Bradford & Bingley Plc v Rashid (FC) [2006] UKHL 37

Opinions of the Lords of Appeal for judgment, before Lord Hoffmann, Lord Hope of Craighead, Lord Walker of Gestingthorpe, Lord Brown of Eaton-under-Heywood, Lord Mance 12th July 2006.

LORD HOFFMANN : My Lords,

1. The chief question is whether a letter containing an acknowledgement of a debt for the purposes of section 29(5) of the Limitation Act 1980 is inadmissible on the ground that the letter formed part of a negotiation with a view to the creditor giving the debtor time to pay or accepting a lesser amount. In common with all of your Lordships, I consider that the letter was admissible. But there is some difference of opinion over the reasons and I must therefore state my own. There is also a subsidiary question as to whether the letters contained acknowledgements within the meaning of the Act. They are set out in the speech to be delivered by my noble and learned friend Lord Brown of Eaton-under-Heywood and I agree with him and my noble and learned friend Lord Hope of Craighead that references in the letter of 26 September 2001 to an ***"outstanding balance"*** and in the letter of 4 October 2001 to an ***"outstanding amount"*** are plain acknowledgements of the existence of a debt. It is clear on the authorities that nothing more is needed.

2. The more complex question is why the letters are admissible. There is no doubt that they formed part of a negotiation. They were written in reply to an invitation from the building society to make them an offer. Judge Hawkesworth QC, sitting in the Bradford County Court and hearing an appeal from the Deputy District Judge, who had admitted one of the letters and given judgment for the building society, regarded this as sufficient to exclude the letters on the grounds that they were impliedly written without prejudice. He said: *"What was in issue was enforcement, and it seems to me there is equally a public policy issue in encouraging the parties to reach agreement as to the repayment of a debt as there is in encouraging them to agree as to the existence of a debt."*

3. The Court of Appeal agreed. I doubt whether anyone could object to the general sentiment expressed. Even when the indebtedness cannot be denied, the parties should be encouraged to agree on the method by which it should be discharged, if necessary giving the debtor time to pay. But the question is how this policy can best be given effect and here, it seems to me, the judge and the Court of Appeal took a rather one-sided view of the matter. They looked only at encouraging the debtor to be open with his creditor without fear of what he said being used against him. But it takes two to negotiate and there is also a public policy in encouraging the creditor not to initiate legal proceedings. The acknowledgement rule plays an important part in furthering this policy because it means that a creditor, negotiating on the basis that his debt has been acknowledged, can proceed with the negotiations and give time to pay without being distracted by the sound of time's winged chariot behind him. It is also unfair that a debtor who does not dispute his indebtedness should be able to ask for time and use that indulgence to rely on the statute. A good example is the celebrated case of ***Spencer v Hemmerde*** [1922] 2 AC 507, in which a member of the Bar borrowed £1,000 for two months in 1910 and then did not pay it back. In 1915 there was a correspondence in which the creditor pressed for payment and the debtor acknowledged his indebtedness but sought to gain time. In consequence of this correspondence the creditor, as Viscount Cave put it, "*stayed his hand*". When proceedings were commenced in 1920, the debtor pleaded the statute of limitations. As the law then stood, it was also necessary that there should be not only an acknowledgement but also an inference of a promise to pay. The issue before the House was whether such a promise could be inferred. There was no suggestion that the letters might be excluded as written in the course of negotiations - a significant omission to which I shall in due course return. However, it is difficult to escape the conclusion that the House, in deciding that the letters were sufficient to lift the time bar, was influenced by the injustice of a debtor asking for time to pay an acknowledged debt and then pleading the statute. As counsel for the creditor said (at p. 510), *"the debtor…was asking for an indulgence, and by means of those letters he obtained the indulgence which enabled him to set up the statute."*

4. The policy of encouraging negotiation therefore requires that the law should give effect to two objectives: first, the objective furthered by the normal without prejudice rule, which allows the parties to speak freely without fear that their statements will be relied upon as admissions if negotiations should break down, and secondly, the objective of the special acknowledgement rule in the Limitation Act, which allows a creditor to give time to negotiate for the payment of an admitted indebtedness without fear that the claim will become statute barred. These two objectives may sometimes appear to pull in opposite directions, although I hope to demonstrate that upon a proper analysis they do not.

5. The Court of Appeal, as I have said, did not recognise any possibility of conflict because they gave no weight to the policy of the acknowledgement rule. In fact, I think that the decision of the Court of Appeal would largely destroy that rule. In the nature of things, most acknowledgements will be coupled with attempts to obtain time to pay or remission of part of the debt. As Lord Sumner said in ***Spencer v Hemmerde*** [1922] 2 AC at p. 526: *"as a rule the debtor who writes such letters has no intention to bind himself further than he is bound already, no intention of paying so long as he can avoid payment, and nothing before his mind but a desire, somehow or other, to gain time and avert pressure."*

   In other words, he intends to initiate or pursue a negotiation as to how and how much of the debt should be paid. It is of course possible that a debtor in arrear might write an acknowledgement unaccompanied by any suggestion that he should be allowed time to pay. But, looking at the examples of acknowledgements which have been admitted and construed as such in the past, I think that such cases would be unusual. Certainly in ***Spencer v Hemmerde*** there was material upon which counsel for the debtor, if the thought had occurred to him, could have argued that his client's letters formed part of an attempt at negotiation. Likewise in ***Dungate v Dungate*** [1965] 1 WLR 1477, the debtor's letter saying: *"Keep a check on totals and amounts I owe you and we will have account now and then….Sorry I cannot do you a cheque yet. Terribly short at the moment"* bears a strong family resemblance to the letters in this case. The same is true of the acknowledgement in the Canadian case of ***Phillips v Rogers*** [1945] 2 WWR 53, 56: *"Re your correspondence re Mr C H Phillips claim $1300 which he is prepared to settle November 1st for $700. Please thank Mr Phillips for the kind offer. I have no idea where I am going to get $700 and meet your demands by November 1st unless I rob a bank and I really don't think a case of this kind warrants such drastic action on my part. If Mr Phillips or yourself have any ideas how I can get that amount of money, honestly I shall be pleased to consider them."*

6. These three letters must be typical of those written by hard pressed debtors since time immemorial and they all either respond to invitations to negotiate terms of payment or attempt to initiate such negotiations. If the acknowledgements they contain are excluded by the without prejudice rule, that will be an end of the rule.

7. In the Court of Appeal, Sir Martin Nourse did not accept this. He said (at paragraph 29): *"each of these cases depends in the end on its own facts and it is difficult to believe that this case will serve as a precedent for any other."*

8. This seems to me to make things worse rather than better. The Court disavows any statement of principle by which the correspondence in cases like ***Spencer v Hemmerde*** [1922] 2 AC 507, ***Dungate v Dungate*** [1965] 1 WLR 1477 and ***Phillips v Rogers*** [1945] 2 WWR 53 can be distinguished. This would be bound to lead to fine distinctions and a good deal of litigation.

9. It is therefore necessary to find a principle which would preserve the acknowledgement rule without doing damage to the without prejudice rule. The solution proposed by my noble and learned friend Lord Hope of Craighead, based on Scottish authority, is to deny altogether the application of the without prejudice rule to unqualified admissions, even if made in the course of negotiations for a settlement. In Scotland, this is based upon a fairly recent line of authority going back to the decision of Lord Wylie in ***Watson-Towers Ltd v McPhail*** 1986 SLT 617.

10. ***Watson-Towers*** was a motion for summary judgment for the value of goods which had been supplied subject to a reservation of title clause. The pursuer's evidence consisted of a letter from the defender making an offer expressed to be without prejudice but which attached a schedule listing the goods in its possession. Lord Wylie held that the schedule was admissible because it was, on the true construction of the letter, not a *"hypothetical admission or concession for the purpose of securing a settlement" but a statement of fact.*

11. This case was followed by Lord Sutherland in ***Daks Simpson Group plc v Kuiper*** 1994 SLT 689, another motion for summary judgment in a claim against a director for an account of secret commissions. In a letter expressed to be without prejudice, the director had said that he was prepared to accept that he had received such commissions in stated amounts. Lord Sutherland said (at p. 692): *"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."*

12. In support of this view, Lord Sutherland referred not only to ***Watson-Towers Ltd v McPhail*** 1986 SLT 617 but also to the Canadian case of ***Kirschbaum v 'Our Voices' Publishing Co*** [1971] 1 OR 737, in which also the judge had distinguished between whether an admission in a letter without prejudice was "*to concede a fact hypothetically, in order to effect a settlement, or to declare a fact really to exist.*" He might have added a reference to Lord Kenyon in ***Turner v Railton*** (1796) 2 Esp 474: *"Concessions made for the purpose of settling the business for which the action is brought, cannot be given in evidence; but facts admitted I have always received."*

13. This limitation on the scope of the without prejudice rule, confining it to admissions which can be construed as made hypothetically rather than without qualification, is not limited to the use of these admissions as acknowledgements under section 29(5) or its Scottish equivalent. It is entirely general. As such, I think that, with all respect to the Scottish judges, including my noble and learned friend Lord Hope, it goes too far. There is nothing in the modern English authorities to encourage a dissection of correspondence or, still worse, conversations, to ascertain whether admissions of fact were made hypothetically or without qualification. It has frequently been said that the purpose of the rule is to encourage parties engaged in settlement negotiations to express themselves freely and without inhibition. It is well established that the rule applies to any genuine attempt at negotiation, whether or not the communications are expressly said to be without prejudice, and I think it would be most unfortunate if the law introduced a new requirement that the parties should preface anything they said with a standard disclaimer that any admissions of fact were to be taken to be hypothetical and solely for the purposes of the negotiation.

14. It is true that the adoption of such a rule would preserve the acknowledgement rule, because an acknowledgement would by definition be an unqualified admission of liability. But I think that such a remedy would be to throw out the baby with the bathwater and that a more precisely targeted principle is needed.

15. Another possible solution is to say that negotiations over the mode of payment of an admitted debt are not really negotiations for the purposes of the without prejudice rule. The debtor is seeking an indulgence rather than a compromise. This is in some ways an attractive solution and I would be willing, if pressed by there being no other, to adopt it. But I feel somewhat uneasy about it because, first, it also has wider implications than saving the acknowledgement rule and secondly, it may in some cases be ineffective to do so. For example, it is clear from the authorities that an admission of indebtedness in general terms, as in this case, is sufficient to constitute an acknowledgement. The procedural bar against bringing the action is lifted and the creditor is free to prove his debt in the ordinary way. But assume that this acknowledgement is made in the course of negotiations about both the amount of the debt and the mode of payment. It would be difficult to say that there was no genuine negotiation to settle the question of the amount for which the debtor was liable. If the negotiations break down and the amount of the debt is later contested in court, one would expect any admissions as to the amount made in the course of negotiations to be excluded by the without prejudice rule. But would the acknowledgement be admissible for the purposes of section 29(5)? If the test is whether the parties were genuinely negotiating over liability rather than the concession of an indulgence, it would have to be excluded. And this would be the case even if the dispute over liability was relatively trivial. It would be hard to distinguish cases on such uncertain grounds. But the public policy of encouraging such negotiations to proceed, once liability has in principle been conceded, without putting the creditor at risk of finding himself time-barred also seems to me a strong one.

16. The solution which I would therefore favour, and which I think is in accordance with principle, is that the without prejudice rule, so far as it is based upon general public policy and not upon some agreement of the parties, does not apply at all to the use of a statement as an acknowledgement for the purposes of section 29(5). That, I would infer, is what everyone thought in ***Spencer v Hemmerde*** [1922] 2 AC 507. It is in accordance with principle because the main purpose of the rule is to prevent the use of anything said in negotiations as evidence of anything expressly or impliedly admitted: that certain things happened, that the party concerned thought he had a weak case and so forth. But when a statement is used as an acknowledgement for the purposes of section 29(5), it is not being used as *evidence* of anything. The statement is not evidence of an acknowledgement. It *is* the acknowledgement. It may, if admissible for that purpose, also be evidence of an indebtedness when it comes to deciding this question at the trial, but for the purposes of section 29(5) it is not being used as such. All that an acknowledgement does under section 29(5) is to allow the creditor to proceed with his case. It lifts the procedural bar on bringing the action. Questions of evidence to prove the debt will arise later.

17. The distinction between adducing a statement as evidence of something expressly or impliedly asserted in the statement and simply as evidence that the statement was made is well known in the law of evidence (see ***Subramaniam v. Public Prosecutor*** [1956] 1 W.L.R. 965) and was the basis upon which the Court of Appeal in ***Muller v Linsley and Mortimer*** [1996] 1 PNLR 74 decided that without prejudice correspondence was admissible to prove that a party was acting reasonably in settling a claim against a third party. In a judgment with which Swinton Thomas and Leggatt LJJ agreed, I said: *"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."

I gave as examples letters used to prove a settlement reached as a result of negotiations, a statement amounting to an act of bankruptcy (***Re Daintrey*** [1893] 2 QB 116) and correspondence used to explain delay in commencing or prosecuting litigation.

18. After a detailed examination of the cases in ***Unilever plc v Procter & Gamble Co*** [2000] 1 WLR 2436, 2446 Robert Walker LJ expressed some doubt as to whether the "large residue of communications which remain protected [as being outside the recognised exceptions to the without prejudice rule] can all be described as admissions." I would certainly accept that the without prejudice rule is capable of excluding statements which are not being used as evidence of the truth of what they expressly or impliedly admit. For example, I do not think that a litigant could be cross-examined to credit on without prejudice correspondence to show that he has made previous inconsistent statements. And I have no doubt that the ***Unilever*** case was rightly decided. It was obvious to everyone in that case that the alternative to settlement of the patent dispute was litigation. The without prejudice meeting was held with a view to discussing settlement and the notion that any reference to the consequences of failure should be admissible as a threat of litigation contrary to section 70 of the Patents Act 1977 was absurd. But, as I pointed out in ***Muller's*** case, the thread which runs through most of the alleged exceptions to the without prejudice rule is that the statement is not being used as evidence of the truth of anything expressly or impliedly asserted or admitted. The fact that acknowledgements used for the purposes of the Limitation Act fall within the same category, combined with the public policy of preserving the acknowledgement rule, seem to me to provide strong grounds for holding that the without prejudice rule does not apply to them. That produces a clear rule, easy to apply and having no side-effects, which preserves the acknowledgement principle without otherwise restricting the scope of the normal without prejudice privilege. It is of course open to the parties to agree that whatever they say in negotiations will not be capable of being used even as an acknowledgement for the purposes of section 29(5), but in such a case the creditor will be alerted to the fact that the debtor intends to rely upon the statute.

19. For those reasons I would allow the appeal and restore the decision of the Deputy District Judge.

LORD HOPE OF CRAIGHEAD. My Lords,

20. I agree with all my noble and learned friends, whose speeches I have had the advantage of reading in draft, that the appeal should be allowed. But my reasons are not entirely the same as theirs. So I should like to explain in my own words why I have reached the same conclusion as they have done.

21. I have no difficulty in regarding the letter of 26 September 2001 as an acknowledgment of the appellants' claim within the meaning of section 29(5) of the Limitation Act 1980. In ***Surrendra Overseas Ltd v Government of Sri Lanka*** [1977] 1 WLR 565, 575E-F Kerr J said that the debtor can only be held to have acknowledged the claim if he has in effect admitted his legal liability to pay that which the plaintiff seeks to recover. But his acknowledgment need not identify the amount of the debt. As Diplock LJ said in ***Dungate v Dungate*** [1965] 1 WLR 1477, 1487E-F, his acknowledgment will be sufficient if the amount for which he accepts legal liability can be ascertained by extrinsic evidence.

22. In its letter of 26 September 2001 the Advice Centre stated that the respondent was not in a position to pay "the outstanding balance, owed to you." It seems to me that the plain meaning of those words is that the respondent was admitting that he owed the appellants a sum of money which for the time being he was unable to pay. There could not be a clearer way of acknowledging that the respondent was under a legal liability to pay the outstanding balance. It is not disputed that the amount of the balance was capable of being determined by extrinsic evidence. In *Dungate*, at p 1487H, having construed the letter on which the plaintiff relied which referred to "amounts I owe you" as an acknowledgment under the Act, Diplock LJ said that this did not seem to him to differ from the statement which was held to be an acknowledgment in *Spencer v Hemmerde* [1922] 2 AC 507. The wording of the letter of 26 September 2001 is no less clear, and I think that the same result must follow. The wording of the letter of 4 October 2001 is slightly different. It refers to "the outstanding amount". But the key to the meaning of that phrase lies in its use of the definite article. This indicates that there is an amount representing the respondent's present state of indebtedness which is readily ascertainable. I think that this letter too was an acknowledgment within the meaning of the statute.

23. The more difficult issue is whether these acknowledgments are protected by the "without prejudice" privilege. As Megarry V-C said in ***Chocoladefabriken Lindt & Sprungli AG and another v The Nestlé Co Ltd*** [1978] RPC 287, 288, the mere failure to use that expression does not conclude the matter. The question is whether the letters were written in an attempt to compromise actual or pending litigation and, if so, whether it can be inferred from their terms and their whole context that they contained an offer in settlement for which the party who made the offer can claim privilege which prevents the acknowledgments from being relied upon for the purposes of the Act. In the present case the context in which the letters were written offers little, if anything, by way of guidance on this issue. The first letter was not written in response to an invitation to negotiate as to what, if anything, was due. It was written in response to an invitation to say how the amount due was to be repaid. So everything, it seems to me, turns on the wording of the letters themselves and the meaning that is to be attached to them.

24. The guiding principle is that parties should be encouraged so far as possible to resolve their dispute without resort to litigation, and that they should not be discouraged by the knowledge that anything that is said in the course of such negotiations may be used to their prejudice in the course of the proceedings: ***Cutts v Head*** [1984] Ch 290, 306, per Oliver LJ. In ***Savings & Investment Bank Ltd v Fincken*** [2004] 1 WLR 667, 684, para 57 Rix LJ observed that the public interest in encouraging parties to speak frankly to one another in aid of reaching a settlement is very great and ought not to be sacrificed save in truly exceptional and needy circumstances. As to how this rule is to be applied in practice, in ***Jones v Foxall*** (1852) 15 Beav 388, 396 Romilly MR deplored attempts to convert offers of compromise into admissions of acts prejudicial to the party making them. In ***Unilever Plc v Procter & Gamble Co*** [2000] 1 WLR 2436, 2448 Robert Walker LJ said that, while the protection of admission against interest is the most important practical effect of the rule, it would be contrary to the underlying objective of giving protection to the parties to dissect out identifiable admissions and withhold protection from the rest. This approach directs attention to the question whether the writer of the letter was seeking a compromise and, if so, what was the issue between the parties that he was seeking to resolve. If the admission was within the scope of the subject matter of the compromise, it is to be given the benefit of the privilege.

25. The cases that have been decided on this issue in Scotland indicate that the judges there have adopted the same guiding principle as that described by Oliver LJ in ***Cutts v Head*** [1984] Ch 290, 306. But they take a more pragmatic approach to the question how it is to be applied in practice. They are more willing to find that admissions in a document which contains an offer

to compromise are to be treated as admissible. Offers, suggestions or concessions made in the course of negotiations are, of course, given the benefit of the privilege. But they are distinguished from clear admissions or statements of fact which, although contained in the same communication, did not form part of the offer to compromise. On such admissions or statements, if they can be clearly identified as such, the other party is entitled to rely. Another important difference in the practice which is adopted in Scotland is that professional advisers who wish to take advantage of the without prejudice rule are expected to say so expressly, and invariably do so. Authority is lacking on the question whether the rule can be invoked where the letter in question omits these words. There has been no discussion of the extent of the protection that the rule gives in that situation. The Scottish cases to which your Lordships have been referred must be understood in the light of this background. They are all cases where the standard phrase was used, and they all proceed on the basis that its use is not conclusive. Scrutiny of the communication is permitted to determine the extent of the protection that was being claimed. An admission which was made in plain terms is admissible, if it falls outside the area of the offer to compromise.

26. In ***Watson-Towers v McPhail***, 1986 SLT 617, the pursuers sought summary decree, relying on a letter which had been written on the defenders' behalf offering to settle the claim for payment of goods supplied to them. The offer was said to be made without prejudice. The pursuers had supplied a quantity of steel and aluminium plates to a company which later went into receivership. The letter proposed a sum in settlement of the pursuers' claim, which was based on a reservation of title clause. But attached to it was a schedule which specified the amount of the plates that were held in stock on the date of the offer by the joint receivers of the company. Lord Wylie found that the schedule was not part of the offer to compromise. He said that the reference to the plates in stock as specified in the schedule was simply a statement of fact. It was not a hypothetical admission or a concession for the purpose of securing a settlement. He held that the without prejudice privilege did not attach to it, and that the pursuers were entitled to rely upon it as an admission for the purposes of their motion for summary decree.

27. ***Daks Simpson Group plc v Kuiper***, 1994 SLT 689, was another case in which the pursuers who were seeking summary decree founded on a letter which had been written by the first defender's solicitor expressly without prejudice. The sums in question were amounts of commission which the first defender had obtained in secret from the pursuers' customers. The letter contained a statement that the first defender was prepared to accept that the first four commission payments stated in a draft settlement agreement listing a number of commission payments paid to him were correct. The total of these four payments was the amount for which the pursuer sought summary decree. Lord Sutherland rejected the first defender's argument that the whole contents of the letter were covered by the privilege and granted summary decree for that amount. Among the authorities to which he was referred were ***Watson-Towers v McPhail***, 1986 SLT 617 and ***Cutts v Head*** [1984] Ch 290. His attention was also drawn to the Canadian case of ***Kirschbaum v "Our Voices" Publishing Co*** [1972] 1 OR 737, where the Court said that the question to be considered is what was the view and intention of the party in making the statement: whether it was to concede a fact hypothetically in order to effect a settlement or to declare a fact really to exist.

28. Lord Sutherland accepted the general principle as described by Oliver LJ in ***Cutts v Head***. He then summarised his approach in these words: *" **'Without prejudice'** in my view means, without prejudice to the whole rights and pleas of the party making the statement. If, however, someone makes a clear and unequivocal admission or statement of fact, it is difficult to see what rights or pleas could be attached to such a statement or admission other than perhaps 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. I would adopt what is said by Lord Wylie in **Watson-Towers** and the Canadian view expressed in **Kirschbaum**."*

29. The claims in ***Watson-Towers v McPhail***, 1986 SLT 617, and ***Daks Simpson Group plc v Kuiper***, 1994 SLT 689, were both brought within the relevant time limit. So the court was not concerned in those cases with the question which arises here, which is whether the debt has been acknowledged for the purpose of prolonging the limitation period. But that was one of the questions which came before the Inner House in ***Richardson v Quercus***, 1999 SC 278. In that case the pursuer was the owner of a flat on the second and top floors of a building which had been damaged by renovation works carried out by the defenders to the basement and ground floor of the same building. He relied on a letter by the defenders' loss adjusters dated 2 June 1992 which confirmed that they had no objection to the pursuer instructing the necessary remedial works to his property but which stated that it was written ***"without prejudice to liability"***. This letter, taken together with previous correspondence, was held to amount to a relevant acknowledgment within the meaning of section 10(1) of the Prescription and Limitation (Scotland) Act 1973 of the subsistence of an obligation to make reparation which would otherwise have been extinguished by the five year negative prescription. That subsection provides that in order to constitute a relevant acknowledgement there must be an unequivocal written admission clearly acknowledging that the obligation still subsists.

30. It was accepted in ***Richardson v Quercus*** that the principles set out in ***Daks Simpson Group*** provided the appropriate test. The principal issue was whether the letter was of sufficient substance to overcome the without prejudice docquet. Lord Prosser dealt at pp 283H-284C with the question whether the letter of 2 June 1992 had to be looked at for this purpose in isolation, as the defenders contended, or under reference to extraneous facts or prior correspondence: *"It is clear that what was said in **Daks** was not intended to cover all possible situations, and it appears to me that each situation must be judged upon its own facts. As will appear from what I say in relation to the two principal grounds of appeal, I am satisfied that in considering the issues raised by section 10(1)(a) and (b) it is not appropriate to look at individual letters or individual events in isolation only. If, looking at them in conjunction and taking this letter into account, it appears that there is no clear indication, or no clear acknowledgment by written admission, that the obligation still subsists, then it may well be that along with a conclusion to that effect, one might conclude that the terms of this letter lacked sufficient substance to overcome the words **'without prejudice to liability'**. But if overall the substance of this letter, taken with the substance of prior events or writings, could be seen as satisfying the conditions set out in section 10(1), it would in my opinion be quite wrong to have decided a priori that the terms of this letter were of insufficient substance to overcome the docquet. If the terms of this letter, whether alone or with other material, are sufficient to satisfy either of those conditions in section 10(1), then in my opinion they are sufficient to render the docquet ineffectual."*

31. The South African case of ***Kapeller v Rondalia Versekeringskorporasie van Suid-Afrika Bpk*** 1964 (4) SA 722 (T) to which Lord Mance has drawn our attention seems to me to be entirely consistent with ***Richardson v Quercus***. In ***Kapeller*** a clear admission by an insurer of liability in the course of without prejudice negotiations about quantum was sufficient to restart the limitation period. That in a nutshell is exactly what the Court of Session decided in *Richardson's* case. In the Canadian case of ***Kirschbaum v "Our Voices" Publishing Co*** [1972] 1 OR 737 to which Lord Sutherland referred in ***Daks Simpson Group plc v Kuiper*** Haines J sitting in the Ontario High Court adopted the same approach. The question in that case was whether discovery of letters written without prejudice should be permitted so that the parties might explore the question whether they contained admissions

of fact which could be taken into account at the trial. Answering that question in the affirmative, the judge said at pp 738-739 that contrary to popular belief the proposition that the shibboleth "***without prejudice***" written on a letter protects it from subsequent use as an admission was not accurate: *"[T]he 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."*

32. In *The Law of Evidence in Canada*, Sopinka, Lederman and Bryant, 2nd ed (1999), para 14.204 the authors summarise the competing theories discussed in 4 Wigmore, *Evidence* (Chadbourn rev, 1972), para 1061. They state that the proposition that all admissions in the course of negotiation towards settlement are without prejudice whether those words are used or not and are not admissible in evidence is clearly the one that is accepted in Ontario. But ***Kirschbaum's*** case has not been overruled or disapproved, so the proposition to which the authors refer must be read subject to the qualification that is set out in that case. This brief comparative exercise shows that, while there may be room for some difference of view as to the application of that qualification in particular cases, the general approach which is taken to this issue in Scotland is far from unorthodox. It cannot be said to be out of line with that which is taken elsewhere.

33. How then do the letters of 26 September 2001 and 4 October 2001 stand up to examination? Neither of them contained the words "***without prejudice***", so the issue is whether they are protected by the public policy rule. It seems to me that the first letter does two things. It contains a clear admission that there is a balance of debt that is still outstanding and then there is a request for time to pay. The Court of Appeal agreed with the judge that it was written as part of an attempt to negotiate. But there is no suggestion in this letter that the amount of the debt itself was open to compromise. The only issue that was being opened up for compromise was how that debt was to be paid off. In my opinion there is nothing in this letter that entitles the respondent to the without prejudice privilege. The second letter, on the other hand, contains both an admission and an offer to compromise. The admission is that there is an amount which is still outstanding. The offer is to pay £500 in full and final settlement of it. But it does not contest the outstanding amount. On the contrary, it is based on what the respondent can offer to pay, not on what he believes to be due. In my opinion this too is not an offer of the kind that attracts the without prejudice privilege on public policy grounds.

34. In these circumstances I do not think that we need to resolve the question whether, if the admissions are covered by the without prejudice rule, they can nevertheless be admitted as acknowledgments for the purpose of setting a new time limit under the 1980 Act. There is, as Lord Brown points out in para 63, no absolute rule that admissions of liability which are contained in communications expressly written without prejudice cannot be admitted for this purpose. But I would respectfully suggest, differing from my noble and learned friend, that the position is the same in cases where the admission is made in the course of correspondence which attracts the protection on grounds of public policy. There is, as he points out, a public interest in prolonging the limitation period in the case of an acknowledged claim, as this tends to keep claims that are still capable of settlement out of court. So there is a balance to be struck between the public interest in that respect and the public interest in preventing statements made in the course of negotiations being used at the trial as admissions of liability. It would be bizarre if a claimant who had been dissuaded from taking proceedings time and time again both before and after the expiry of the limitation period by prolonged correspondence which contained repeated statements that liability was admitted, and which sought to negotiate only on the matter of quantum, was to be deprived of his claim on limitation grounds when negotiations broke down simply because the admissions were made in letters which contained proposals as to the amount that was to be paid in settlement of that liability. This suggests to me that there is something wrong with an absolute rule that will always exclude an admission made in the course of negotiations from being relied upon as an acknowledgment for the purposes of the 1980 Act.

35. Like Lord Hoffmann (see para 9), therefore, I would wish to find a solution which preserves the acknowledgment rule without damaging the without prejudice rule. But I must repeat the point that I have already made (see para 26) that the Scottish cases were not concerned with the situation which arises where the acknowledgment is contained in a communication which lacks the without prejudice docquet. The only case which deals with the acknowledgment rule is ***Richardson v Quercus***, where the acknowledgment was contained in a letter written by loss adjusters which was expressed to be without prejudice to liability. It is not right to say, as Lord Hoffmann does in para 9, that Scottish authority denies altogether the application of the without prejudice rule to unqualified admissions made in the course of negotiations for settlement. The issue was treated in that case as one of construction, to be determined according to the words used and in the light of the surrounding circumstances. But the Scottish approach suggests to me that a solution less radical than that which Lord Hoffmann proposes could usefully be adopted where the without prejudice rule is invoked in the absence of a docquet to this effect. I have the same misgivings about his solution as those which have been expressed by Lord Walker and Lord Brown. I venture to suggest that the solution which I propose is less objectionable. It is based on the way the without prejudice rule operates in the docquet cases. The qualification that applies in those cases is capable of providing a common sense answer to the problem that arises in the non docquet cases also.

36. The appellants' case is that one or other or both of these letters contains an acknowledgment for the purposes of section 29(5)(a) of the 1980 Act. The letters seem to me to provide all that is needed to satisfy this requirement. Why else, one might ask, were they written other than to acknowledge there was a claim that could still be maintained against the respondent? The purpose of the first letter was to obtain time to pay, and the purpose of the second was to persuade the appellants to accept a lesser sum in final settlement of an amount which was admitted to be outstanding. The only explanation that can be given for writing to the appellants in these terms is that the respondent appreciated that there was a claim which they still could enforce against him. That was why he was seeking to find ways of avoiding that result. It seems to me that they provide a good example of an acknowledgment in writing of the kind that the statute contemplates. They contain an express and unequivocal admission of the existence of debt. In my opinion the appellants would have been entitled to found on that admission as an acknowledgment for the purposes of the statute, even if there had been other material in the letters which attracted the without prejudice privilege.

LORD WALKER OF GESTINGTHORPE, My Lords,

37. I have had the great advantage of reading all my Lords' opinions in draft. On two basic conclusions your Lordships are unanimous, and I am in agreement with those conclusions: Mr Rashid (through his agent) gave an acknowledgment within the meaning of section 29(5) of the Limitation Act 1980, and it was not protected by the "***without prejudice***" rule from being admitted in evidence as an acknowledgment. There is however no unanimity as to why it was admissible in evidence as an acknowledgment.

38. In common with all your Lordships I think that the Court of Appeal failed to see that there are two public interests engaged in this appeal. There is the interest in encouraging the settlement of disputes so as to avoid (or at least shorten) litigation; that the Court of Appeal did recognise. But it is also in the public interest that a debtor who acknowledges his debt, and so induces his creditor not to have immediate resort to litigation, should not then be able to claim that the debt is statute-barred because the creditor held his hand. That is, as Lord Hoffmann says, the policy behind the acknowledgment rule, to which Parliament, in enacting the Limitation Act 1939, gave a broader and simpler scope (for the earlier history see the Fifth Interim Report (Statutes of Limitation) of the Law Revision Committee (1936) Cmd. 5334, para 19).

39. In the opinion of my noble and learned friend Lord Brown of Eaton-under-Heywood Mr Rashid's acknowledgment was not protected for two reasons: it was not expressed to be "without prejudice", and there was no dispute as to liability to be compromised, the only element of negotiation being directed to obtaining time for payment (any reduction in the amount to be paid, as suggested in the agent's second letter, would have been a matter of pure indulgence on the part of the lender). On this point my noble and learned friends Lord Hope of Craighead and Lord Mance appear to take much the same view as Lord Brown.

40. Lord Hoffmann (in paras 15 and 16 of his opinion) expresses doubts about the soundness and practicality of a distinction between compromise as to liability and compromise (or indulgence) as to time for payment, and proposes that an acknowledgment should be recognised as outside the rule since the relevant statement is not *evidence* of an acknowledgment (or of anything else); it *is* the acknowledgment. This proposed principle is a development of the thoughts which my Lord (as Hoffmann LJ) expressed in ***Muller v Linsley & Mortimer*** [1996] 1 PN LR 74.

41. I have to say that I was initially much attracted to this solution. But on reflection I have the same difficulty with it as is expressed in Lord Brown's opinion. It is indeed well established in the law of evidence that the hearsay rule applies only to statements which are to be relied on as evidence of the truth of the matters stated. As Lord Wilberforce said in ***Ratten v The Queen*** [1972] AC 378, 387, *"Words spoken are facts just as much as any other action by a human being. If the speaking of the words is a relevant fact, a witness may give evidence that they were spoken. A question of hearsay only arises when the words spoken are relied on 'testimonially,' i.e. as establishing some fact narrated by the words. Authority is hardly needed for this proposition, but their Lordships will restate what was said in the judgment of the Board in* ***Subramaniam v Public Prosecutor*** *[1956] 1 WLR 965, 970:*

> *'Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.'"*

So in ***Ratten*** evidence was admitted that a woman making a telephone call was in a hysterical state, and in ***Subramaniam*** evidence of threats was admitted as relevant to the issue of duress.

42. Like Lord Brown, I do not see how this principle can easily be applied to an acknowledgment. An acknowledgment of a debt is in its very nature an express admission (just as a payment on account is an implied admission) of the existence of a debt. To say that it does not matter whether the admission is true or false (so as to equate it with the threats in ***Subramaniam***) seems to me rather unreal. Few debtors would see any advantage in making a false admission of a debt, as a sort of latter-day *indebitatus assumpsit*. Just as the law would be complicated and distorted by a rule which protected only "***qualified***" or "***hypothetical***" admissions, so it would in my opinion tend to be complicated and distorted by a rule under which one and the same statement was admissible as an acknowledgment for the purposes of section 29(5) of the Limitation Act 1980, but not as an admission against interest. It would not, as I see it, be relying on the distinction between testimonial and non-testimonial use, but on a more elusive distinction between different types of testimonial use.

43. For these reasons, and for the reasons more fully set out in the opinion of Lord Brown, I too would allow this appeal.

LORD BROWN OF EATON-UNDER-HEYWOOD, My Lords,

44. A debtor's written acknowledgment of his debt or other liquidated pecuniary claim starts time running afresh under the Limitation Act 1980 (the 1980 Act). Such is the effect of sections 29 (5) and 30. In what circumstances, however, can an acknowledgment be rendered inadmissible in evidence pursuant to the without prejudice rule? That critically is the issue before your Lordships. A subsidiary issue arises as to whether either or both of the documents relied upon by the appellants in the present case in fact constitutes an acknowledgment of their claim within the meaning of the 1980 Act.

45. The facts of the case can be briefly told. The appellants (Bradford & Bingley) were mortagees under a legal mortgage of 60 Duckworth Terrace, Bradford, created by the respondent (Mr Rashid) to secure repayment of the sum of £50,300 advanced towards the purchase of the property. Payments due under the mortgage speedily fell into arrears, and the last such payment was made on 3 January 1991. On 2 October 1991, following a possession order, the property was sold for £47,000 leaving a shortfall owing by Mr Rashid to Bradford & Bingley of £15,583 (the debt). On 14 June 1994 Bradford & Bingley notified Mr Rashid of the debt (having in the meantime had difficulty in tracing his whereabouts), indicating that they might be prepared to waive part of it were he to make a substantial immediate payment. Nothing of relevance then occurred until Bradford & Bingley returned to the matter in 2001, asking Mr Rashid to complete a draft income/expenditure form and to make an "offer of repayment". Following Mr Rashid's completion and return of the form (with a nil offer of repayment), solicitors for Bradford & Bingley wrote on 25 June 2001 saying that that was not acceptable and inviting Mr Rashid's "proposals for repayment as a matter of urgency".

46. The next three letters are the most important ones. On 26 September 2001 an Advice Centre wrote to Bradford & Bingley's solicitors on Mr Rashid's behalf: *"Please find attached Mr Rashid's financial statement, which clearly indicates that at present he is not in a position to repay the outstanding balance, owed to you. However, my client requests that once his financial situation is stable he will start to repay. This could be in year 2003/04. Please could you take the above into consideration and reassess this matter and of course his financial situation."*

47. On 2 October 2001 Bradford & Bingley's Solicitors replied: *"Our client is not willing to hold this matter without payment. Our client requires Mr Rashid's proposals for repayment. Should your client be in a position to raise a lump sum payment in full and final settlement, our client is willing to consider writing off a substantial amount of this debt."* (For whatever reason the letter of 2 October 2001 was not available in the courts below.)

48. On 4 October 2001 the Advice Centre replied: *"I have informed my client Mr M. Rashid of the contents of your letter. He is willing to pay approximately £500 towards the outstanding amount as a final settlement. He is only able to afford this amount by borrowing from friends and family."*

The correspondence before your Lordships ends at this point. None of it was marked without prejudice. Nothing in the event was paid. It is the letters of 26 September 2001 and 4 October 2001 that Bradford & Bingley seek to rely on as acknowledgments for the purposes of the 1980 Act.

49. Eventually, on 17 June 2003, Bradford & Bingley issued proceedings claiming £15,583 plus statutory interest. The sole defence advanced was that of limitation, pursuant to section 20(1) of the 1980 Act (allowing a period of twelve years for an action brought to recover "any principal sum of money secured by a mortgage") in respect of the debt; section 20(5) (allowing six years for an action to recover arrears of interest payable in respect of any monies secured by a mortgage) in respect of the interest claim. It is clear that the twelve year period prescribed by section 20(1) for recovering the principal mortgage debt began to run on 3 January 1991 when Mr Rashid made his last payment on account (see ***West Bromwich Building Society v Wilkinson*** [2005] 1 WLR 2303) so that, but for any acknowledgment of the debt within the terms of section 29(5) of the 1980 Act, time would have expired before the issue of these proceedings on 17 June 2003.

50. The trial at first instance took place before Deputy District Judge Heaton in the Bradford County Court. He held that although the final letter of 4 October 2001 was written without prejudice and therefore inadmissible, the earlier letter of 26 September 2001 was not and, since it was a valid acknowledgment of the debt, the claim was not statute barred. Accordingly, by order dated 26 May 2004, he gave judgment for Bradford & Bingley in the sum of £22,127.86 inclusive of interest. Mr Rashid was given leave to appeal.

51. On 14 December 2004 his Honour Judge Hawkesworth allowed Mr Rashid's appeal, holding that both of the Advice Centre's letters were written without prejudice and were thus inadmissible as acknowledgments. Bradford & Bingley's claim was accordingly statute barred.

52. Finally, on 22 July 2005, the Court of Appeal (Buxton and Latham LJJ and Sir Martin Nourse) dismissed Bradford & Bingley's appeal (without, indeed, calling on counsel for Mr Rashid). Neither Judge Hawkesworth nor the Court of Appeal reached any conclusion upon whether either or both of the letters of 26 September 2001 and 4 October 2001 constituted an acknowledgment; it was sufficient for their decisions that they found these letters in any event to be inadmissible in evidence under the without prejudice rule.

53. I find it convenient to address first the issue whether either or both of the Advice Centre's letters constitute an acknowledgment. So far as relevant sections 29(5) and 30 of the 1980 Act provide:

"29(5) . . . where any right of action has accrued to recover

(a) any debt or other liquidated pecuniary claim; or

(b) . . .

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 acknowledgment or payment."

30(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."

54. Although, as stated, Judge Hawkesworth and the Court of Appeal reached no decision as to whether the letters constituted an acknowledgment of Bradford & Bingley's claimed debt, it is noteworthy that Sir Martin Nourse, giving the only reasoned judgment in the Court of Appeal, held that the letter of 26 September, no less than that of 4 October, contained "an admission against interest" and was to be regarded as written without prejudice: *"In my view, the words 'the outstanding balance, owed to you' do constitute an admission that the amount of the shortfall originally specified in the letter of 14 June 1994 is owed by the defendant to Bradford & Bingley".*

That notwithstanding, Mr Nugee QC submits that in neither letter did Mr Rashid admit that the debt claimed by Bradford & Bingley was a good one, merely that he could not at present pay, or was willing to settle for £500, whatever sum was in fact due. The letter referred only to "the outstanding balance, owed to you" (letter of 26 September) and "the outstanding amount" (letter of 4 October), in neither case acknowledging what sum was outstanding. In particular Mr Nugee submits that unless there is an admission of a definite amount due or an amount ascertainable by mere calculation, there is no acknowledgment within the statute.

55. In advancing this argument Mr Nugee seeks to reopen the issue as to what precisely was decided by the Court of Appeal in ***Good v Parry*** [1963] 2 QB 418, an issue raised and apparently resolved by the Court of Appeal's subsequent decision in ***Dungate v Dungate*** [1965] 1 WLR 1477. The relevant letter in *Good v Parry* discussed first the writer's proposed purchase of the house (offering £1,350 subject to contract), and continued: *"The question of outstanding rent can be settled as a separate agreement as soon as you present your account."* It was held not to constitute an acknowledgment of the landlord's claim for rent. Lord Denning MR said that the sentence meant *"there may be some rent outstanding and it can be made the subject of an agreement as soon as you present your account"* and concluded: *"Such being the meaning of it, I am quite satisfied there is no acknowledgment, because there is no admission of any rent of a defined amount due, or of any amount that can be ascertained by calculation. The amount is uncertain altogether. Nor can I regard it as a promise to pay whatever amount may be found due on taking an account. The tenant clearly reserves the right to examine it and not to be bound except by separate agreement."*

Danckwerts LJ regarded the letter as *"merely . . . an admission that there may be some possible justified claim but no admission that there is such a debt in fact."* Davies LJ thought that *"the letter did not acknowledge the claim; it only acknowledged that there might be a claim."*

56. The debtor's letter in ***Dungate v Dungate*** (a claim against the widow and administratrix of the claimant's deceased brother) read: *"Keep a check on totals and amounts I owe you and we will have account now and then . . . Sorry I cannot do you a cheque yet—terribly short at the moment."* Holding this to be an acknowledgment of the claim, Diplock LJ said that *"an acknowledgment under this Act need not identify the amount of the debt and may acknowledge a general indebtedness, provided that the amount of*

the debt can be ascertained by extraneous evidence" (as had been possible there). As for the letter in ***Good v Parry*** Diplock LJ agreed that it *"'did not acknowledge the claim; it only acknowledged **that there might be a claim.'** … [It] did not state that any rent was in fact outstanding."* Russell LJ and Sellers LJ agreed, Russell LJ stating that the Dungate letter acknowledged "*I owe you money,"* adding *"the quantum can be established, as it has been, by extrinsic evidence."*

57. Edmund Davies J, the first instance judge in ***Dungate v Dungate***, had said that the letter was *"a totally unqualified admission of indebtedness—the **'totals and amounts I owe you'**—and it is open thereafter for the plaintiff to supplement that letter by oral evidence (as he has done) to show the amounts which his brother then owed him and the present position."*

58. It seems to me that Mr Nugee may well be right in suggesting a distinction between on the one hand Lord Denning's (although not, I think, his colleagues') apparent view in ***Good v Parry*** that, even had the letter there admitted that *some* rent was due, it would not have constituted an acknowledgment because the amount was "uncertain altogether" and not able to "be ascertained by calculation" (or, as Lord Denning had said earlier, "a mere matter of calculation from vouchers"); and on the other hand the approach taken in ***Dungate v Dungate***, that any uncertainties as to the quantum of the admitted liability can be determined by "extraneous evidence", including if necessary oral evidence to resolve any dispute. Assume, for example, that a creditor seeks to recover an outstanding debt of £1,000 and the debtor, asserting that he has made a number of unreceipted cash payments in partial repayment, admits that he owes something but not as much as £1,000. It may be doubted whether Lord Denning would have regarded that as an acknowledgment, the precise sum owed being capable of ascertainment "by calculation", and without "separate agreement" of the parties. ***Dungate v Dungate***, however, appears to me clear authority for holding that it *would be* an acknowledgment (although, had the debtor in fact admitted liability only for £500 rather than some unspecified sum short of £1,000, that, in my opinion, would constitute an acknowledgment of the claim only to the extent of £500—see Kerr J's judgment in ***Surrendra Overseas Ltd v Government of Sri Lanka*** [1977] 1 WLR 565).

59. How, then, should one approach the letters of 26 September and 4 October in the present case? Neither letter, as Mr Nugee is bound to accept, in fact suggested any basis whatever for disputing Mr Rashid's liability for the whole of the shortfall specified in Bradford & Bingley's original letter of 14 June 1994. Indeed, as the statement of facts and issues before the House records: *"There is not and never has been any dispute as to the quantum of the debt or the appellant's entitlement to obtain a judgment in respect thereof, subject to the question of limitation."*

Mr Nugee nevertheless submits that the letters cannot realistically be read as admitting the entirety of the claim: it would, for example, have been open to Mr Rashid thereafter to have sought to challenge the sufficiency of the sum realised by Bradford & Bingley on the sale of the property in 1991. No doubt it would. But in my opinion each of the letters of 26 September and 4 October constituted a clear acknowledgment for the purposes of the 1980 Act.

60. ***Dungate v Dungate*** was to my mind rightly decided. Acknowledgments are not confined to admissions of debts which are indisputable as to quantum as well as liability. That to my mind would be a retrograde step in the law, not least given the Law Commission's conclusion in their 2001 Report on Limitation of Actions (Law Com No. 270), following an extensive consultation process, that the present distinction made by section 29 (5) between claims for specific amounts and claims for unspecific amounts is ***"anomalous"*** (para 3.149), and their recommendation that a written acknowledgment or a part payment "irrespective of the nature of the claim, should restart the running of time" (para 3.155(1)).

61. I turn therefore to the application here of the without prejudice rule, noting that this is the first occasion upon which the House has had to consider the interrelationship between this rule and the operation of section 29(5) of the 1980 Act.

62. The principles upon which the without prejudice rule operates are well-established and conveniently found summarised in Lord Griffiths' speech in ***Rush & Tompkins Ltd v Greater London Council*** [1989] AC 1280, 1299: *"The **'without prejudice'** rule is a rule governing the admissibility of evidence and is founded upon the public policy of encouraging litigants to settle their differences rather than litigate them to a finish. It is nowhere more clearly expressed than in the judgment of Oliver LJ in **Cutts v Head** [1984] Ch 290, 306:*

> *'That the rule rests, at least in part, upon public policy is clear from many authorities, and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should, as it was expressed by Clauson J. in **Scott Paper Co. 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.'*

*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."*

63. In both ***Cutts v Head*** and ***Rush & Tompkins*** itself the communications in question had been expressly made "without prejudice" and, generally speaking, such communications will attract the privilege even without the public policy justification of encouraging parties to negotiate and settle their disputes out of court. As Hoffmann LJ pointed out in ***Muller v Linsley & Mortimer*** [1996] 1 PNLR 74, 77, that indeed was the position in ***Cutts v Head***: the only justification there for excluding reference to the without prejudice offer on costs was an implied agreement based on customary usage and understanding. But even in cases where communications are expressly made without prejudice there are occasions when the rule will not prevent their admission into evidence—the main instances (including those under the heading "*unambiguous impropriety"*) are listed and described in Robert Walker LJ's judgment in ***Unilever Plc v The Procter & Gamble Co*** [2000] 1 WLR 2436, 2444-2445.

64. In the present case, of course, as already observed, the exchanges in question were *not* marked without prejudice, so there can be no question of any implied agreement here. Rather the critical question here is whether (in Lord Griffiths' words in ***Rush & Tompkins v GLC***) *"it is clear from the surrounding circumstances that the parties were seeking to compromise the action"*—whether, as Megarry V-C put it in ***Chocoladefabriken Lindt & Sprungli AG v The Nestlé Co Ltd*** [1978] RPC 287, 288, *"there is an attempt to compromise actual or impending litigation"*.

65. The mere fact, of course, that the communications in question constituted acknowledgments does not mean that they necessarily fall outside the protection of the without prejudice rule. There appeared to be some suggestion in Bradford & Bingley's written case that clear and unequivocal admissions, even if made explicitly without prejudice, are admissible in evidence, not least as acknowledgments to defeat a limitation defence (and certainly this seems to be so in Scotland—see particularly ***Watson-Towers Ltd v McPhail*** 1986 SLT 617, ***Daks Simpson Group Plc v Kuiper*** 1994 SLT 689 and ***Richardson v Quercus*** 1999 SC 278). This, however, is not how I understand the position in this jurisdiction. Rix LJ in the Court of Appeal in ***Savings and Investment Bank Ltd v Fincken*** [2004] 1 WLR 667, reviewing recently the many authorities on the "unambiguous impropriety" exception, concluded (at para 57): *"It is not the mere inconsistency between an admission and a pleaded case or a stated position, with the mere possibility that such a case or position, if persisted in, may lead to perjury, that loses the admitting party the protection of the privilege . . . It is the fact that the privilege is itself abused that does so. It is not an abuse of the privilege to tell the truth, even where the truth is contrary to one's case. That, after all, is what the without prejudice rule is all about, to encourage parties to speak frankly to one another in aid of reaching a settlement: and the public interest in that rule is very great and not to be sacrificed save in truly exceptional and needy circumstances."*

66. If without prejudice admissions of liability are not admissible at trial as evidence of their truth, no more in my opinion can they be admitted as acknowledgments for the purpose of setting time running afresh under the 1980 Act. I do not see the position here as analogous to that arising in ***Muller v Linsley & Mortimer*** where the Court of Appeal ordered disclosure to the defendants of without prejudice negotiations which had led to the settlement of an earlier action brought by the plaintiffs against other parties. The plaintiffs were asserting that their conduct in settling the earlier claim had been a reasonable attempt to mitigate their loss; the defendants denied this. Lord Hoffmann said: *"The without prejudice correspondence forms part of that conduct and its relevance lies in the light it may throw on whether the Mullers acted reasonably in concluding the ultimate settlement and not in its admissibility to establish the truth of any express or implied admissions it may contain. On the contrary, any use which the defendants may wish to make of such admissions is likely to take the form of asserting that they were not true and that it was therefore unreasonable to make them."*

67. Earlier he had said: *"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."*

In acknowledgment cases, by contrast, the statements *are* sought to be adduced in evidence as admissions. Indeed, it is only as admissions that they are relevant as acknowledgments.

68. It need hardly be pointed out, moreover, that the wider the category of admissions to be regarded as capable of constituting statutory acknowledgments (and, as explained above, ***Dungate v Dungate*** to my mind establishes that any clear acceptance of a liquidated liability suffices, even if the quantum of that liability is disputed), the more inappropriate would it be to deny to such admissions the protection of the without prejudice rule assuming that it would otherwise apply.

69. I return, therefore to the key question on this appeal: were the exchanges between the parties in September and October 2001 properly to be regarded as an attempt to compromise actual or impending litigation?

70. Sir Martin Nourse, in his admirably clear and concise judgment below, said this: *"It is true that in the letter of 26 September the defendant was saying that he was not in a position to pay anything and might well not be able to pay anything until the year 2003/2004. But that emphasises rather than detracts from the negotiating nature of the letter. Put more broadly, the* ***'difference'*** *between Bradford & Bingley and the defendant was that Bradford & Bingley were seeking payment under the threat of proceedings, at any rate of something, and the defendant was seeking to avoid payment of anything over a period of two years or more."*

71. A little later he quoted Judge Hawkesworth's judgment in the court below: *"The letter of 26 September cannot be looked at in isolation. It was part of an attempt to negotiate on behalf of the defendant to avoid him being saddled with a large judgment debt. It seems to me that the public policy foundation for the without prejudice rule is made out both in respect of the opening letter and all subsequent letters. . . . What was in issue was enforcement, and it seems to me there is equally a public policy issue in encouraging the parties to reach agreement as to the repayment of a debt as there is in encouraging them to agree as to the existence of a debt. The letter of 26 September was indeed a letter in which the defendant was 'laying his cards upon the table' preparatory to negotiations."*

Sir Martin agreed: *"in particular that there is equally a public policy issue in encouraging the parties to reach agreement as to the repayment of a debt as there is in encouraging them to agree as to the existence of a debt."*

Finally Sir Martin expressed his belief that the case would not serve as a precedent for other cases and would not result in virtually all acknowledgments being held to be privileged.

72. I would respectfully disagree with these conclusions. If the without prejudice rule is to apply not merely to attempts to resolve a dispute over the existence or extent of a liability but also to discussions as to how an admitted liability is to be paid, that would seem to me a very substantial enlargement of its scope. Save for a single case in the Bristol Mercantile Court—***The Cadle Co v Hearley*** [2002] 1 Lloyds LR 143, a first instance decision of Judge Havelock-Allan QC, not in fact referred to by the Court of Appeal in the present case—there appears to be no previous authority for such an approach. On the contrary, one is struck by its apparent novelty. It never, for example, appears to have occurred to anyone in ***Dungate v Dungate*** (nor indeed, in ***Good v Parry***) that, acknowledgment or not, the letter in question was in any event inadmissible under the without prejudice rule.

73. In my opinion the without prejudice rule has no application to apparently open communications, such as those here, designed only to discuss the repayment of an admitted liability rather than to negotiate and compromise a disputed liability. I find it impossible to regard the correspondence here as constituting "*negotiations genuinely aimed at settlement"* (Lord Griffiths in ***Rush & Tompkins v GLC***) or *"an attempt to compromise actual or impending litigation"* (Megarry V-C in the ***Lindt*** case). Nor does the underlying public policy justification for the rule appear to have any application in circumstances such as these. That justification, as Oliver LJ observed in ***Cutts v Head*** (see para 62 above) *"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"*. No *"statements or offers"* were made here with a view to settling a dispute. Since the debt was admitted, there *was* no dispute. As Mr Fenwick QC aptly put it in argument, Mr Rashid was simply asking for a concession; he was not giving one.

74. I cannot, moreover, agree with the court below that *"there is equally a public policy issue in encouraging the parties to reach agreement as to the repayment of a debt as there is in encouraging them to agree as to the existence of a debt."* That seems to me too simplistic an approach. The position as to acknowledgments is more complicated than that. Acknowledgments, if effective for the purposes of the 1980 Act, tend, like negotiated settlements, to keep the parties out of court. By prolonging the limitation period they enable the creditor to give the debtor time to pay; he is not driven to resort to litigation to recover the debt. If open acknowledgments, merely because accompanied by a proposal to pay by instalments or with a discount, or at some unspecified future date, are to attract without prejudice privilege, then creditors will have no option but to issue proceedings and thereby add to the debtor's ultimate liability. But that is not to say that all acknowledgments should therefore be excluded from the without prejudice rule.

75. As I have explained, acknowledgments may well leave issues of quantum outstanding and negotiations designed to resolve these to my mind *should* qualify for without prejudice protection. In these cases the policy underlying the without prejudice rule seems to me to outweigh the countervailing policy reason for lengthening the period in which the creditor must issue proceedings. There are, after all, sound policy reasons for having limitation periods in the first place: disputes, if eventually they need to be litigated, should be litigated before they become too stale.

76. In short, therefore, some acknowledgments will indeed attract without privilege protection. But these will be cases where the extent of the liability is genuinely in dispute and the parties are attempting to settle that difference. Had Mr Rashid, for example, in fact been seeking to question the sufficiency of the sum obtained from the mortgagee's sale of the property and had the correspondence been devoted to resolving that particular issue, without prejudice protection might well have applied. But that simply was not the case. The correspondence treated the debt as an undisputed liability and dealt only with whether, when and to what extent Mr Rashid could meet that liability. The question before your Lordships is whether in those circumstances the without prejudice rule should be extended at the expense of the statutory provision for acknowledgments. For the reasons given I would hold not.

77. I would accordingly allow Bradford & Bingley's appeal, set aside the orders of the Court of Appeal and Judge Hawkesworth, and restore the order of the deputy district judge giving judgment for Bradford & Bingley in the sum of £22,127.86.

LORD MANCE, My Lords,

78. I have had the advantage of reading in draft the speeches prepared by my noble and learned friends Lord Hoffmann, Lord Hope of Craighead and Lord Brown of Eaton-under-Heywood.

79. The first issue is whether either or both of the Advice Centre's letters of 26th September and 4th October 2001, if admissible in evidence, constituted an acknowledgement of the appellant bank's claim for the purposes of sections 29(5) and 30 of the Limitation Act 1980. On this issue, I agree with Lord Brown's reasoning and conclusions in paragraphs 53-60. The letters acknowledged the existence of ***"the outstanding balance, owed to you"*** or ***"the outstanding amount"***. The appellant bank is entitled to prove the unstated quantum of that admitted balance or amount by any admissible means, including oral evidence, in accordance with the Court of Appeal's decision in ***Dungate v. Dungate*** [1965] 1 WLR 1477. By the first letter, written in response to the appellant bank's insistence on proposals for repayment, Mr Rashid was simply requesting time to "start to repay" the outstanding balance. By the second letter, written in response to the bank's reiteration of its insistence and its indication that it would consider writing off a substantial sum if Mr Rashid raised a lump sum payment ***"in full and final settlement",*** Mr Rashid was simply offering ***"approximately £500 towards the outstanding amount as a final settlement"***. In each case, he was clearly acknowledging the outstanding debt without question.

80. The second issue thus arises whether these letters are, as His Honour Judge Hawkesworth and the Court of Appeal have held, inadmissible as having been written impliedly without prejudice. I agree that there is a short answer to this issue. The letters were not without prejudice, because they were not written in the context of any dispute regarding the debt, or of any attempt to compromise any such dispute. Indeed, the agreed statement of facts before the House admits that there has never been any dispute about the quantum of the debt or the appellant bank's entitlement to a judgment in respect of it (apart from the dispute about limitation which was not and could not have been in existence at the date of either letter in 2001, or indeed until after 3 January 2003, twelve years from the date of Mr Rashid's last payment).

81. The existence of a dispute and of an attempt to compromise it are at the heart of the rule whereby evidence may be excluded (or disclosure of material precluded) as ***"without prejudice"***. This is clear from the passage which Lord Brown has in paragraph 62 cited in full from Lord Griffiths' speech in ***Rush & Tompkins Ltd. v. Greater London Council*** [1989] AC 1280 at page 1299D, commencing: *"The **'without prejudice'** rule is a rule governing the admissibility of evidence and is founded upon the public policy of encouraging litigants to settle their differences rather than litigate them to a finish".*

As to disclosure, Lord Griffiths concluded at page 1305D-E that: *"….. the general public policy that applies to protect genuine negotiations from being admissible in evidence should also be extended to protect those negotiations from being discoverable to third parties."*

The rule does not of course depend upon disputants already being engaged in litigation. But there must as a matter of law be a real dispute capable of settlement in the sense of compromise (rather than in the sense of simple payment or satisfaction).

82. Thus, in ***Turner v. Railton*** (1796) 2 Esp. 474, evidence was admitted that the defendant's former attorney had admitted the debt claimed and made an offer on the defendant's behalf to pay a certain sum on account, and Lord Kenyon said: *"Concessions made for the purpose of settling the business for which the action is brought, cannot be given in evidence; but facts admitted I have always received."*

Likewise, in ***Thomson v. Austen*** (1823) LJ KB (OS) 99, where evidence of an admitted cross-debt was in part excluded, the court is reported as saying: *"We also think that the evidence which was refused was not indicative of any intention to make a compromise, for if it had been so, he would have offered some concession, some sacrifice for the sake of peace; but he simply wishes the matter ended, and then makes an unqualified admission".* (A similar though not identical passage is attributed to Bayley J in another report at (1823) 2 Dowl. & Ry. 358.)

83. Here, the respondent, Mr Rashid, was not offering any concession. On the contrary, he was *seeking* one in respect of an undisputed debt. Neither an offer of payment nor actual payment of a smaller sum in purported discharge of a larger admitted indebtedness has the effect in law of discharging that indebtedness: cf ***Foakes v. Beer*** (1884) 9 App. Cas. 605; ***D & C Builders Ltd. v. Rees*** [1966] 2 QB 617 (authorities which we were not in any way asked to reconsider). But, even if Mr Rashid

had been offering a lesser sum on a basis which could, if accepted, have precluded the appellant bank from pursuing the admitted larger debt (as might have been the case under Scots law, which has no doctrine of consideration, or which might have been the case under English law, if Mr Rashid had been offering a composition to all his creditors), there would have still have been no relevant dispute about his indebtedness, and the ***"without prejudice"*** rule would still have had no application.

84. That is sufficient to allow this appeal. But I wish to say a few words on the situation where (unlike in this case) words such as "***without prejudice***" are expressly used. If they are used in the context of an attempt to compromise a dispute, then the *"without prejudice*" rule, which I have already described, applies. Indeed, in an article of great learning and continuing value, ***'Without Prejudice' Communications - their admissibility and effect*** (1974) U.B.C. Law Review 85 (on which Robert Walker LJ also drew in ***Unilever plc v. The Procter & Gamble Company*** [2000] 1 WLR 2436), Mr David Vaver (now Reuters Professor of Intellectual Property Law at Oxford) concludes at page 90 that the express use of the term "***without prejudice***" was developed by the legal profession by about 1830 as a result of the distinction drawn by previous court decisions (to two of which I have referred) between admissions of liability and offers of compromise. Even where there is a dispute, not every offer of compromise is necessarily intended to be without prejudice, and the express use of the phrase not only puts the matter beyond doubt in a situation where there is an offer to compromise an existing dispute, but is also capable of throwing some light on the answer to the objective question whether such a situation existed. But its use is by no means conclusive. Neither a dispute nor a concession or offer to compromise can be conjured out of mere words.

85. Mr Vaver submits at page 134, and I agree with him, that the "***without prejudice"*** rule of admissibility should be "***strictly confined"*** to ***"the area of its legitimate utility ….. in the facilitation of disputes".*** In that area, concerning admissibility in court or disclosure, the court is, as Lord Griffiths stated in ***Rush & Tompkins***, giving effect to a rule of public policy. But there are, as Mr Vaver recognises, other contexts in which the phrase ***"without prejudice"*** may be deployed by one or more parties, in a way which can have some effect on their legal relations (rather than on admissibility or disclosure). When Mr Guppy in Dickens' Bleak House (chapter IX) insisted after the event that his unsuccessful move *"to file a declaration - to make an offer"* of marriage to Miss Esther Summerson had been *"without prejudice",* he was not suggesting that the offer had been made to compromise some dispute between them, merely that he did not want to be embarrassed by later reference to it, and Miss Summerson was fully entitled therefore to qualify her response: "*I will never mention it,"* said she, *"unless you should give me future occasion to do so."*

86. The use and potential significance of the phrase *"without prejudice"* in contexts where there is no dispute or attempt to compromise is considered in Mr Vaver's article at pages 132 and 164-169. At page 132, he identifies two relevant questions, the one what effect (if any) may have been intended, the other whether the court ought to give effect to that intention. At pages 164-169, he points out that the intention is likely to have been to deprive a communication or act of all or a particular legal consequence which it would otherwise have or to reserve or preserve a course of action which might otherwise be prejudiced. He cites as examples ***Oliver v. Nautilus Steam Shipping Co. Ltd.*** [1903] 2 KB 639 and ***Unsworth v. Elder Dempster Lines Ltd.*** [1940 1 KB 658, and, in the context of limitation, ***Cory v. Bretton*** (1830) 4 Car. & P. 462; 172 ER 783, where the provision in a letter that it was "not to be used in prejudice of my rights …." *was read as meaning that an apparent acknowledgement of indebtedness in the same letter was "clearly a conditional statement,"* as well as ***In re River Steamer Company*** (1871) LR 6 Ch.App. 822, 831-2, where the phrase ***"without prejudice***" meant that the debtor could not be regarded as having entered into the new contract - an acknowledgement being at the date of these last two cases only capable of restarting the limitation period if read as implying a fresh promise to meet the old debt. In any such case, it is a matter of construction and substantive law (rather than admissibility or privilege) whether effect will be given to the intention. But, as Mr Vaver points out, the phrase may also be used unthinkingly or superfluously, in which case it falls simply to be ignored: cf also ***Nicholson v. Southern Star Fire Insurance Co. Ltd.*** (1927) 28 SR (NSW) 124, ***re Brisbane City Council and White*** (1981) 50 LGRA 225, where the phrase was ***"futile"*** in the context of an originating process, and the ***Unilever*** case, where Robert Walker LJ at page 2448A referred to *"the uncontroversial point that* ***'without prejudice'*** *is not a label which can be used indiscriminately so as to immunise an act from its normal legal consequences, where there is no genuine dispute or negotiation".* In his Treatise on the Anglo-American System of Evidence (2nd Ed. 1923) paragraph 1061, Wigmore echoed Dickens in noting the confusion resulting from the unthinking use of the phrase as a ***"shibboleth"***, and the Law Reform Committee made the same point with judicious understatement in its sixteenth report on *Privilege in Civil Proceedings* (Cmnd. 3472: December 1967) paragraph 23.

87. In the light of this analysis, it is wrong to assimilate the express use or effect of the phrase "without prejudice" in a context where there is no dispute or attempt to compromise a dispute with the significance of the ***"without prejudice"*** rule which applies, or of the "***privilege"*** which exists, where there is an attempt to compromise a dispute. I am unable therefore to agree with my noble and learned friend Lord Brown's statement in paragraph 63 that ***"generally speaking"*** communications marked ***"without prejudice"*** will *"attract the privilege even without the public policy justification of encouraging parties to negotiate and settle their disputes out of court".* It is not open to a party or parties to extend at will the reach of the ***"without prejudice***" rule or of the ***"privilege"*** it affords as regards admissibility or disclosure. Nor is this conclusion in any way affected if one takes the view (which Hoffmann LJ, as my noble and learned friend then was, did in ***Muller v. Linsley and Mortimer*** [1996] 1 PNLR 74, at pages 77D and 79G) that convention, rather than a questionable view of public policy, was the basis of the prohibition which (unless otherwise stipulated: cf ***Cutts v. Head*** [1984] Ch. 290) precludes the use of without prejudice communications on questions of costs. Indeed, Hoffmann LJ at page 79F identified the conventional position regarding costs as ***"the only case"*** where the use of without prejudice communications otherwise than as admissions was precluded.

88. Had there been a dispute and an attempt at its compromise, the further issue would have arisen whether the use of Mr Rashid's acknowledgment of his indebtedness to satisfy sections 29(5) and 30 of the Limitation Act 1980 fell within one of the qualifications or exceptions to the ***"without prejudice"*** rule, variously addressed by Mr Vaver at pages 143-164, by Lord Griffiths in ***Rush & Tompkins*** at page 1300B-1301D, by Hoffmann LJ in ***Muller*** at page 79D-G and by Robert Walker LJ (as my noble and learned friend then was) in ***Unilever*** at pages 2444D-2446D.

89. Two possibilities may be suggested. One, the broader, is that an unequivocal admission made during without prejudice communications regarding the possible compromise of a dispute may be isolated from the remainder of the communications and so used against the party making it, whether on the issue of liability or to restart the limitation period. This appears to be the view taken at first instance in Scotland: cf ***Watson-Towers v. McPhail*** 1986 SLT 617 and ***Daks Simpson Group plc v. Kuiper*** 1994 SLT 689 (use as admissions on liability of statements in the course of without prejudice communications which were, in the first case, *"not … a hypothetical admission or concession for the purpose of securing a settlement but … a statement of fact"* and,

in the second case, not *"offers, suggestions, concessions or whatever"* but *"a clear and unequivocal admission or statement of fact"*); and cf ***Richardson v Quercus Limited*** 1999 SC 278 (adoption of the same approach to restart the running of limitation).

90. I agree with Lord Brown that English law has viewed the matter in different terms. Lord Griffiths in ***Rush & Tompkins*** put the position as follows: *"There is also authority for the proposition that the admission of an 'independent fact' in no way connected with the merits of the cause is admissible even if made in the course of negotiations for a settlement. Thus an admission that a document was in the handwriting of one of the parties was received in evidence in* ***Waldridge v. Kennison*** *(1794) 1 Esp. 142. I regard this as an exceptional case and it should not be allowed to whittle down the protection given to the parties to speak freely about all issues in the litigation both factual and legal when seeking compromise and, for the purpose of establishing a basis of compromise, admitting certain facts. If the compromise fails the admission of the facts made for the purpose of the compromise should not be held against the maker of the admission and should therefore not be received in evidence."*

91. In ***Unilever*** at pages 2448H-2449B, Robert Walker LJ said that the authorities showed that the protection of admissions was *"the most important practical effect"* of the without prejudice rule, and that *"… to dissect out identifiable admissions and withhold protection from the rest of without prejudice communications (except for a special reason) would not only create huge practical difficulties but would be contrary to the underlying objective of giving protection to the parties, in the words of Lord Griffiths in the* ***Rush & Tompkins*** *case [1989] AC 1280, 1300: 'to speak freely about all issues in the litigation both factual and legal when seeking compromise and, for the purpose of establishing a basis of compromise, admitting certain facts.' Parties cannot speak freely at a without prejudice meeting if they must constantly monitor every sentence, with lawyers or patent agents sitting at their shoulders as minders".*

92. At present, therefore, I see the first-instance Scots authorities as taking an approach differing from the English appellate approach. A limited review suggests that other Commonwealth jurisdictions also adopt an approach which is generally similar to the English, rather than the Scots: see e.g. (a) as regards Canada, *Evidence in Canada* (Sopinka, Lederman and Bryant) (2nd Ed. 1999 paragraph 14.204 and Supplement 2004, paragraph 14.204.1, explaining that the theory *"that all admissions in the course of negotiations towards settlement are protected by a privilege based on public policy"* is *"now universally accepted in Canada",* following the British Columbia Court of Appeal decision in ***Middlekamp v. Fraser Valley Real Estate Board*** (1992) 96 DLR (4th) 227 (although one can find earlier authority adopting Wigmore's different theory in ***Kirschbaum v. "Our Voices" Publishing Co.*** [1971] 1OR 737, to which Lord Sutherland referred in ***Daks Simpson Group plc v. Kuiper***); (b) as regards Australia, *Cross on Evidence (Australian Edition)* (J. D. Heydon) (2004) paragraphs 25350 and 25375, where the exception is explained as limited to statements of fact that have *"no reference at all to the dispute"* or are not *"reasonably incidental to [the] negotiations";* and *Law of Privilege* (McNicol) (1992) pages 477-478, submitting that *"future courts should be careful not to restrict without prejudice privilege too much"* under this test, and concurring with Lord Griffiths' comments concerning ***Waldridge v. Kennison***; and (c) as regards South Africa, *The South African Law of Evidence* (formerly Hoffmann and Zeffertt, now Zeffertt, Paizes and Skeen) page 617, where the exception is said to be even more narrowly limited to *"admissions that are quite unconnected with or irrelevant to the settlement"*. In ***Kapeller v. Rondalia Versekeringskorporasie van Suid-Afrika Bpk*** 1964 (4) SA 722 (T) (mainly reported in Afrikaans, but summarised in Zeffertt, Paizes and Skeen at page 617), Viljoen R was able to distinguish a clear admission by a motor insurer as to liability in respect of a motor accident from the without prejudice negotiations which followed on that basis regarding quantum, and so to treat the admission as restarting the limitation period. I can understand that line of reasoning. But the Scots cases appear on their facts to me to go considerably further. However, I think it preferable to say no more about the scope of any exception, until a case arises where it falls squarely for determination on the facts.

93. The other, more limited half-way possibility, supported by my noble and learned friend Lord Hoffmann, invokes and seeks to build on his observations in ***Muller v. Linsley and Mortimer*** at pages 79F-80A to the effect that (with the one possible conventional qualification relating to costs, to which I have referred) the rationale of the without prejudice rule is directed solely to circumstances where a statement made without prejudice is proposed to be used as an admission in relation to the subject-matter of dispute. The possibility involves distinguishing between the use of Mr Rashid's admission as an acknowledgment to avoid any limitation problem and its use as an admission to prove liability on the merits at trial. In ***Belanger v. Gilbert*** [1984] 6 W.W.R. 474, 476, (British Columbia Court of Appeal) (cited in *Evidence in Canada* at paragraph 14.226), one of the three members of the court, Lambert JA, supported this distinction, saying: *"In my opinion it is possible for a letter to be considered as a "without prejudice" letter and inadmissible in evidence in relation to its contents about the flow of settlement negotiations either on liability or quantum, but at the same time for the same letter to be admissible in evidence for the exclusive purpose of s.5 of the Limitation Act. It is not necessary to decide that question on the facts of this case, and I explicitly do not do so."*

In support of this distinction, the argument is no doubt that a debtor who makes an unqualified admission in the course of without prejudice negotiations for the compromise of a dispute is, in effect, encouraging the creditor not to commence proceedings, so that, while it would be wrong to treat the admission as prejudicing the debtor on the merits, it would be equally wrong to allow him to take the benefit of time gained in negotiations when it came to a limitation issue. On the other hand, an acknowledgment may, in this country, be made before or after the date when the limitation period would otherwise expire (a date which may itself also be open to argument in some cases), and it may be said that the public policy in allowing parties to negotiate freely would be undermined if, during any negotiations, they had to keep an eye open for the possible impact on limitation of any admissions they were without prejudice prepared to make. The argument that a creditor may in such a context be encouraged not to commence proceedings may also be said to have a certain circularity, on the basis that a creditor engaging in without prejudice negotiations should always keep an eye on the limitation position for the very reason that the negotiations are without prejudice. However, since the suggested distinction between the different effects (on the merits and on limitation) of one and the same admission were not explored in any detail before us, perhaps for good reason, I think it again best to say no more on the point.

94. For the reasons I have given, I agree that this appeal should be allowed.

Justin Fenwick QC; Nicole Sandells for the appellants (Instructed by Addleshaw Goddard)
Christopher Nugee QC; William Hanbury for the respondents (Instructed by Williscroft & Co)