Before LORD JUSTICES BUXTON, LATHAM & SIR MARTIN NOURSE C.A. 22nd July 2005

1. LORD JUSTICE BUXTON: I will ask Sir Martin Nourse to give the first judgment.

2. SIR MARTIN NOURSE: This is a second appeal, brought with the permission of Longmore LJ, against an order of His Honour Judge Hawkesworth QC made in the Bradford County Court on 14th December 2004.

3. The claimant, Bradford & Bingley Plc ("Bradford & Bingley", which expression I will use to include its predecessor the Bradford & Bingley Building Society) was the mortgagee under a legal mortgage of 60 Duckworth Terrace, Bradford, created by the defendant, Mohammed Rashid, in 1989 in order to secure repayment of the sum of £50,300 advanced to him in order to enable him to purchase that property. The defendant having fallen into arrears with the payments due under the mortgage, an order for possession was obtained and the property sold on 2nd October 1991 for £47,000, leaving a shortfall owing by the defendant to Bradford & Bingley of £15,583.62. It is important to record at this early stage that the last payment made by the defendant under the mortgage was on 3rd January 1991.

4. Following the sale of the property, Bradford & Bingley encountered difficulties in tracing the whereabouts of the defendant. However, from June 1994 onwards there was what appears to have been a somewhat spasmodic correspondence between Bradford & Bingley and the defendant (or solicitors acting on his behalf) in regard to the shortfall, the whole of which correspondence we have not seen. Eventually, Bradford & Bingley commenced these proceedings on 17th June 2003, more than 12 years after the defendant had made his last payment under the mortgage on 3rd January 1991.

5. By its particulars of claim Bradford & Bingley claimed payment of £15,583 in respect of the shortfall, plus interest at the rate of 8% from the date of the sale of the property. By his defence the defendant denied the particulars of claim in their entirety and averred that Bradford & Bingley's claim was statute-barred pursuant to section 20(1) of the Limitation Act 1980, which provides for a 12-year limitation period in an action to recover money secured by a mortgage. No formal reply was put in, but in his witness statement filed in support of the claim Mr JA Wragg, a recoveries officer with Bradford & Bingley, relied on two letters dated 26th September and 4th October 2001 respectively as constituting acknowledgements within sections 29 and 30 of the 1980 Act.

6. The trial took place before Deputy District Judge Heaton. The defendant argued that the two letters relied on were written without prejudice and were therefore inadmissible and, further and in any event, that neither of them constituted an acknowledgement. The District Judge decided that, though the letter of 4th October was written without prejudice and was therefore inadmissible, the letter of 26th September was not so written and, further, that it was a valid acknowledgement of Bradford & Bingley's right to the payment of the amount of the shortfall. By his order made on 26th May 2004 he gave judgment for Bradford & Bingley in the sum of £22,127.86 including interest. He gave the defendant permission to appeal.

7. The defendant having duly appealed, his appeal came before Judge Hawkesworth. He decided that both the letters of 26th September and 4th October 2001 were written without prejudice and were therefore inadmissible. That made it unnecessary for him to decide whether the letter of 26th September amounted to an acknowledgement and he made no finding in that regard. By his order made on 14th December 2004 the judge ordered that the appeal be allowed and there be judgment for the defendant. In other words, he dismissed the action.

8. It is common ground between the parties that, if there was no admissible acknowledgement, Bradford & Bingley's action, having been brought more than 12 years after the last payment by the defendant under the mortgage, is statute-barred. We have started by hearing argument on the without prejudice point, assuming for this purpose that either or both of the letters of 26th September and 4th October were valid acknowledgements within sections 29 and 30 of the 1980 Act. The defendant's case on inadmissibility is based on the rule which gives the protection of privilege to without prejudice communications. The application of the rule may be founded either on an implied agreement of the parties, or on public policy, or on both. Here it is common ground that the defendant cannot rely on an implied agreement between himself and Bradford & Bingley.

9. As to public policy, it is unnecessary to go back further than the judgment of Oliver LJ in **Cutts v Head** [1984] Ch 290, 306, where he said:
*"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 RPC 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."*

10. In **Rush & Tompkins v Greater London Council** [1989] AC 1280, at page 1299D, Lord Griffiths, with whose speech the others of their Lordships agreed, said that the without prejudice rule was a rule governing the admissibility of evidence and was founded upon the public policy of encouraging litigants to settle their differences rather than litigate them to a finish. Having cited with approval the passage I have read from the judgment of Oliver LJ in **Cutts v Head**, Lord Griffiths continued:

"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."

11. Later, having referred to the cases in which the scope of the without prejudice rule had been considered, nearly all of which concerned the admissibility of evidence at trial after negotiations had failed, Lord Griffiths said, at page 1300B-C:
"These cases show that the rule is not absolute and resort may be had to the 'without prejudice' material for a variety of reasons when the justice of the case requires it. It is unnecessary to make any deep examination of these authorities to resolve the present appeal but they all illustrate the underlying purpose of the rule which is to protect a litigant from being embarrassed by any admission made purely in an attempt to achieve a settlement."

In my view it is clear that when in each of those passages Lord Griffiths referred to "settlement" he meant settlement of the "differences" he had referred to at page 1299D.

12. Although Judge Hawkesworth based his decision only on the two letters of 26th September and 4th October 2001, there were other letters in the trial bundle to which reference was made by the District Judge. Those letters we have seen, though it is clear that we have not seen the whole of the correspondence between the parties. Into the reasons for that I need not go. We have to do the best we can with what we have got.

13. The first letter we have seen was one from Bradford & Bingley to the defendant personally dated 14th June 1994, shortly after they had discovered his whereabouts. That letter started by informing the defendant with regret that the proceeds of sale of the property were insufficient to repay the outstanding mortgage in full, there being a shortfall of £15,583. In the third paragraph it was said that Bradford & Bingley would like to enter into discussions with the defendant to see how that sum might be repaid. The fourth paragraph was in these terms:
"It is appreciated that you may well be unable to clear this shortfall in one payment but if you are able to do so, the Society may be prepared to waive a proportion of the shortfall as an incentive to adopting this course of action."

14. The next letter we have seen was a letter from Bradford and Bingley dated 21st February 1995, addressed to solicitors acting for the defendant, in which it was said that in the absence of any acceptable proposals from him, Bradford & Bingley's solicitors would be instructed to commence

action for the recovery of the outstanding debt. It was, however, pointed out that Bradford & Bingley would always prefer to resolve the matter amicably and so avoid legal action and unnecessary costs.

15. The next letter was dated 18th October 1995, but that takes the matter no further and need not be referred to.

16. The final letter we have seen during this period was dated 9th November 1995. On this occasion it was a letter from Bradford & Bingley to the defendant personally, in which it was said that, following previous correspondence regarding the shortfall and a further review of the case, Bradford & Bingley regretted to note that the defendant had failed to submit any acceptable proposals for clearance of the outstanding sum. There was a threat of proceedings which might, it was said, lead Bradford & Bingley to consider bankruptcy proceedings and so on.

17. We have not seen any correspondence between that letter and the crucial letters of 26th September and 4th October 2001, to which I now come. It is to be noted that in his witness statement Mr Wragg introduces those letters in this way:
"There are a number of examples of written acknowledgements throughout the history of correspondence in this case and examples are set out below: ..."

Reference is then made to the two letters, but in the context of acknowledgement. It seems clear that if they were acknowledgements, they were not acknowledgements requested as such by Bradford & Bingley. If either of them does constitute an acknowledgement, it will, as it seems to me, be entirely fortuitous.

18. The letters of 26th September and 4th October were both written by the Manningham Project Advice Centre in Bradford to Bradford & Bingley or its solicitors. The first appears to have been addressed to the defendant personally, but it is common ground that it was sent to Bradford & Bingley. The body of the letter was in these terms:
"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 re-assess this matter and of course, his financial situation.
Please do not hesitate to contact Mr Rashid if you require further clarification regarding this matter."

That is signed by an advice worker with the Manningham Project.

19. The letter of 4th October was addressed to Abigail Poole of Bradford & Bingley's solicitors. The body of the letter was in these terms:
"Thank you for your letter dated 2nd October 2001. I have informed my client Mr Rashid of the contents of your letter. He is willing to pay approximately £500.00 towards the outstanding amount as a final settlement. He is only able to afford this amount by borrowing from friends and family.
I am enclosing documentary evidence required by you.
I look forward to hearing from you shortly."

That letter was signed by the same advice worker.

20. Neither of those letters was headed "without prejudice", nor indeed was any other letter which we have seen. However, as Lord Griffiths has pointed out, the application of the rule is not dependent upon the use of that phrase.

21. We have not seen the letter dated 2nd October referred to in the letter of 4th October, nor have we seen any correspondence subsequent to the letter of 4th October.

22. We have not called on Mr Hanbury for the defendant to respond to the appeal, but his written submissions broadly reproduce those he made before the judge. His basic submission was that the two letters of 26th September and 4th October, both individually and together, constituted an attempt by the defendant to avoid Bradford & Bingley's obtaining a judgment against him. Mr Hanbury accepted that there was no dispute as to the quantum of the claim or Bradford & Bingley's ultimate entitlement to obtain a judgment. But he said that that did not matter. What did matter was that in the letter of 26th September the defendant was laying his cards on the table and seeking an agreement

that Bradford & Bingley should stay their hands and grant some forbearance. He added that the letter of 4th October was on any footing, as the District Judge had held, a without prejudice negotiation letter containing, as it did, a genuine offer, albeit only of £500, to try to settle the matter.

23. The primary, though not the main, submission made by Ms Sandells in her well-sustained argument, is that as a matter of law a debtor cannot claim without prejudice privilege in a letter when the only purpose of that claim is to prevent a court from deciding whether the letter is an acknowledgement of the debt within sections 29 and 30 of the 1980 Act. No authority has been cited in support of that submission and I would be most surprised to find one. It would completely undermine the principle of the rule in a case where, as part of negotiations but for no other purpose, it was in the debtor's interests to acknowledge the debt. The submission is contrary to principle and must be rejected.

24. Ms Sandell's main submission is that the privilege applies only where the parties are attempting to settle a matter in dispute between them. Here she says that the letter of 26th September at all events does not raise any dispute between the parties; it merely asks for time to pay "the *outstanding balance, owed to you"*. Ms Sandells says that it is not a negotiating letter. She adds that it does not make any admission against interest by the defendant, and she relies at this stage in her argument on a passage in the judgment of Hoffmann LJ in **Muller v Linsley and Mortimer** [1996] 1 PNLR 74, at pages 79C-80A, where he makes it clear that in his view the public policy rationale of the rule is directed solely to admissions.

25. I start with the letter of 4th October. In my judgment it is clear, for the reasons given by the District Judge, that that letter was written without prejudice. As for the letter of 26th September, I do not accept that it does not contain an admission against interest. 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 14th June 1994 is owed by the defendant to Bradford & Bingley. The fact that the admission may have been made earlier, expressly or impliedly, and moreover made more than once does not prevent its being made again. Further, the letter must be read in the context of the previous correspondence, such as we have it, including the suggestion made in the fourth paragraph of the letter of 14th June 1994 that Bradford & Bingley might be prepared to waive a proportion of the shortfall as an incentive to the defendant to make payment in one go. It is true that in the letter of 26th 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.

26. I also respectfully doubt whether the application of the rule is as narrow as appears to have been suggested by Hoffmann LJ in **Muller**, in the passage on which Ms Sandells has relied. In **Unilever Plc v Procter & Gamble Co [**2000] 1 WLR 2436, at page 2448, Robert Walker LJ said, under the heading "*Without prejudice: conclusions*":
"In those circumstances I consider that this court should, in determining this appeal, give effect to the principles stated in the modern cases, especially ***Cutts v Head, Rush & Tompkins Ltd v Greater London Council*** *and* ***Muller v Linsley & Mortimer****. Whatever difficulties there are in a complete reconciliation of those cases, they make clear that the without prejudice rule is founded partly in public policy and partly in the agreement of the parties. They show that the protection of admissions against interest is the most important practical effect of the rule. But to dissect out identifiable admissions and withhold protection from the rest of without prejudice communications (except for a special reason) would not only create huge practical difficulties but would be contrary to the underlying objective of giving protection to the parties, in the words of Lord Griffiths in 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****.'"*

27. That passage in Lord Griffiths' speech appears at page 1300F. Reference can also be made in this context to the earlier passage in Lord Griffiths' speech which I have already read at page 1300B-C. It

seems from observations of Robert Walker LJ at page 2446 A-B that he too may have entertained doubts as to whether the application of the rule was as narrow as was suggested by Hoffmann LJ in **Muller.**

28. In deciding the prejudice issue in favour of the defendant, Judge Hawkesworth said at paragraph 11 of his judgment:
"The letter of 26th 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. It matters not that at that stage limitation had not been raised as an issue. If the law at that time was uncertain then it may have been a bargaining chip which could have been deployed later or when proceedings were issued. Until the Claimants had obtained their judgment there was no compulsion upon the Defendant to pay and he had in fact paid nothing for more than a decade. 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 26th September was indeed a letter in which the Defendant was, 'laying his cards upon the table' preparatory to negotiations. In my judgment, it was without prejudice and inadmissible against him."

29. I respectfully agree with these views of the judge, 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. I desire to add only two further points. First, 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. Secondly, I do not subscribe to Ms Sandells' fear that if the letters of 26th September and 4th October 2001 or either of them are accepted to have been acknowledgements but are nevertheless privileged, it will follow that all acknowledgements within sections 29 and 30 of the 1980 Act, whether informal or formal, will be privileged.

30. For these reasons, I would dismiss this appeal on the privilege ground, which makes it unnecessary, as it was unnecessary for Judge Hawkesworth, to decide whether the letters or either of them amounted in reality to an acknowledgement.

31. **LORD JUSTICE LATHAM**: I agree.

32. **LORD JUSTICE BUXTON**: I also agree.

ORDER: Appeal dismissed with costs; the stay imposed by Longmore LJ in relation to the assessment of costs be formally removed; detailed assessment of the respondent's Community Legal Service funding certificate; permission to appeal to the House of Lords refused. (Order not part of approved judgment)

MS NICOLE SANDELLS (instructed by Messrs Addleshaw Goddard, Leeds LS1 1HQ) appeared on behalf of the Appellant

MR WILLIAM HANBURY (instructed by Messrs Williscroft & Co, Bradford BD1 5BD) appeared on behalf of the Respondent