Greater London Council v Rush & Tompkins Ltd [1988] ADR.L.R. 11/03

Before Lords Bridge, Brandon, Griffiths, Oliver and Goff. House of Lords. 3rd November 1988

LORD BRIDGE OF HARWICH : My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Griffiths. I agree with it and, for the reasons he gives, I would allow the appeal.

LORD BRANDON OF OAKBROOK : My Lords, For the reasons given by my noble and learned friend Lord Griffiths I would allow the appeal.

LORD GRIFFITHS : My Lords, This appeal raises a novel point on the right to discovery of documents. It arises out of a dispute under a building contract in the following circumstances. The appellants, Rush and Tompkins Ltd., entered into a building contract in December 1971 with the Greater London Council (G.L.C.) to build 639 dwellings on the Hartwell Estate in Ealing. In January 1973 Rush and Tompkins engaged the respondents, P. J. Carey Plant Hire (Oval) Limited, as sub-contractors to carry out ground works required under the main contract.

The completion of the contract was subject to much disruption and delay and between June 1976 and January 1979 Careys put in claims for loss and expense to Rush and Tompkins.

Rush and Tompkins for their part maintained that they were entitled to be reimbursed by the G.L.C. in respect of these claims for loss and expense under the sub-contract. It appears that the G.L.C. would not agree Carey's claim and consequently Rush and Tompkins would not pay it. Eventually in order to resolve the deadlock Rush and Tompkins commenced proceedings in August 1979 against the G.L:C. as first defendant and Careys as second defendant in which they claimed an inquiry into the loss and expenses to which Careys were entitled under the sub-contract and a declaration that they were entitled to be reimbursed that sum by the G.L.C.

However, before these proceedings came to trial Rush and Tompkins entered into a compromise with the G.L.C. on 12 October 1981 in which Rush and Tompkins accepted the sum of £1,200,000 in settlement of all outstanding claims under the main contract. It was a term of this settlement that Rush and Tompkins would accept direct responsibility for all the subcontractors' claims. This settlement embraced matters which ranged far beyond those raised in the action with which this appeal is concerned. Rush and Tompkins then discontinued the action against the G.L.C..

The terms of this settlement were disclosed to Careys but the settlement did not show what valuation had been put upon Carey's claim in arriving at the global settlement of £1,200,000.

The action then went to sleep but eventually it awoke and Careys added a counterclaim to recover their loss and expense which they quantified at £150,582.86. In their statement of claim Rush and Tompkins had pleaded that the architect had withheld consent to the settlement of Carey's claim and that the G.L.C. had stated in writing that the claim did not exceed a value of approximately £10,000. So on the face of it the gap between the parties was very wide.

Careys, however, believed that in the negotiations between Rush and Tompkins and the G.L.C. documents must have come into existence which showed the basis upon which Carey's claim was valued for the purpose of the global settlement and they suspected that they might show that the figure was very much larger than the sum of £10,000 which had been alleged as the value of the claim in the statement of claim

Rush and Tompkins admit that there are such documents and that they relate to the issues in the action, presumably because they cast light on the value of Carey's claim, but they maintain that Careys are not entitled to discovery of these documents because they came into existence for the purpose of settling the claim with the G.L.C. and are thus protected from discovery by the "without prejudice rule."

Careys took out a summons for the specific discovery of this without prejudice correspondence but the official referee, Judge Esyr Lewis Q.C., accepted the argument of the main contractors and refused discovery. The Court of Appeal reversed his decision and ordered discovery of the without prejudice correspondence passing between Rush and Tompkins and the G.L.C. holding that the protection given by the without prejudice rule ceased once a settlement had been reached.

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 L.J. 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. I cannot therefore agree with the Court of Appeal that the problem in the present case should be resolved by a linguistic approach to the meaning of the phrase "without prejudice." I believe that the question has to be looked at more broadly and resolved by balancing two different public interests namely the public interest in promoting settlements and the public interest in full discovery between parties to litigation.

Nearly all the cases in which the scope of the without prejudice rule has been considered concern the admissibility of evidence at trial after negotiations have failed. In such circumstances no question of discovery arises because the parties are well aware of what passed between them in the negotiations.. 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. Thus the without prejudice material will be admissible if the issue is whether or not the negotiations resulted in an agreed settlement, which is the point that Lindley L.3. was making in **Walker v Wilsher** (1889) 23 Q.B.D. 335 and which was applied in **Tomlin v Standard Telephones and Cables Ltd.** [1969 1 W.L.R. 1378. The court will not permit the phrase to be used to exclude an act of bankruptcy: see **In re Daintrey, Ex Parte Holt** [1893] 2 Q.B. 116 nor to suppress a threat if an offer is not accepted: see **Kitcat v Sharp** (1882) 48 L.T. 64. In certain circumstances the without prejudice correspondence may be looked at to determine a question of costs after judgment has been given: see **Cutts v Head** [1984] Ch. 290. 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.

I cannot accept the view of the Court of Appeal that **Walker v Wilsher** is authority for the proposition that if the negotiations succeed and a settlement is concluded the privilege goes, having served its purpose. In **Walker v Wilsher** the Court of Appeal held that it was not permissible to receive the contents of a without prejudice offer on the question of costs and no question arose as to

the admissibility of admissions made in the negotiations in any possible subsequent proceedings. There are many situations when parties engaged upon some great enterprise such as a large building construction project must anticipate the risk of being involved in disputes with others engaged on the same project. Suppose the main contractor in an attempt to settle a dispute with one sub-contractor made certain admissions it is clear law that those admissions cannot be used against him if there is no settlement. The reason they are not to be used is because it would discourage settlement if he believed that the admissions might be held against him. But it would surely be equally discouraging if the main contractor knew that if he achieved a settlement those admissions could then be used against him by any other sub-contractor with whom he might also be in dispute. The main contractor might well be prepared to make certain concessions to settle some modest claim which he would never make in the face of another far larger claim. It seems to me that if those admissions made to achieve settlement of a piece of minor litigation could be held against him in a subsequent major litigation it would actively discourage settlement of the minor litigation and run counter to the whole underlying purpose of the without prejudice rule. I would therefore hold that as a general rule the without prejudice rule renders inadmissible in any subsequent litigation connected with the same subject matter proof of any admissions made in a genuine attempt to reach a settlement. It of course goes without saying that admissions made to reach settlement with a different party within the same litigation are also inadmissible whether or not settlement was reached with that party.

My Lords, I beg to move that the Report of the Appellate Committee be now considered.

The Question is : That the Report of the Appellate Committee be now considered. As many as are of that opinion will say "***Content***". The contrary "***Not-conten***t". … The Contents have it. (Their Lordships will indicate what Order they would propose to make.)

My Lords, I beg to move that the Report of the Appellate Committee be agreed to.

The Question is: That the Report of the Appellate Committee be agreed to. As many as are of that opinion will say "***Content***". The contrary "***Not-content***" The Contents have it.

The Question is: That the Order of the Court of Appeal of the 21st of December 1987 be set aside, and that the Order of His Honour Judge Esyr Lewis Q.C. of the 12th of February 1987 be restored. As many as are of that opinion will say "***Content*****.** The contrary "***Not-content***". The Contents have it.

The Question is: That the Respondents do pay to the Appellants their costs in this House and in the Court of Appeal. As many as are of that opinion will say "**Content".** The contrary "***Not-content***". The Contents have it.

JUDGMENT : 3 0 November 1988

Upon Report from the Appellate Committee to whom was referred the Cause Rush and Tompkins Limited against Greater London Council and others, That the Committee had heard Counsel on Tuesday the 26th and Wednesday the 27th days of July 1988, upon the Petition and Appeal of Rush and Tompkins Limited of Marlowe House, Station Road, Sidcup, Kent DA15 7BP, praying that the matter of the Order set forth in the Schedule thereto, namely an Order of the Court of Appeal of the 21st day of December 1987, might be reviewed before Her Majesty the Queen in Her Court of Parliament and that the said order might be reversed, varied or altered or that the Petitioners might have such other relief in the premises as to Her Majesty the Queen in Her Court of Parliament might seem meet; as upon the case of P. J.,Carey Plant Hire (Oval) Limited (trading as P: Carey Contractors) lodged in answer to the said Appeal; and due consideration had this day of what was offered on either side in this Cause:

It is Ordered and Adjudged, by the Lords Spiritual and Temporal in the Court of Parliament of Her Majesty the Queen assembled, That the said Order of Her Majesty's Court of Appeal of the 21st day of December 1987 complained of in the said Appeal be, and the same is hereby, Set Aside: and That the Order of His Honour Judge Esyr Lewis Q.C. of the 12th day of February 1.987 be, and the same is hereby, Restored: **And it is further Ordered,** That the Respondents do pay or cause to be paid to the said Appellants the Costs incurred by them in the Court of Appeal and also the Costs incurred by them in respect of the said Appeal to this House, the amount of such lastmentioned Costs to be certified by the Clerk of the Parliaments if not

agreed between the parties: And it is also further Ordered, That the Cause be, and the same is hereby, remitted back to the Queen's Bench Division of the High Court of Justice to do therein as shall be just and consistent with this Judgment.

In arriving at my opinion on this aspect of the case I have taken into account the reports of two cases in "The Times" newspaper around the turn of the century. The first is a decision of Darling J. in **Teign Valley Mining Co. Ltd. v Woodcock**, The Times 22 July 1899 which is cited in both ***Phipson On Evidence***, 13th ed., (1982), Paras. 19-11, 20-04; and Halsbury's Laws of England, 4th ed., Vol. 17, (1976), para. 212 as authority for the proposition that the protection afforded by "without prejudice" does not extend to third parties. The report is short and unclear, but it appears that the claim was by a company for money owed upon calls upon its shares. The defendant, Woodcock, admitted liability to the company but claimed against a Captain Rising that he held the shares as his nominee. The judge admitted in evidence terms of the negotiation between the plaintiffs and Captain Rising in which Captain Rising admitted ownership of the shares standing in the name of the nominee. The judge expressed doubts whether he should have admitted the evidence and said he did so because he had been pressed to do so by counsel. I agree with the comment of the Court of Appeal [1988] 2 W.L.R. 533, 538 that "the report is such that it is not worthy of citation as constituting authority for any proposition of law." The other case is **Stretton v Stubbs Ltd.** The Times 28 February 1905, this was an action for libel and slander arising in the following circumstances. Mr. Stretton was an artist and judgment had been obtained against him in the sum of £16 in the City of London Court by a picture frame maker. That judgment had been entered by consent pursuant to a without prejudice agreement with the plaintiff's solicitor that no publicity should be given to the result of the action. The defendants published the judgment in Stubbs' Weekly Gazette and the plaintiff alleged that their canvaser had gone round to various tradesmen pointing out the importance of subscribing to the Gazette, directing their attention to the plaintiff's name and saying that he could not be worthy of credit. The jury returned a verdict for the plaintiff of £25. As part of his case the plaintiff had relied upon the contract between himself and the solicitor for the plaintiff in the City of London Court action that the judgment should not be made public. This contract was contained in two without prejudice letters. The offer was contained in a letter from the plaintiff and the acceptance in a letter from the solicitor. The judge permitted the second letter to be put in evidence and read but refused to admit the first letter which had contained admissions by the plaintiff that he was absolutely insolvent. From a reading of the report it appears that the ground upon which it was submitted to the Court of Appeal that the judge had erred in refusing to admit the first letter was that putting in the second letter as part of the without prejudice correspondence rendered the first letter admissible. It was also submitted that it would be wrong for the plaintiff not to be allowed to be cross-examined on his assertion that he was insolvent and at the same time to allow him to put himself before the jury as being quite solvent and of good credit. The Court of Appeal allowed the first letter to be read to the court. The report does not say why the Sir Richard Henn Collins M.R. permitted it but Matthew L.J. is recorded as saying "that in his opinion a letter written with regard to an action and marked 'without prejudice' was only privileged for the purpose of that particular action." No citation of authority or reasoning is given in support of that opinion. There may well have been good grounds for admitting the first letter in that action on the ground that it was a part of a correspondence which the plaintiff had chosen to put in evidence, and possibly also on the ground of establishing an independent fact, namely, the plaintiff's insolvency, which was unconnected with the merits of the dispute about the amount owed to the frame maker and was obviously of central importance to the issue of libel or slander. I cannot however regard it as an authority of any weight for the proposition that without prejudice negotiations should in all circumstances be admissible at the suit of a third party.

The only issue that now survives in the present litigation is the sub-contractors' counter claim. For the reasons I have given the contents of the without prejudice correspondence between the main contractor and the G.L.C. will not be admissible to establish any admission relating to the sub-contractors' claim. Nevertheless, the sub-contractors say they should have discovery of that correspondence which one must assume will include admissions even though they cannot make use of them in evidence. They say that the correspondence is likely to reveal the valuation put upon the

claim by the main contractor and the G.L.C. and that this will provide a realistic starting point for negotiations and therefore be likely to promote a settlement. This is somewhat speculative because for all we know the sub-contractors' claim may have been valued in the without prejudice correspondence at no more than the figure of £10,000 pleaded in the statement of claim leaving the parties as far apart as ever. However, it is of course a possibility that it appeared at a much higher" figure.

It was only at a late stage in the respondent's argument that the distinction between discoverability and admissibility was taken. In the courts below the question appears to have been considered solely on the question of admissibility. But the right to discovery and production of documents does not depend upon the admissibility of the documents in evidence: see **O'Rourke v Darbishire** [1920] A.C. 581.

The general rule is that a party is entitled to discovery of all documents that relate to the matters in issue irrespective of admissibility and here we have the admission of the head contractors that the without prejudice correspondence would be discoverable unless protected by the without prejudice rule. There is little English authority on this question but I think some light upon the problem is to be gained from a consideration of the decision in **Rabin v Mendoza & Co.** [1954] 1 W.L.R. 271. In that case the plaintiffs sued the defendants for negligence in surveying a property. Before the action commenced a meeting had taken place between the plaintiffs' solicitor and a partner in the defendants' firm of surveyors to see if the matter could be settled without litigation. The defendants agreed at the meeting to make enquiries to see if they could obtain insurance cover against possible risk of damage to the house so that litigation could be avoided. After the interview the defendants obtained a report from another surveyor for the purpose of "attempting to obtain insurance cover. No settlement was reached and the action commenced. The defendants disclosed the existence of the report in their affidavit of documents but claimed privilege from production on the ground that it was made in pursuance of a without prejudice discussion between the plaintiffs' solicitor and the defendants'. The master, the judge and the Court of Appeal all upheld the defendants' claim to privilege. Denning L.J. after referring to **Whiff en v Hartwright** (1848) 11 Beav. 111 said, at pp. 273-274:
"the Master of the Rolls 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. This case seems to me to fall within that principle. This report was clearly made as a result of a 'without prejudice' interview and it was made solely for the purposes of the 'without prejudice' negotiations. The solicitor for the plaintiff himself says in his affidavit that at the time of the interview it was contemplated that steps such as these should be undertaken. - I find myself, therefore, in agreement with the decision of Master Burnand and the judge that this is not a case where production should be ordered."

Romer L.J. (p. 274) put the matter even more strongly saying:
"It seems to me that it would be monstrous to allow the plaintiff to make use - as he certainly would make use - for his own purposes as against the defendants of a document which is entitled to the protection of 'without prejudice' status."

This authority shows that even as between the parties to without prejudice correspondence they are not entitled to discovery against one another.

In Canada there are conflicting decisions. In **Schetky v Cochrane and the Union Funding Co.** [1918] 1 W.W.R. 821 the Court of Appeal in British Columbia ordered oral discovery to be given to a defendant of negotiations between the plaintiff and another defendant in the action but held that on the trial there would be no higher right to use the statements or admissions than that which a party to the negotiations would have who sought to introduce them in evidence. This decision was followed in **British Columbia in Derco Industries Ltd. v A. R. Grimwood Ltd. Insurance Corporation of British Columbia and P.L.C. Construction** Ltd. [1985] 2 W.W.R. 137 in which Lambert J.A. said, at p. 142:
"to the extent that there is a rule that prevents the production of documents that were prepared in the course of negotiations leading to a concluded settlement, it is my opinion that the rule does not extend to the prevention of the production of those documents at the instance of alitigant who was not a party to the settlement and whose

claim for production comes under the rule in the ***Peruvian Guano*** *case."* (**Compagnie Financiere et Commerciale du Pacifigue v. Peruvian Guano Co.** 1882 11 Q.B.D. 55

Schetky v. Cochrane and the Union Funding Co was not followed by the Court of Appeal of Ontario in **I. Waxman & Sons Ltd. v. Texaco Canada Ltd.** [1968] 2 O.R. 452. The Court of Appeal in a short judgment upheld a long reasoned judgment by Fraser J. who expressed the following opinion [1968] 1 D.R. 642, 656:
"I am of opinion that in this jurisdiction a party to a correspondence within the 'without prejudice' privilege is, generally speaking, protected from being required to disclose it on discovery or at trial in proceedings by or against the third party."

I suspect that until the present decision of the Court of Appeal the general understanding of the profession was that without prejudice negotiations between parties to litigation would not be discoverable to other parties and that admissibility and discoverability went together. For instance in the Annual Practice (1988) under "Discovery and Inspection of Documents" Note 24/5/17 reads:
*"Without prejudice communications - any discussions between the parties for the purpose of resolving the dispute between them are not admissible, even if the words 'without prejudice' or their equivalent are not expressly used (****Chocoladefabriken Lindt v Nestle Co. Ltd.*** *1978 R.P.C. 287. It follows that documents containing such material are themselves privileged from production."*

I would refer also to the critical note on this decision of the Court of Appeal written by one of the Law Commissioners, Mr. Brian Davenport Q.C., in volume 104 of the Law of Quarterly Review P. 349 in which he states that the decision will be received "*with surprise and dismay by many practitioners*."

I have come to the conclusion that the wiser course is to protect without prejudice communications between parties to litigation from production to other parties in the. same litigation. In multi-party litigation it is not an infrequent experience that one party takes up an unreasonably intransigent attitude that makes it extremely difficult to settle with him. In such circumstances it would, I think, place a serious fetter on negotiations between other parties if they knew that everything that passed between them would ultimately have to be revealed to the one obdurate litigant. What would in fact happen would be that nothing would be put on paper but this is in itself a recipe for disaster in difficult negotiations which are far better spelt out with precision in writing.

If the party who obtains discovery of the without prejudice correspondence can make no use of it at trial it can be of only very limited value to him. It may give some insight into his opponent's general approach to the issues in the case- but in most cases this is likely to be of marginal significance and will probably be revealed to him in direct negotiations in any event. In my view this advantage does not outweigh the damage that would be done to the conduct of settlement negotiations if solicitors thought that what was said and written between them would become common currency available to all other parties to the litigation. In my view 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. Accordingly I would allow this appeal and restore the decision of the learned official referee.

LORD OLIVER OF AYLMERTON : My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Griffiths. I agree with it and would allow the appeal for the reasons which he has given.

LORD GOFF OF CHIEVELEY : My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Griffiths. I agree with it and, for the reasons he gives, I would allow the appeal.