BEFORE OLIVER AND FOX LJJ. CA. 7th December 1983
JUDGMENT : OLIVER LJ.

This appeal has taken a very unusual course. It is an appeal from an order of Foster J made on the trial of the action on 22 July 1981 and it first came before us on 12 October 1983, when we delivered judgment allowing the appeal in part but dismissing it on the point with which we have been concerned today. The action was one which concerned the plaintiff's rights of access over the defendant's land to the plaintiff's fishery. He claimed certain declarations and injunctions and damages and there was a counterclaim for various negative declarations and for damages for trespass. After a very lengthy hearing the judge found generally in the plaintiff's favour, save that he also found that the defendant had two sustainable claims for damages. He therefore granted the plaintiff certain injunctions but he also inserted in the order certain declarations purporting to limit the plaintiff's enjoyment of his rights of access and a mandatory order on him to carry out certain repairs. He also awarded the plaintiff damages in a sum which precisely equalled the damages awarded to the defendant so that, in this respect, the claim and the counterclaim cancelled out. The defendant did not appeal against this, but the plaintiff appealed against the imposition of the restrictions placed by the judge on the exercise of his rights and also against the order to carry out repairs. That was the substance of the appeal, although there were subsidiary points on costs.

Before the appeal came on, however, the defendant, no doubt on advice, conceded (and, I think, clearly rightly conceded) that the declarations and order appealed against were made without any jurisdiction and that the judge's order must therefore be varied accordingly. The result of that was that, but for the subsidiary questions on costs, there would have been nothing left in the appeal. The plaintiff, however, had obtained the judge's leave to appeal against the order made as regards the costs of the action, and the notice of appeal also challenged the correctness of the judge's order as regards the costs of a hearing before him when, as a result of their failure to agree on the form of the order to be made, counsel found it necessary to speak to the minutes. Accordingly, the appeal was brought on on these two points. The parties were anxious to have the appeal heard without delay and, having been offered a convenient date on which only two Lords Justices could be available, they agreed to the appeal being heard by a court so constituted, notwithstanding that the appeal was, in fact, a final appeal.

I do not think that anybody at that stage appreciated the far-reaching importance of the point which, in fact, has occupied most of the time taken in hearing the appeal and, indeed, counsel for the defendant had not originally, I think, thought that it would be necessary to refer the court to any authority on the point. With hindsight, it can be seen that it would have been preferable for the appeal to have been heard by a full court of three, but the general importance of the point at issue did not fully emerge until the second day of the hearing, by which time it was, for practical purposes, too late to interrupt the hearing and start the whole appeal again before a reconstituted court. We, accordingly, proceeded to hear the appeal, which we allowed as regards the costs of speaking to the minutes. No further question arises as to that.

The main part of the argument, however, was taken up with the other point at issue, namely the general costs of the action. The judge evidently took the view that, since the defendant had succeeded in establishing a claim to damages, albeit one which was equaled by the plaintiff's claim, the plaintiff, notwithstanding that he had in the main succeeded in the action, ought not to have the whole of his costs against the defendant. He accordingly ordered that the defendant pay to the plaintiff only half of the plaintiff's taxed costs of the action. That, of course, was an exercise of the judge's discretion which it would not ordinarily be easy for an appellant to challenge successfully, but the point at issue in the appeal, which I will elaborate more fully in a few moments, was whether he had exercised his discretion on a wrong principle inasmuch as he had declined to look at and take into consideration an offer of compromise made by the plaintiff before the trial, which was contained in a letter written in a form suggested by this court as being appropriate in matrimonial proceedings relating to financial provision. Counsel for the defendant succeeded in persuading us that, whatever may be the appropriate procedure adopted without argument by this court in matrimonial proceedings, we were bound by the authority of a powerful decision of this court (consisting of Lord Esher MR, Lindley and Bowen LJJ) to hold that it was not one which was generally available and that the judge was, therefore, right in principle in declining to take the offer into account when determining the question of costs (see ***Walker v Wilsher*** (1889) 23 QBD 335). We accordingly dismissed the appeal on this point.

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After the hearing, however, and before the order was drawn up, two things emerged. In the first place, it emerged that the question in issue had in fact been very recently considered by Sir Robert Megarry V.C, in a case to which we had not been referred, but which plainly would have influenced our decision if it had been known to us (see ***Computer Machinery Co Ltd v Drescher*** [1983] 3 All ER 153, [1983] 1 WLR 1379). Let me make it quite clear that I am not in the least blaming counsel for not drawing this decision to our attention. They could not, any more than could this court, have known of it because it was not in fact reported until the issue of the All England Law Reports published on the Friday following our decision. The second thing that emerged, as a result both of counsel's inquiries and of discussion with some of our colleagues more familiar than we are with practice in the Queen's Bench and Family Divisions, was that the use of the Family Division procedure, both in the Queen's Bench and Family Divisions (and, as it now appears, in the Chancery Division) was, in fact, very much more widespread than we had supposed and that it has been frequently sanctioned in this court in proceedings other than matrimonial proceedings although, apparently, without any challenge having been offered to it.

As a result of the publication of the report referred to, counsel for the plaintiff was very properly prompted to draw it to the court's attention and to inquire whether the court would require further argument and, in the circumstances, we thought it right to direct that the order should not be drawn up until the matter had been restored and consideration given to the question of whether the judgments delivered on 12 October should be withdrawn. As a result, we have now had the benefit of a much fuller argument than we had when the matter was first before us, and out attention has been directed to a number of authorities not previously cited which, it is argued, whilst they do not directly bear on the point in issue, should cause us to re-examine the view which we previously formed that we were bound by authority to come to the conclusion that we did. Having heard that fuller argument, we thought it right to direct that the judgments which we delivered on 12 October should, so far as this point is concerned, be withdrawn in any event, and we accordingly reserved judgment.

I turn, therefore, to a rather more detailed consideration of the relevant facts.

The trial, which lasted some 33 days, took place in the summer of 1981 and, as already indicated, resulted in the plaintiff successfully establishing the rights of access which he claimed in the action. At an earlier stage of the matter, that is to say in July 1979, there had been a motion (which in fact came before Fox LJ) the result of which was a consent order under which undertakings were given on the part of the defendant not to obstruct the access claimed by the plaintiff and undertakings were given on the part of the plaintiff with regard to the use of the access, undertakings which limited that use in a manner more favourable to the defendant than he has, in the event, been found to be entitled to demand. On 15 December 1980, with the trial impending, the plaintiff's solicitors wrote to the defendant's solicitors a letter in which they suggested that the action be compromised on terms which they there set out. This letter was headed 'Without Prejudice' and indicated that, after the failure of previous negotiations, their client had 'now instructed that we write without prejudice with further proposals'. It then set out a series of proposals for the settlement of the action and those proposals undoubtedly would in fact have been more beneficial to the defendant than the order which was finally made on the determination of the action. In particular, it suggested that the access as limited by the undertakings in the consent order should continue, that the plaintiff should pay the defendant a sum of £500 in respect of one of his claims to damages and that, subject to this, all other claims to damages on each side should be treated as cancelling each other out. Each side was to pay its own costs.

In effect, the plaintiff was offering to the defendant everything that the defendant got out of the action and, in fact, a little bit more, because, on the total sum of damages, the defendant was being offered £500 more than he actually got out of the action in which, as has been seen, the two sums of damages precisely cancel out. That letter goes on, after the setting out of the terms, as follows:

'Should the above proposals, as a whole, not recommend themselves to your clients, we would respectfully suggest that they give further consideration to those relating to damages. These are put forward to enable the real issue, that of access, to be dealt with more effectively, and in the event of this being unacceptable to your clients, we reserve the right to bring this letter to the notice of the Judge on the issue of costs.'

When, after judgment, the judge came to deal with the question of costs, counsel for the plaintiff sought to refer to this letter for the purpose of showing that, at least from the date at which the offer in the letter could

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reasonably have been accepted (which he put at 31 December 1980), this expensive action was totally unnecessary, since the defendant could then have got everything to which he was entitled without a contest. If the letter was admissible that argument was, I think, unanswerable. We have heard counsel for the defendant's submissions to the contrary but, speaking for myself, I have no doubt at all that, on that hypothesis, it almost inevitably followed that the plaintiff was entitled to his costs of the action from the date suggested. The judge, however, declined to look at the letter on the ground that, since it was marked 'Without Prejudice', he was precluded from taking it into consideration. It is that refusal which counsel for the plaintiff relies on as showing that the judge erred in principle in exercising his discretion as to costs in the way in which he did. In support of his contention that the correspondence could be referred to, he drew the judge's attention to two decisions of this court in matrimonial cases which have undoubtedly established the admissibility on questions of costs of letters in the form of the letter in this case in matrimonial proceedings concerned with financial provision for parties to and issue of marriage. It seems, however, that neither counsel was able to draw the judge's attention to any reported case in which the point had been dealt with in proceedings of any other type and the judge accepted the submission of counsel for the defendant that the practice was peculiar to the Family Division.

The first case on which counsel for the plaintiff relied was a decision of this court in ***Calderbank v Calderbank*** [1975] 3 All ER 333, [1976] Fam 93. That was a matrimonial dispute about what provision should be made for the parties under the provisions of ss 23 and 24 of the Matrimonial Causes Act 1973. There was also a summons before the court under s 17 of the Married Women's Property Act 1882. In an affidavit which was sworn on 10 August 1974 the wife had offered to transfer to the husband a house which was occupied by the husband's mother, which was then worth about £12,000, in return for his vacating the matrimonial home which she wanted to sell. He had refused the offer on the ground that it was not adequate for his needs. Heilbron J granted a declaration sought by the wife and ordered a lump sum payment of £10,000 for the husband out of the proceeds of sale of the matrimonial home. So it will be seen that, in fact, the husband got rather less out of this than he had been offered by the offer of 10 August, which would in fact have been worth £12,000 to him.

The question of costs came before this court and was dealt with in a judgment of Cairns LJ in which he said ([1975] 3 All ER 333 at 342, [1976] Fam 93 at 105): *'Before Heilbron J the wife's application for costs was based on a letter which had been written by the wife's solicitors to the husband's solicitors offering something substantially more than £10,000. Heilbron J, despite that letter being drawn to her attention, made no order as to costs. Immediately after the hearing before her it was discovered that that was a "without prejudice" letter and very properly at the opening of this part of the appeal counsel for the wife asked for the court's guidance whether in those circumstances he was entitled to rely on that letter. We formed the opinion that he was not. The letter was written without prejudice. The without prejudice bar had not been withdrawn and therefore we took the view that it was a letter which could not be relied on either before the judge at first instance or before this court. Counsel for the wife then indicated the difficulty that a party might be in in proceedings of this kind when he or she was willing to accede to some extent to an application that was made and desired to obtain the advantages that could be obtained in an ordinary action for debt or damages by a payment into court, that not being a course which would be appropriate in proceedings of this kind.'*

Cairns LJ then went on to consider how that difficulty might be got over and to suggest a formula which might be used in future cases to ensure that negotiations could be conducted without prejudice to the issue at the trial, but yet nevertheless be referred to after judgment when the question of costs came to be considered. He said: *'There are various other types of proceedings well known to the court where protection has been able to be afforded to a party who wants to make a compromise of that kind and where payment in is not an appropriate method. One is in proceedings before the Lands Tribunal where the amount of compensation is in issue and where the method that is adopted is that of a sealed offer which is not made without prejudice but which remains concealed from the tribunal until the decision on the substantive issue has been made and the offer is then opened when the discussion as to costs takes place. Another example is in the Admiralty Division where there is commonly a dispute between the owners of two vessels that have been in collision as to the apportionment of blame between them. It is common practice for an offer to be made by one party to another of a certain apportionment. If that is not accepted no reference is made to that offer in the course of the hearing until it comes to costs, and then if the court's apportionment is as favourable to the party who made the offer as what was offered, or more favourable to him, then costs will be awarded on the same basis as if there had been a payment in. I see no reason why some similar practice should not be adopted in relation to*

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such matrimonial proceedings in relation to financesas we have been concerned with. Counsel for the wife drew our attention to a provision in the Matrimonial Causes Rules 1968, SI 1968/219, with reference to damages which were then payable by a co-respondent, provision to the effect that an offer might be made in the form that it was without prejudice to the issue as to damages but reserving the right of the co-respondent to refer to it on the issue of costs. It appears to me that it would be equally appropriate that it should be permissible to make an offer of that kind in such proceedings as we have been dealing with and I think that that would be an appropriate way in which a party who was willing to make a compromise could put it forward. I do not consider that any amendment of the Rules of the Supreme Court is necessary to enable this to be done.'

Now, in fact, the letter in the *Calderbank* case was not in the form suggested by Cairns LJ and, indeed, the court did not take it into consideration. What had happened there was that the without prejudice offer had been repeated as an open offer in the affidavit referred to above and the costs were dealt with on the footing that the husband ought to have accepted that open offer. Thus, Cairns LJ's suggested procedure was dictum only and, as counsel for the defendant has observed, dictum without any argument in opposition. The procedure suggested is obviously a sensible and convenient one in a case where payment into court is not appropriate, and it is not, therefore, surprising to find that practitioners were quick to adopt it. In ***McDonnell v McDonnell*** [1977] 1 All ER 766, [1977] 1 WLR 34 a letter had been written in the suggested form (it has since become dignified by the title 'a **Calderbank letter**') and this court, again without any argument on the matter, accepted and indorsed the practice suggested by Cairns LJ.

I do not think that I need refer to that case in any detail. Ormrod LJ said ([1977] 1 All ER 766 at 769, [1977] 1 WLR 34 at 37): *'The important factor which distinguishes this case is the fact that the husband's solicitors took advantage of a recent decision of this court in* **Calderbank v Calderbank**. *On 16th December 1975, shortly after serving the notice of appeal, they wrote a letter to the wife's solicitors offering to withdraw the appeal altogether if the wife would agree to a modification of Lane J's order in respect of [the house]. In accordance with the procedure suggested in* **Calderbank v Calderbank**, *they headed the letter "Without Prejudice" but reserved the right to bring it to the attention of the court after judgment on the question of costs.'*

Then he considered the significance of the letter and said ([1977] 1 All ER 766 at 770, [1977] 1 WLR 34 at 38): *'Clearly this is a very important consideration in exercising the court's discretion with regard to costs. It would be wrong, in my judgment, to equate an offer of compromise in proceedings such as these precisely to a payment into court. I see no advantage in the court surrendering its discretion in these matters as it has to all intents and purposes done where a payment into court has been made. A* **Calderbank v Calderbank** *offer should influence but not govern the exercise of the discretion. The question to my mind is whether, on the basis of the facts known to the wife and her advisers and without the advantage of hindsight, she ought reasonably to have accepted the proposals in the letter of 16th December, bearing always in mind the difficulty of making accurate forecasts in cases such as this. On the other hand, parties who are exposed to the full impact of costs need some protection against those who can continue to litigate with impunity under a civil aid certificate.'*

Since the first hearing of this appeal a LEXIS search has been carried out, from which it emerges that the procedure has been resorted or referred to in a number of other reported cases, but always in relation to proceedings for financial provision in the Family Division (see, for instance, ***Potter v Potter*** [1982] 3 All ER 321, [1982] 1 WLR 1255); and counsel for the defendant draws particular attention to Cairns LJ's reference in the ***Calderbank*** case to the desirability of such a procedure in 'such proceedings as we have been dealing with' as indicating that he, at any rate, never envisaged the suggested procedure as having any wider application. He points out that the current editions of *Cross on Evidence* (5th edn, 1979) and *Phipson on Evidence* (13th edn, 1982) contain no mention of the ***Calderbank*** case at all, whilst 17 *Halsbury's Laws* (4th edn) para 213 states the general rule that a without prejudice letter cannot be referred to on a question of costs and then qualifies it by a footnote which suggests that the Calderbank letter is an exception restricted to 'matrimonial proceedings relating to finance'.

What counsel for the defendant particularly relies on, however, is the decision of this court in ***Walker v Wilsher*** (1889) 23 QBD 335. That was an appeal from Huddleston B, who had, on the question of costs, after trial looked at some without prejudice correspondence and made his order accordingly. That was attacked in the Court of Appeal, Lord Esher MR saying (at 336–337): *'The letters and the interview were without prejudice, and the question is whether under such circumstances they could be considered in order to determine whether there was*

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good cause or not for depriving the plaintiff of costs. It is, I think, a good rule to say that nothing which is written or said without prejudice should be looked at without the consent of both parties, otherwise the whole object of the limitation would be destroyed. I am, therefore, of opinion that the learned judge should not have taken these matters into consideration … '

Lindley LJ was equally uncompromising. He said (at 337): *'What is the meaning of the words "without prejudice"? I think they mean without prejudice to the position of the writer of the letter if the terms he proposes are not accepted. If the terms proposed in the letter are accepted a complete contract is established, and the letter, although written without prejudice, operates to alter the old state of things and to establish a new one. A contract is constituted in respect of which relief by way of damages or specific performance would be given. Supposing that a letter is written without prejudice then, according both to authority and to good sense, the answer also must be treated as made without prejudice.'*

A little later he said (at 338): *'No doubt there are cases where letters written without prejudice may be taken into consideration, as was done the other day in a case in which a question of laches was raised. The fact that such letters have been written and the dates at which they were written may be regarded, and in so doing the rule to which I have adverted would not be infringed. The facts may, I think, be given in evidence, but the offer made and the mode in which that offer was dealt with—the material matters, that is to say, of the letters—must not be looked at without consent.'*

Bowen LJ was equally adamant. He said (at 339): *'The precise question now before us, as to the admissibility of such evidence for the purpose of deciding as to the costs of an action could not have arisen before the Common Law Procedure Act, 1852. Up to then costs at common law always followed the event, and it naturally follows that there is no authority before that time on the point. Then comes the case before Kindersley, V.C., who did precisely what Huddleston, B., has done here [see* **Williams v Thomas** *(1862) 2 Drew & Sm 29, 62 ER 532]. I think there was a confusion of thought and reasoning in the judgment of the Vice-Chancellor which we ought not to hesitate to point out. The use that the defendant sought in that case to make of the offer which had been made without prejudice was to attract the attention of the Court to the conduct of the plaintiff upon receiving it. In my opinion it would be a bad thing and lead to serious consequences if the Courts allowed the action of litigants, on letters written to them without prejudice, to be given in evidence against them or to be used as material for depriving them of costs. It is most important that the door should not be shut against compromises, as would certainly be the case if letters written without prejudice and suggesting methods of compromise were liable to be read when a question of costs arose. The agreement that the letter is without prejudice ought, I think, to be carried out in its full integrity.'*

This, counsel for the defendant submits, is a clear authority, which is binding on this court, for the proposition that 'without prejudice' means 'without prejudice for all purposes' and that a letter once so marked cannot be referred to at any stage of the proceedings without the consent of both parties. Costs are, he submits, as much an issue in the proceedings as is anything else, and indeed the proposed compromise almost invariably relates to the costs of the proceedings as much as to the other matters in issue.

Counsel for the plaintiff accepts that this court is bound by ***Walker v Wilsher*** so far as it constitutes decision, although he categorises the wide remarks of the court as to the meaning of the words 'without prejudice' as dicta, but he submits that the case establishes no more than this, that where a letter is headed 'without prejudice' simpliciter, and no reservation is made by the writer similar to that made in the ***Calderbank*** case, it cannot be referred to on the question of costs. That, indeed, was accepted by the court in the ***Calderbank*** case. ***Walker v Wilsher***, he submits, tells us nothing about a letter of the ***Calderbank*** type which was not there in issue and indeed was not even contemplated in that case.

The answer of counsel for the defendant to this, and it was one which appealed to us when we first heard the matter, is that it is altogether too restricted a construction of the decision in ***Walker v Wilsher***.

The court was concerned with the question of whether the contents of a letter headed 'without prejudice' could be looked at at all, and the court decided that it could not, in other words the 'without prejudice' heading cast a veil, not over the date on which the letter was written or over the fact that it was written, but over the whole of the contents, which would, of course, include the purported unilateral reservation of the right to treat the letter as 'with prejudice' in a certain event. If you cannot refer to the letter at all, you cannot refer to and rely on a reservation contained in it, for that is a reservation which is, in terms, repugnant to the expressed nature of the letter itself. He refers particularly to Lord Esher MR's statement that to look at

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something written without prejudice would be to destroy 'the whole object of the limitation' and to Lindley LJ's clear opinion that 'the offer made and the mode in which that offer was dealt with—the material matters, that is to say, of the letters—must not be looked at without consent'.

Support for counsel for the defendant's view of the matter is, I think, to be gained from dicta in ***Re Daintrey, ex p Holt*** [1893] 2 QB 116, [1891–4] All ER Rep 209, a decision of a Divisional Court in Bankruptcy. The question at issue there was whether a particular letter could be relied on as an act of bankruptcy. The letter was one sent by a debtor to a creditor at a time when there was no dispute, headed 'without prejudice' and containing an offer of composition but threatening that payment would be suspended unless the offer was accepted. The court, in holding that the letter was admissible, relied on the fact that there was no dispute and no offer of compromise, so that the sender could not destroy the admissibility of the letter as evidence simply by heading the letter 'without prejudice', the protection afforded by that phrase being limited to negotiations for compromise. In giving the judgment of the court, however, Vaughan Williams J went on to observe obiter ([1893] 2 QB 116 at 120, [1891–4] All ER Rep 209 at 212): *'Moreover, we think that the rule has no application to a document which, in its nature, may prejudice the person to whom it is addressed. It may be that the words "without prejudice" are intended to mean without prejudice to the writer if the offer is rejected but, in our opinion, the writer is not entitled to make this reservation in respect of a document which, from its character, may prejudice the person to whom it is addressed if he should reject the offer, and for this reason also we think the judge is entitled to look at the document to determine its character.'*

Thus, counsel for the defendant argues, the plaintiff here is not only in a dilemma himself, but he puts the other party in a dilemma, for he says in one breath 'this is without prejudice' and in the next threatens to use the letter to the prejudice of the other if the offer is not accepted. The two stances are contradictory and, if what Vaughan Williams J said in ***Re Daintrey, ex p Holt*** is right, the recipient of the letter is entitled to write back and say: 'This is not a without prejudice at all. If you want to negotiate without prejudice, by all means let us do so, but you cannot have it both ways. If you wish to use your letter prejudicially against me, you must take your courage in both hands and treat the correspondence as open throughout.' If, however, he does not do that but accepts the letter for what its heading suggests it to be (that is a letter protected from disclosure at any stage of the proceedings), then, counsel for the defendant argues, the writer, whatever he says in the letter, cannot unilaterally claim to retract the protection which he himself has attached to it in using a formula which, since at latest 1889, has a fixed and well-understood meaning.

This argument was one from which, on the material before us at the first hearing of this appeal, I found it very difficult to escape, although counsel for the defendant had frankly to admit that the ***Calderbank*** case (which he has to say is contrary to previous authority) had created an anomaly in the Family Division for which it was very difficult to account. However, he took his stand on the 'sacred' nature of 'without prejudice' negotiation (see ***Hoghton v Hoghton*** (1852) 15 Beav 278 at 321, 51 ER 545 at 561 per Romilly MR) and the oft-reiterated statements that such negotiations are, as a matter of public policy, to be protected from disclosure to the court seised of the dispute (see ***Statesbury v Turner*** [1943] KB 370 following ***Walker v Wilsher***; and see also ***Tomlin v Standard Telephones and Cables Ltd*** [1969] 3 All ER 201 at 205–206, [1969] 1 WLR 1378 at 1385 per Ormrod J).

Now, it is certainly the case, and the contrary is not argued, that the use of the words 'without prejudice' as a cover for negotiations and with no reservation of the sort suggested in the *Calderbank* case has today the same consequences as it had in 1889 when *Walker v Wilsher* was decided. Thus, it cannot be contended that the meaning of the expression has changed. The answer to the question whether, accepting that meaning, it is yet open to a party taking advantage of the protection afforded by the use of the formula to qualify its operation must, I think, therefore be sought in an analysis of the underlying basis for the protection and the practice of the courts generally in relation to its application. As to this the argument of counsel for the defendant may, I think, be summarised conveniently in three propositions. (1) The protection from disclosure of without prejudice negotiations rests in part on public policy and in part on convention (ie an express or implied agreement that the negotiations shall be so protected). (2) There is no public policy which precludes a conventional modification of the protection to the extent suggested in ***Calderbank v Calderbank***. (3) The actual practice adopted in all divisions of the High Court shows that this conventional modification

has been generally accepted and is recognised by the courts and to that extent at least public policy has been modified.

That the rule rests, at least in part, on public policy is clear from many authorities, and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should, as it was expressed by Clauson J in ***Scott Paper Co v Drayton Paper Works Ltd*** (1927) 44 RPC 151 at 157, be encouraged freely and frankly to put their cards on the table. If, however, the protection against disclosure rested solely on a public policy to encourage out-of-court settlement of disputes, ***Walker v Wilsher*** is not readily intelligible, for, although the court, and in particular Bowen LJ, seem to have been prepared to assume that an inability to refer to the correspondence on a question of costs, after judgment, would encourage settlement, it is difficult to see, if one thinks about it practically, how that could do so. As a practical matter, a consciousness of a risk as to costs if reasonable offers are refused can only encourage settlement, whilst, on the other hand, it is hard to imagine anything more calculated to encourage obstinancy and unreasonableness than the comfortable knowledge that a litigant can refuse with impunity whatever may be offered to him even if it is as much as or more than everything to which he is entitled in the action. 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.

It was expressed thus by Romilly MR in ***Jones v Foxall*** (1852) 15 Beav 388 at 396, 51 ER 588 at 591): *'… I find that the offers were, in fact, made* without prejudice *to the rights of the parties; and I shall, as far as I am able, in all cases, endeavour to repress a practice which, when I was first acquainted with the profession, was never ventured upon, but which, according to my experience in this place, has become common of late—namely, that of attempting to convert offers of compromise into admissions of acts prejudicial to the person making them. If this were permitted, the effect would be that no attempt to compromise a dispute could ever be made.'*

Once, however, the trial of the issues in the action is at an end and the matter of costs comes to be argued, this can have no further application for there are no further issues of fact to be determined on which admissions could be relevant. One is, therefore, compelled to seek some additional basis for the decision in *Walker v Wilsher* and it is, as it seems to me, to be found in an implied agreement imported from the marking of a letter 'without prejudice' that it shall not be referred to at all. This certainly derives some support from the judgment of Bowen LJ, where he says (23 QBD 335 at 339) that 'the agreement that the letter is without prejudice ought, I think, to be carried out in its full integrity', and it accords with the view expressed by Denning LJ in ***Rabin v Mendoza & Co*** [1954] 1 All ER 247 at 248, [1954] 1 WLR 271 at 273 where he said: *'It is said, however, that apart from legal professional privilege, there is a separate head of privilege on the ground that the documents came into existence on the understanding that they were not to be used to the prejudice of either party. "Without prejudice" does not appear as a head of privilege in the ANNUAL PRACTICE, but in BRAY ON DISCOVERY ((1885) p 308) it is said: "The right to discovery may under very special circumstances be lost by contract as where correspondence passed between the parties' solicitors with a view to an amicable arrangement of the question at issue in the suit on a stipulation that it should not be referred to or used to the defendant's prejudice in case of a failure to come to an arrangement." That proposition is founded on* **Whiffen *v.* Hartwright** *((1848) 11 Beav 111 at 112, 50 ER 759), where LORD LANGDALE, M.R., refused to order the production of letters which passed without prejudice, "observing, that he did not see how the plaintiff could get over this express agreement, though he by no means agreed, that the right of discovery was limited to the use which could be made of it in evidence." LORD LANGDALE M.R., there affirms the undoubted proposition that production can be ordered of documents even though they may not be admissible in evidence. Nevertheless, if documents come into being under an express, or, I would add, a tacit, agreement that they should not be used to the prejudice of either party, an order for production will not be made.'*

Whatever may have been the position in 1889, it is, I think, clear that there can now no longer be said to be any reason in public policy why, where offers have been made and refused of everything which could be obtained by the proceedings, that fact should not be brought to the court's attention in the argument as to costs. I say that in the light of the matters which are referred to below. If this is right, then is there any logical

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reason why, in appropriate circumstances, the conventional meaning of the phrase should not be modified so long as this intended modification is clearly expressed and brought to the attention of the recipient? Is there, to put it another way, any policy of the law which prevents a party to litigation from putting forward an offer of correspondence on the footing that it shall be treated as without prejudice on the issue of liability only? Counsel for the plaintiff submits that there clearly is not and he draws attention to numerous examples of closely analogous procedures which have been sanctioned and recognised in proceedings where no payment into court is appropriate. To begin with, the procedure established by the Rules of the Supreme Court since 1933 for payment into court in the case of actions for debt or damages, where the fact of payment in is withheld from the court until after liability has been determined, is neither more nor less than a without prejudice offer of settlement subject to a reservation that the offer will be brought to the court's attention when the issue of liability has been determined. The only essential difference is that it is backed up by a deposit with the court of the amount offered. Thus, counsel for the plaintiff submits, it is really unarguable that there is any public policy which prevents exactly the same thing being done, in a case where a money payment is not, or is not alone, the relief claimed in the proceedings. And one finds that, in fact, similar procedures have been adopted in many cases where the defendant is not able to protect his position by a payment in or where a payment in is not appropriate. Perhaps the most striking example is that of the sealed offer in arbitration proceedings. Counsel for the plaintiff has referred us to the decision of Donaldson J in ***Tramountana Armadora SA v Atlantic Shipping Co SA*** [1978] 2 All ER 870 esp at 876, where he said: *'Although the respondents' offer of settlement has been referred to as an "open offer", this is a misnomer. Offers of settlement in arbitral proceedings can be of three kinds, namely "without prejudice", "sealed" and "open". A "without prejudice" offer can never be referred to by either party at any stage of the proceedings, because it is in the public interest that there should be a procedure whereby the parties can discuss their differences freely and frankly and make offers of settlement without fear of being embarrassed by these exchanges if, unhappily, they do not lead to a settlement. A "sealed offer" is the arbitral equivalent of making a payment into court in settlement of the litigation or of particular causes of action in that litigation. Neither the fact, nor the amount, of such a payment into court can be revealed to the judge trying the case until he has given judgment on all matters other than costs. As it is customary for an award to deal at one and the same time both with the parties' claims and with the question of costs, the existence of a sealed offer has to be brought to the attention of the arbitrator before he has reached a decision. However, it should remain sealed at that stage and it would be wholly improper for the arbitrator to look at it before he has reached a final decision on the matters in dispute other than as to costs, or to revise that decision in the light of the terms of the sealed offer when he sees them.'*

That case is a striking one because the sealed offer there made was in fact preceded by a correspondence containing the same offer, so that the sealed offer served precisely the same effect as a ***Calderbank*** letter. This case was followed and applied by Ralph Gibson J in ***Archital Luxfer Ltd v Henry Boot Construction Ltd*** [1981] 1 Lloyd's Rep 642 at 654–655.

Now, an arbitrator has the same discretion as to costs as a High Court judge (see ***Statesbury v Turner*** [1943] KB 370) and counsel for the plaintiff asks rhetorically why, if this procedure is unexceptionable in arbitrations, should it be incapable of application in proceedings in the High Court. In fact, the 'arbitration letter' or sealed offer dates back at least to compulsory arbitrations under the Lands Clauses Acts and has been formally recognised as appropriate in compensation cases under the Lands Tribunal Rules.

Again, a procedure almost identical to the ***Calderbank*** letter has, for a considerable time, been recognised and accepted in Admiralty cases, and our attention has been drawn to the following passage in McGuffie Fugeman and Gray Admiralty Practice (1964) pp 325–326, paras 717–718: *'Where a claim is for an unliquidated sum, negotiations for settlement are based not on tender but on offers to pay. Offers to pay must not be disclosed or pleaded, even if the amount offered has been paid into Court [there follows a reference to RSC Ord 22, r 7] … Another form of offer which is often made is directed to proportions of blame and not to amounts of money, this being confined to collisions and similar actions where proportions of blame are at stake. At the conclusion of the trial of liability, the offer is brought to the attention of the judge if the offerer has been as successful or more successful than foreshadowed in his offer … '*

Thus, here, the only difference between the offer envisaged and the ***Calderbank*** letter is that the offer is an open offer not expressed to be without prejudice but one which is, by practice and convention, treated in

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exactly the same way as if it were so expressed, save when it comes to the question of costs after liability has been established.

Yet another example of a similar procedure, again where payment into court is inappropriate, is to be found in RSC Ord 16, r 10, where a third party or joint tortfeasor makes an offer of contribution to a particular extent. Even if he reserves the right to bring the offer to the attention of the court, he is not permitted to do so until the question of liability has been determined.

Finally, counsel for the plaintiff draws attention to the former provision referred to by Cairns LJ in ***Calderbank v Calderbank***, namely that of r 50 of the Matrimonial Causes Rules 1968, which empowered a co-respondent in effect to make a ***Calderbank*** offer in respect of damages on the footing that it would be referred to only on the question of costs.

Now, all this shows, counsel for the plaintiff (and, I am bound to say, I think rightly) submits, that there is no reason in principle why the ***Calderbank*** procedure should be treated as restricted only to matrimonial proceedings or why it should be held to be ineffective or unavailable when it differs in form only, though not at all in substance, from similar procedures long recognised and accepted in relation to other types of proceedings. If, he argues, the only impediment is what has come to be regarded as the conventional effect of the use of the words 'without prejudice', the result of the practice of all divisions of the court since ***Calderbank v Calderbank*** has been that that conventional effect is accepted and recognised as modified to the extent that an offeror is, by the express terms of his offer, entitled to reserve his position after the issue of liability has been determined. It is here, I think, that the actual practice of the courts over the years which have elapsed since the ***Calderbank*** case becomes of importance. It has been brought to our attention that letters in this form have been in frequent use in the Queen's Bench Division in cases where a payment into court would not be appropriate, for instance where what is in issue is not liability but the proportions of contribution to liability (eg in cases where a defence of contributory negligence is raised), and in the Court of Appeal, where what is in issue is whether a judgment for damages in the court below was excessive. Although we have not been referred to any reported case in this court (other than a matrimonial case) where the procedure has been approved, we understand that its use in proceedings other than matrimonial proceedings has, in at least one case in this court, received the approval of Lord Denning MR, and counsel for the plaintiff has been good enough to tell us that inquiry of practitioners in both the Queen's Bench and Chancery Divisions indicates that the procedure is frequently resorted to there. Counsel for the defendant does not quarrel with this, but takes his stand on ***Walker v Wilsher*** and submits that the mere fact that a procedure has become common when it has been allowed to pass without argument cannot alter the fact that it is contrary to authority.

I do not, for my part, think that that is a conclusive answer for, if the protection of without prejudice correspondence as regards costs rests, as I believe that it does, on the conventional import of the words, a wide and continued practice adopted and recognised, albeit without challenge, in all divisions of the court may show, and, I think does show, that the conventional meaning has become capable of modification where express reservation is made at the time of the offer without infringing the public policy which protects negotiations from disclosure whilst liability is still in issue.

That brings me to the recently reported decision of Sir Robert Megarry V-C in ***Computer Machinery Co Ltd v Drescher*** [1983] 3 All ER 153 at 156, [1983] 1 WLR 1379 at 1382–1383. The Vice-Chancellor said: *'For reasons that will appear, I think that I should pause in my recital of the facts in order to say something about these two cases. For a long while it has been settled law that if letters written "without prejudice" do not result in an agreement, they cannot be looked at by the court even on the question of costs, unless both parties consent: see, for example,* **Walker v Wilsher** *(1889) 23 QBD 335;* **Stotesbury v Turner** *[1943] KB 370. Thus if in "without prejudice" correspondence a defendant offers less than the plaintiff is claiming but more than the plaintiff ultimately recovers at the trial, the defendant cannot use his offer in support of a contention that the plaintiff should receive no costs for the period subsequent to the offer. If the claim is purely a money claim, this causes no difficulty: the defendant may pay into court under RSC Ord 22 the sum that he is offering, and although knowledge of this will be withheld from the court until both liability and quantum have been decided, the fact of payment in is admissible, and usually highly relevant, in deciding what order for costs should be made. If, however, the claim is not solely a money claim, but some other relief is sought, such as an injunction, there was formerly no comparable procedure. What was needed was some procedure*

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whereby the defendant could make an offer to submit to an injunction, give an undertaking or afford other relief on the footing that the offer would be without prejudice until the case was decided but with prejudice when it came to costs. It was a procedure of this type which was suggested by Cairns LJ in **Calderbank v Calderbank** *[1975] 3 All ER 333 at 342, [1976] Fam 93 at 105–106 and was acted on in* **McDonnell v McDonnell** *[1977] 1 All ER 766 at 770, [1977] 1 WLR 34 at 38. These were both matrimonial appeals from the Family Division, however, and there has been some uncertainty whether the procedure applies to other cases. Thus 17* Halsbury's Laws *(4th edn) para 213 cites* **Calderbank v Calderbank** *for the proposition that "in matrimonial proceedings relating to finance" a party may make this type of offer, and the 1983 cumulative supplement leaves it there. Nor do the cases appear to have been given the prominence which they deserve. Thus leading books which discuss offers made "without prejudice" still leave unamended statements based on* **Walker v Wilsher** *(1889) 23 QBD 335, without any mention of either* **Calderbank** *or* **McDonnell***: see, for example,* Phipson on Evidence *(13th edn, 1982) p 374;* Cross on Evidence *(5th edn, 1979) p 301. Nor are the cases mentioned in* The Supreme Court Practice 1982*. In my view, the principle in question is one of perfectly general application which is in no way confined to matrimonial cases. Whether an offer is made "without prejudice" or "without prejudice save as to costs", the courts ought to enforce the terms on which the offer was made as tending to encourage compromise and shorten litigation; and the latter form of offer has the added advantage of preventing the offer from being inadmissible on costs, thereby assisting the court towards justice in making the order as to costs. I should say at once that no point on this arises for decision, as the parties have very sensibly acted on this footing. What I have been saying is as obiter as what Cairns LJ said (and Scarman LJ and Sir Gordon Willmer concurred with) in* **Calderbank v Calderbank***; but I hope that the attention of the profession (including authors and editors) will be more generally directed to what seems to me to be a valuable procedural process that is too little used.'*

That, of course, was dictum, not decision, and, counsel for the defendant submits, suffers from the same defect as ***Calderbank v Calderbank*** itself, namely that it was dictum pronounced without there being before the court any argument against the proposition.

Nevertheless, it is extremely powerful dictum and, moreover, dictum which embraces a consideration of ***Walker v Wilsher***, which is counsel for the defendant's sheet-anchor. It is, of course, not binding on us, but it has, I think, the importance that it further confirms the width of the practice and general acceptance of the permissibility and effectiveness of the qualification on the accepted meaning of the without prejudice formula to which I have referred above.

That practice had, in fact, previously been recognised (although again without contest) in the Chancery Division in ***Re D (J)*** [1982] 2 All ER 37 at 51, [1982] Ch 237 at 255, where a letter of offer was taken into account on the question of costs. Although it does not appear from the report, counsel for the plaintiff was able to tell us that he had ascertained from counsel engaged in the case that it was, in fact, a ***Calderbank*** offer.

Although, as I have said, I was originally persuaded by the argument of counsel for the defendant that Foster J was right to reject the letter of offer in this case, the further argument which we have heard and the considerations to which I have adverted above have compelled me to the conclusion that that decision was wrong. I think that it must now be taken to be established that the ***Calderbank*** formula suggested by Cairns LJ is not restricted to matrimonial proceedings but is available in all cases where what is in issue is something more than a simple money claim in respect of which a payment into court would be the appropriate way of proceeding. I have not, in saying this, overlooked the submission of counsel for the defendant that, whatever may be the position today, Foster J was right to reach the conclusion that he did in 1981, there being before him no suggestion that the practice had spread beyond the Family Division, where, it must be accepted, there are considerations which make such a procedure particularly desirable and appropriate. In my judgment, however, quite apart from the dictum of Sir Robert Megarry V-C, to which reference has been made, the admissibility of the letter with which this appeal is concerned would have been justified at the time of the hearing before the judge if he had had addressed to him the arguments which have been addressed to us. In the circumstances, he should, in my judgment, have admitted the letter and his failure to do so entitles the plaintiff to succeed in this court. I would, therefore, allow the appeal and vary the order as to costs below by providing that the plaintiff should have half his costs of the action up to 31 December 1980 and the whole of his costs thereafter.

I would add only one word of caution. The qualification imposed on the without prejudice nature of the *Calderbank* letter is, as I have held, sufficient to enable it to be taken into account on the question of costs; but it should not be thought that this involves the consequence that such a letter can now be used as a substitute for a payment into court, where a payment into court is appropriate. In the case of the simple money claim, a defendant who wishes to avail himself of the protection afforded by an offer must, in the ordinary way, back his offer with cash by making a payment in and, speaking for myself, I should not, as at present advised, be disposed in such a case to treat a ***Calderbank*** offer as carrying the same consequences as payment in.

FOX LJ.

The issue is whether a letter of 15 December 1980 written by the plaintiff's solicitors to the defendant's solicitors and communicating suggested terms of compromise can, after judgment in the action, be referred to on the question of costs and against the wishes of the defendant. The letter was headed 'Without prejudice'. After stating the proposed terms, the letter added: 'and in the event of this being unacceptable to your clients we reserve the right to bring this letter to the notice of the judge on the question of costs.' Foster J refused to admit the letter.

I start with ***Walker v Wilsher*** (1889) 23 QBD 335. It was decided in this court in 1889 and its authority has never been questioned. It was a straightforward case of an offer of terms of compromise made 'without prejudice' and with no further qualification. The letters containing the offer were held not to be admissible on the question of costs.

Lord Esher MR said (at 337): *'It is, I think, a good rule to say that nothing which is written or said without prejudice should be looked at without the consent of both parties, otherwise the whole object of the limitation would be destroyed.'*

Lindley LJ said (at 337) that the words 'without prejudice' meant 'without prejudice to the position of the writer of the letter if the terms he proposes are not accepted', but that 'according both to authority and good sense, the answer also must be treated as made without prejudice'.

And Bowen LJ said (at 339): *'… it would be a bad thing and lead to serious consequences if the Courts allowed the action of litigants, on letters written to them without prejudice, to be given in evidence against them or to be used as material for depriving them of costs. It is most important that the door should not be shut against compromises, as would certainly be the case if letters written without prejudice and suggesting methods of compromise were liable to be read when a question of costs arose.'*

Re Daintrey, ex p Holt [1893] 2 QB 116, [1891–4] All ER Rep 209 was a bankruptcy case in which it was held that a 'without prejudice' letter was admissible as evidence to prove an act of bankruptcy. Vaughan Williams J, giving the judgment of the Divisional Court, after observing that the 'without prejudice' rule was a rule adopted to enable disputants 'without prejudice' to engage in discussion for the purpose of arriving at terms of peace, went on to say ([1893] 2 QB 116 at 120, [1891–4] All ER Rep 209 at 212): *'Moreover, we think that the rule has no application to a document which, in its nature, may prejudice the person to whom it is addressed. It may be that the words "without prejudice" are intended to mean without prejudice to the writer if the offer is rejected; but, in our opinion, the writer is not entitled to make this reservation in respect of a document which, from its character, may prejudice the person to whom it is addressed if he should reject the offer … '*

Those cases, I think, emphasise two things. First, that the purpose of the rule is to facilitate a free discussion of compromise proposals by protecting the proposals and discussion from disclosure in the proceedings. The ultimate aim appears to be to facilitate compromise.

Second, whilst the ordinary meaning of 'without prejudice' is without prejudice to the position of the offeror if his offer is refused, it is not competent to one party to impose such terms on the other in respect of a document which, by its nature, is capable of being used to the disadvantage of that other. The expression must be read as creating a situation of mutuality which enables both sides to take advantage of the 'without prejudice' protection.

The juridical basis of that must, I think, in part derive from an implied agreement between the parties and in part from public policy. As to the former, Bowen LJ in ***Walker v Wilsher***, after the passage which I have already cited to the effect that it is important that the door should not be shut against compromises, went on to say (23 QBD 335 at 339): *'The agreement that the letter is without prejudice ought, I think, to be carried out in its full integrity.'*

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As to public policy it obviously is desirable to facilitate compromise rather than forcing the parties to litigate to the end. But to achieve a compromise one of them has to make an offer. He might be apprehensive that his offer might be used against him if the negotiations failed. So he would make his offer without prejudice to his position if the offer was refused. But that was unfair to the other party. It was one-sided. So it was necessary to extend the without prejudice umbrella to cover both parties.

I come then to ***Calderbank v Calderbank*** [1975] 3 All ER 333, [1976] Fam 93, the case which has given its name to the 'Calderbank offer' (ie the kind of qualified 'without prejudice' offer with which we are concerned in this case). In fact, one thing that was quite absent from ***Calderbank v Calderbank*** was a Calderbank offer. There seem to have been two offers in the case as reported. The first was contained in a letter which was an unqualified without prejudice letter. The second was in an affidavit and was an open offer. The proposition that the letter could be referred to on the question of costs was no more capable of argument than the proposition that the affidavit could not. The Court of Appeal rejected the letter and decided the matter on the affidavit. Counsel, however, asked the court for some guidance as to the course to be followed in matrimonial proceedings for financial provision when a party decided to accede to some extent to proposals and desired to obtain the advantages that could be obtained in an ordinary action for debt or damages by a payment into court. It was in these circumstances that Cairns LJ, after referring to the Admiralty and Lands Tribunal procedure, said that it would be appropriate for the offer to be made in the form that it was without prejudice as to the issues but reserving the right to refer to it on costs. This statement was, however, entirely obiter. The question of the effect in law of a ***Calderbank*** offer was not an issue in the case at all.

The decision of the Court of Appeal in ***McDonnell v McDonell*** [1977] 1 All ER 766, [1977] 1 WLR 34 takes the matter no further. The court, it is true, accepted an offer in the ***Calderbank*** form as being valid, but there is nothing to suggest that the matter was in issue or the subject of any argument.

We have not been referred to any case where the precise question with which we are concerned in this case has been an issue between the parties and has been adjudicated on. We must, therefore, consider the matter on principle. The substantial difficulty in the defendant's way can be put thus. Here is a letter headed 'Without prejudice'. ***Walker v Wilsher*** an authority binding on the Court of Appeal, determines that, the offer having been refused, such a letter cannot be referred to on the question of costs after the trial. It is said, however, that the letter is not really 'without prejudice' at all in the ***Walker v Wilsher*** sense; it is only partially so because the plaintiff chose to restrict its operation by the concluding provision about reference to costs. But that gives rise to the question whether the plaintiff was entitled to pick and choose in that way. The rule is concerned with offers. The use of the formula protects both parties from reference to the offer if it is refused. The reason why the words 'without prejudice' had to be given the extended meaning 'without prejudice to the position of either party if the offer is refused' was because the offeror was not entitled to impose one-sided terms which might prejudice the offeree if the offer was rejected. That, I think, is evident from the judgment in ***Re Daintrey, ex p Holt*** and also from the judgment of Lindley LJ in ***Walker v Wilsher.*** The qualification that the offeror is to be quite free to refer to the offer on the question of costs so far from being without prejudice, however, may be highly prejudicial to the offeree. Certainly that could be so in a case like the present where we are concerned with the costs of a 33-day action in the High Court. It is said, therefore, that it was not competent to the plaintiff to make an offer in the terms which he did.

When the matter was first before us that approach seemed to me to be correct. We have now, however, had the advantage of much further argument and much more information about the practice in all divisions of the High Court and I think it is necessary to look at the matter afresh.

I will consider first the question of policy. ***Walker v Wilsher***, there is no doubt, proceeds on a policy consideration, namely that the compromise of disputes should be facilitated. Now, an offer of compromise in the ***Calderbank*** form is not, so far as the substantive issues in the action are concerned, an inhibition on compromise. Down to judgment, the proposal for compromise cannot be referred to. The matter only arises on the question of costs after the issues have been decided. As to that, I am not convinced that the reservation as to costs would inhibit a reasonable compromise. If a party is exposed to a risk as to costs if a reasonable offer is refused, he is more rather than less likely to accept the terms and put an end to the litigation. On the other hand, if he can refuse reasonable offers with no additional risk as to costs, it is more rather than less likely to encourage mere stubborn resistance.

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Furthermore, the existing practice, both under the Rules of the Supreme Court and other procedures, are difficult to reconcile with the existence of any public policy objection to the ***Calderbank*** type of offer.

Thus, the procedure under the rules of court for payment into court in cases where a debt or damages are claimed is, in effect, a ***Calderbank*** procedure, since the fact of the payment into court cannot be referred to until the issue of liability has been determined. It then becomes material on the question of costs. Other examples are the 'sealed offer' in arbitration proceedings (see ***Tramountana Armadora SA v Atlantic Shipping Co SA*** [1978] 2 All ER 870) and in Lands Tribunal proceedings (referred to by Cairns LJ in ***Calderbank v Calderbank*** and also the Admiralty procedure in apportionment disputes in collision cases (also referred to by Cairns LJ in ***Calderbank v Calderbank****)*. The sealed offer is not a new procedure: it seems to date back to practice adopted in compulsory arbitrations under the Lands Clauses Acts.

In the circumstances, I do not think that we would be justified in rejecting ***Calderbank*** offers on grounds of public policy. In principle, they are more likely to fulfil than to frustrate the public policy of facilitating compromises. And we have no reason to suppose that, in the various jurisdictions to which I have referred where something akin to the *Calderbank* offer has been operated over a substantial period, the practice has been found to be in any way unsatisfactory or that any criticism of it has developed.

There remains, however, the problem of the effect which, on the authority of ***Walker v Wilsher***, attaches to the words 'without prejudice'. That, as I have indicated, derives, in my view, from two sources: public policy and an implied agreement that the words are to have a particular effect. The question of public policy I have dealt with. As regards the conventional basis (ie agreement) that depends on what, by implication, is to be attributed to the words 'without prejudice'. It appears from what we are now told by counsel that the practice of making offers in the ***Calderbank*** form is by no means limited to the Family Division (where it was adopted after the decision in ***Calderbank v Calderbank****)* but is used in both the Queen's Bench and the Chancery Divisions to a considerable extent. Counsel for the plaintiff, as I understood him, found on inquiry that the practice in the Chancery Division was now more widespread than he had previously supposed. It seems also to be in use to some extent in the Court of Appeal where the dispute concerns the quantum of damages awarded in the court below. It is clear, therefore, that there has, over the years, developed a substantial body of practice adopting the ***Calderbank*** form or something very similar to it. It seems to me that, if the practice is valid, there is no reason for restricting it to the Family Division (though it was in relation to certain Family Division proceedings that Cairns LJ recommended it in ***Calderbank v Calderbank****)*. Logically, it should then be of universal application, as was indeed the view of Sir Robert Megarry V-C in ***Computer Machinery Co Ltd v Drescher*** [1983] All ER 153, [1983] 1 WLR 1379.

In the end, I think that the question of what meaning is given to the words 'without prejudice' is a matter of interpretation which is capable of variation according to usage in the profession. It seems to me that, no issue of public policy being involved, it would be wrong to say that the words were given a meaning in 1889 which is immutable ever after, bearing in mind that the precise question with which we are concerned in this case did not arise in *Walker v Wilsher* and the court did not deal with it. I think that the wide body of practice which undoubtedly exists must be treated as indicating that the meaning to be given to the words is altered if the offer contains the reservation relating to the use of the offer in relation to costs.

On the further argument which we have now heard I would, for the above reasons, and contrary to my original view of the matter, allow the appeal and make the order proposed by Oliver LJ. I should add that I agree with the concluding observations in his judgment as to attempts to use the ***Calderban****k* form as a substitute for payment into court in the case of a simple money claim.

Appeal allowed. Leave to appeal to the House of Lords refused.

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