refined by the experts so far as possible. It is not for the parties to tell the experts what opinions they are allowed to hold. The duty owed by the experts to the Court is to express in their Joint Statement and in their Reports to the Court the views which they themselves honestly hold. It is well understood that after giving his initial privileged advice to the party to the litigation an expert may honestly change his opinion either as a result of further research and thought or as a result of discussions with other experts. If he does so change his mind, he should record that change of mind either in the Joint Statement or in his Report or, if necessary, in a Supplemental Report, bearing in mind that those documents will eventually become the basis of his sworn testimony. The question of his immunity from suit with regard to such changes of mind has been considered by the Court of Appeal in **Stanton v. Brian F. Callaghan and Associates**.

41. The freedom and duty of the expert to record freely such changes of opinion is most clear when the expert is to give evidence on opinion as to scientific or engineering theory and practice. The party to the litigation cannot properly tell the expert what evidence he is to give under oath in Court, nor can he tell the expert what opinion to express in documents produced by him as a condition of the party being allowed to adduce that evidence. There may, however, be cases where a party wishes to adduce evidence of fact which conflicts to some degree with such opinions. For example, in a case of alleged nuisance by tree roots, the experts may agree that in their opinion a tree is probably 40 years old. That agreement expressed in a Joint Statement is admissible. A party might nonetheless be permitted to call evidence of the planter of the tree that it was planted 30 years ago. There would then be an issue of fact for the Court to decide.

42. Some confusion of thought may arise when, as in the present case, the expert is a quantity surveyor given the task of expressing opinions about the amount of the sums claimed. However, just as with other experts, when they meet at an experts' meeting ordered by the Court, unless they receive

express instructions giving them special additional authority, they are not aiming at reaching agreements binding on the parties. Their objective is to express opinions, agreed if possible, as to the value of work done or not done, or of defective work, or the value of a freehold or whatever is in issue. Any agreements will be admissible in evidence but not as agreements binding the parties. Sometimes, the parties agree, either before or after the experts' meetings, that any agreements made by the experts will be binding on the parties, but that is a matter separate from the fact that the Joint Statement of the experts made after the experts' meeting is open but not binding.

43. When Quantity Surveyors or Valuers meet **without prejudice** under order of the court, they often discuss figures which are not precise but fall within a band of what is reasonable. Discussions between the experts may lead them into a recognition that they are respectively proposing figures at the top and the bottom of the range. They may then sensibly modify their views to agree upon a figure between the extremes. That may be referred to as a compromise, but it is not a compromise in the sense of a compromise agreement binding on the parties.

44. When an action reaches trial, a judge will very often urge that experts as to quantum should try to reach agreement on the amount in issue while evidence is heard on the issues as to liability. That is what appears to have happened in the Richard Roberts Case. When that happens, it is essential that it should be made clear either that the experts are to meet further to define the issues for the benefit of the Court or that they are meeting with the authority of the parties to settle the issues of amount of the claim or counterclaim. The instructions to the experts in those circumstances should be clearly defined.

45. I do not believe that any statement I have made regarding the current law as to privilege or the non-binding nature of Joint Statements by experts will be altered by the new Rules to come into force in April.

Future conduct of the action

46. On 29 January, 1999, I gave further directions for the conduct of this action which included the following:

*Quantum experts to continue to meet **without prejudice** as often as may be necessary to further narrow issues and agree facts until 18 February, 1999.*

Experts to agree a further Joint Statement indicating those parts of their evidence on which they are and those parts on which they are not in agreement by 25 February, 1999.

Plaintiffs and defendants must serve precise updated particulars of the sums claimed by 4 March, 1999.

Experts' reports are to be exchanged by 18 March, 1999.

Statements of witnesses of fact are to be exchanged by 18 March, 1999.

Pre-trial review including consideration of counsel's proposals for programme for trial and list of issues on 19 March, 1999.

Trial on 13 April, 1999.

47. I have been asked to give guidance as to the extent to which the experts may "revisit" the Joint Statement which they have signed. It follows from what I have already said that if an expert has an honest and independent change of opinion after signing a Joint Statement, whether or not it is marked "Interim", he has a duty to record that change of view. Changes of opinion will no doubt be the subject of cross-examination at the trial should the expert be called as a witness. Whether such change of view shows an admirable flexibility of thought, or a response to new information, or a regrettable inconstancy of mind will be a matter for the trial judge to assess.

48. While the parties are not bound by the agreement already reached by the experts or by any further agreement reached by them in the further meetings which I have ordered, a party wishing to present a case inconsistent with those agreements will plainly be faced with considerable difficulties and I have little doubt that with the benefit of the experts' agreements the parties will be assisted in reaching appropriate compromises.