CA before Slade LJ, Balcomb LJ, Stocker LJ.

JUDGMENT : BALCOMBE LJ.

1. In December 1971 the Greater London Council (the GLC) entered into a contract with Rush & Tompkins Ltd for the development of the Hanwell Estate in Ealing by the construction of 639 dwellings. In January 1973 Rush & Tompkins engaged P J Carey Plant Hire (Oval) Ltd (trading as P J Carey Contractors and hereinafter called 'Carey Contractors') as domestic sub-contractors to carry out certain ground works required by the main contract. Between June 1976 and January 1979 Carey Contractors submitted to Rush & Tompkins claims for loss and expense to which they contend they are entitled under the sub-contract. So far Carey Contractors have only received a very small part of the sum to which they claim to be entitled.

2. In August 1979 Rush & Tompkins started proceedings to which the GLC and Carey Contractors were defendants. By their statement of claim Rush & Tompkins claimed against the GLC a declaration that the GLC were liable to pay to them any sum which they (Rush & Tompkins) were liable to pay to Carey Contractors in respect of direct loss and expense under the sub-contract, save in so far as such loss and expense had been caused by Rush & Tompkins's default. They also claimed as against both defendants an inquiry as to the amount of the loss and expense which Carey Contractors were entitled to recover from them (which as against Carey Contractors they contended did not exceed £10,000), and certain other heads of consequential relief.

3. To this statement of claim both defendants put in defences, and the action was in July 1981 transferred to the official referee's list. However, on 12 October 1981 Rush & Tompkins entered into a compromise agreement with the GLC, under which the GLC paid the sum of £1,200,000 to Rush & Tompkins, who were to be responsible for meeting all sub-contractors' claims. It is accepted by Rush & Tompkins that that compromise agreement was preceded by correspondence 'without prejudice' between themselves and the GLC. In December 1981 Rush & Tompkins discontinued the action against the GLC.

4. Rush & Tompkins's action as against Carey Contractors then went to sleep for over three years. We were not told why, and for the purposes of this judgment the delay is immaterial. After various interlocutory applications Carey Contractors were given leave to amend their defence by adding a counterclaim for an inquiry as to the amount due to them under the sub-contract and for payment of any amount found due on the inquiry, which they did in February 1986. (Since the hearing at first instance from which this appeal is brought, the counterclaim has been further amended and a defence to counterclaim served, but nothing now turns on this.)

5. This appeal concerns Carey Contractors' application for specific discovery of the 'without prejudice' correspondence between Rush & Tompkins and the GLC leading up to the compromise agreement of October 1981. The compromise agreement itself has been disclosed to Carey Contractors. It is conceded by Rush & Tompkins that the correspondence may be relevant to the issues between themselves and Carey Contractors, in that it may show how the global settlement sum was arrived at and how the parties to that agreement evaluated Carey Contractors' claim, but they claim that the correspondence is privileged from disclosure because it was conducted without prejudice. This claim to privilege was upheld by his Honour Judge Esyr Lewis QC in a judgment delivered on 12 February 1987, and it is from that judgment that this appeal is brought with the leave of the judge.

6. The rule which gives the protection of privilege to *'without prejudice'* correspondence *'depends partly on public policy, namely the need to facilitate compromise, and partly on implied agreement'* as Parker LJ stated in ***South Shropshire DC v Amos*** [1987] 1 All ER 340 at 343, [1986] 1 WLR 1271 at 1277. The nature of the implied agreement must depend on the meaning which is conventionally attached to the phrase *'without prejudice'*. The classic definition of the phrase is contained in the judgment of Lindley LJ in ***Walker v Wilsher*** (1889) 23 QBD 335 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.'*

7. Although this definition was not necessary for the facts of that particular case and was therefore strictly obiter, it was expressly approved by this court in ***Tomlin v Standard Telephones and Cables Ltd*** [1969] 3

All ER 201 at 204, 205, [1969] 1 WLR 1378 at 1383, 1385 per Danckwerts LJ and Ormrod J. (Although he dissented in the result, on this point Ormrod J agreed with the majority.) The definition was further cited with approval by both Oliver and Fox LJJ in this court in ***Cutts v Head*** [1984] 1 All ER 597 at 603, 610, [1984] Ch 290 at 303, 313. In our judgment, it may be taken as an accurate statement of the meaning of *'without prejudice'*, if that phrase be used without more. It is open to the parties to the correspondence to give the phrase a somewhat different meaning, e.g. where they reserve the right to bring an offer made 'without prejudice' to the attention of the court on the question of costs if the offer be not accepted (see ***Cutts v Head***) but subject to any such modification as may be agreed between the parties, that is the meaning of the phrase. In particular, subject to any such modification, the parties must be taken to have intended and agreed that the privilege will cease if and when the negotiations *'without prejudice'* come to fruition in a concluded agreement.

8. The attribution of such intentions to the parties is, in our judgment, entirely consistent with the considerations of public policy which lead the court to give protection to what has been said in the course of negotiations under the 'without prejudice' rule. As Oliver LJ said in ***Cutts v Head*** [1984] 1 All ER 597 at 605, [1984] Ch 290 at 306: *'That the rule rests, at least in part, on public policy is clear from many authorities, and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should, as it was expressed by Clauson J in* **Scott Paper Co v Drayton Paper Works Ltd** *(1927) 44 RPC 151 at 156, be encouraged freely and frankly to put their cards on the table … The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability.'*

9. To the like effect Fox LJ said ([1984] 1 All ER 597 at 611, [1984] Ch 290 at 314): *'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.'*

10. However, unless the parties have chosen to give the phrase a different meaning, once the 'without prejudice' correspondence has resulted in their reaching a concluded agreement, the protection has served the purpose for which it must be treated as having been intended, and this particular head of public policy has no further application. The more general head of public policy which lies behind the rules requiring discovery of documents in civil proceedings (currently RSC Ord 24 and CCR Ord 14), which is to provide the parties with the relevant documentary material before the trial, so as to assist them in appraising the strength or weakness of their respective cases, and thus to provide for the fair disposal of the proceedings before or at the trial (see 13 *Halsbury's Laws* (4th edn) para 1) can then take effect.

11. Approaching the present case on the basis of these principles, it seems to us clear that, unless further authorities compel a different conclusion (a) the privilege afforded by the correspondence between Rush & Tompkins and the GLC being marked 'without prejudice' came to an end when that correspondence came to fruition in the compromise agreement of October 1981, (b) it would then have been discoverable as between the GLC and Rush & Tompkins, had it been relevant to any issue that might still have been outstanding between them, although it is difficult to think of any issue between those parties to which it might have been relevant, (c) it is certainly discoverable as between Rush & Tompkins and Carey Contractors where it is conceded to be relevant.

12. We now turn to the principal further authorities cited to us to see whether they require us to reach any different conclusion.

13. In ***Holdsworth v Dimsdale*** (1871) 24 LT 360 the defendant was being sued on a bill of exchange drawn and indorsed by him. He wrote to the plaintiff's attorneys a letter, headed *'without prejudice'*, as follows: *'I never had any notice of dishonour of this bill, but if the debt will be accepted without costs, I do not want Mr. Holdsworth to be the loser of it, and I would give a cheque.'*

14. Thereupon the plaintiff applied to discontinue the action on payment of costs by him to the defendant, which costs were subsequently taxed and paid. The plaintiff then commenced another action on the bill against the defendant, and offered the 'without prejudice' letter as evidence of waiver of notice of dishonour. It was held he could do so. Blackburn J said (at 361): *'Then comes the further question, whether when the letter was only to be without prejudice conditionally and the condition was fulfilled, the letter could be used against the writer of it? The mere statement of the point resolves it. It is, of course, quite right that admissions made without prejudice should not be available against those making them; but when an admission is upon a condition, as here, which has been performed, it would be monstrous to say that it should never be used. Here the writer of the letter says in effect, "I will waive notice of dishonour if you consent to forego costs. I say this is not an admission against myself unless you accept my offer; if you concur, of course, it may be used."'*

This decision is entirely consistent with the conclusion stated above.

15. ***Teign Valley Co Ltd v Woodcock*** (1899) Times, 22 July is cited by both *Phipson on Evidence* (13th edn, 1982) paras 19–11, 20–04 and 17 *Halsbury's Laws* (4th edn) para 212 as authority for the proposition that the protection afforded by 'without prejudice' does not extend to third parties.

16. The report is by no means clear, but it appears that what happened was that, in proceedings between W and R, W sought to tender in evidence a document, marked 'without prejudice', proposing terms of settlement in an action between T and R, which contained certain admissions on the part of R. Darling J admitted the document, although expressing doubts as to whether he was right to do so. The report is such that it is not worthy of citation as constituting authority for any proposition of law, but at least it can be said that it does not appear to be inconsistent with our conclusion above.

17. ***Stretton v Stubbs Ltd*** (1905) Times, 28 February was an action for defamation. The plaintiff alleged that the defendants had published a statement that judgment had been obtained against him in the county court, the innuendo being that this imputed insolvency to the plaintiff. The defendants sought to put in a letter written by the plaintiff 'without prejudice', which had led to a concluded settlement in another action, which contained admissions by the plaintiff that he was absolutely insolvent. The trial judge had refused to admit the letter, but this court allowed the letter to be read. Mathew LJ said that, in his opinion, a letter written with regard to an action and marked 'without prejudice' was only privileged for the purposes of that action. The report of this case is also not of the clearest, but the decision appears to be entirely consistent with our conclusion above.

18. ***Derco Industries Ltd v A R Grimwood Ltd*** [1985] 2 WWR 137 is a decision of the Court of Appeal of British Columbia which is directly in point. On facts very similar to those in the present case it was held that a plaintiff (in the same position as Carey Contractors) was entitled to production of 'without prejudice' correspondence between the defendants and another party which had led to a concluded settlement in another action arising from the same construction project.

19. ***Derco Industries Ltd v A R Grimwood Ltd*** was followed by his Honour Judge Lewis Hawser QC in ***Lorne Stewart Ltd v William Sindall plc*** (1987) 35 Build LR 109.

20. Counsel for Rush & Tompkins relied, as did the judge below, on two appellate decisions, one of the Court of Appeal of Ontario and one of this court.

21. **I Waxman & Sons Ltd v Texaco Canada Ltd** [1968] 2 OR 452 is the Ontario case. The headnote reads: *'Communications written "**without prejudice**" and with a view to settlement of issues between A and C are privileged from production at the instance of B in subsequent litigation between A and B on the same subject-matter or subject-matter closely related to that with which the correspondence in question was concerned.'*

22. The Court of Appeal of Ontario, in so holding in a short judgment, upheld a very full and careful judgment to that effect by Fraser J ([1968] 1 OR 642). However, a careful reading of both judgments makes it clear that the 'without prejudice' correspondence there in question had not led to a concluded settlement (see [1968] 1 OR 642 at 644). Accordingly, this case is distinguishable from the present one.

23. The decision of this court, on which counsel for the plaintiffs and the judge relied, is ***The Aegis Blaze*** [1986] 1 Lloyd's Rep 203. The privilege there in question was legal professional privilege. This court held that a party entitled to claim legal professional privilege for a document in one action could claim privilege for

the same document in a second or subsequent action provided that there was a sufficient connection for the document to be relevant. However, legal professional privilege is based upon an entirely different head of public policy than that which justifies 'without prejudice' privilege, and with all respect to Fraser J in the *Waxman* case, who thought that similar reasoning might 'well be applicable both to solicitor-and-client privilege and to without prejudice privilege' (see [1968] 1 OR 642 at 657) and to the judge in the present case, these two heads of privilege are wholly different. In our judgment, therefore, ***The Aegis Blaze*** affords no assistance in the present case.

24. That would be enough to dispose of the present appeal, but the case has disclosed what appear to be some widespread misconceptions as to the nature of 'without prejudice' privilege. In an attempt to remove those misconceptions, and to give guidance to the profession, we venture to state the following principles.

(1) The purpose of 'without prejudice' privilege is to enable parties to negotiate without risk of their proposals being used against them if the negotiations fail. If the negotiations succeed and a settlement is concluded, the privilege goes, having served its purpose. This will be the case whether the privilege is claimed as against the other party or parties to the negotiations, or as against some outside party.

(2) It is possible for the parties to use a form of words which will enable the 'without prejudice' correspondence to be referred to, even though no concluded settlement is reached, eg on the issue of costs: see ***Cutts v Head*** [1984] 1 All ER 597, [1984] Ch 290.

(3) In contrast, in our judgment, it might be possible for parties to use a special form of words which, at least as between the parties themselves, would preclude reference to 'without prejudice' correspondence even after a settlement has been reached. However, no such special form of words was used in the present case and we find it unnecessary to express any view on the effect which the use of such special wording would have in the context of subsequent applications for discovery by third parties.

(4) The privilege does not depend on the existence of proceedings.

(5) Even while the privilege subsists, ie before any settlement is reached, there are a number of real or apparent exceptions to the privilege. Thus: (a) the court may always look at a document marked 'without prejudice' and its contents for the purposes of deciding its admissibility (see ***Re Daintrey, ex p Holt*** [1893] 2 QB 116, [1891–4] All ER Rep 209, ***South Shropshire DC v Amos*** [1987] 1 All ER 340, [1986] 1 WLR 1271). This is not a real exception to the privilege, since the court must always be able to rule on the admissibility of a document, when a claim to privilege is challenged. It is under this head that the court can look at the documents to see, eg if an agreement has been concluded and, if so, to construe its terms; (b) the rule has no application to a document which, by its nature, may prejudice the person to whom it is addressed. Thus a letter written without prejudice may be used to prove an act of bankruptcy (see ***Re Daintrey, ex p Holt*** [1893] 2 QB 116, [1891–4] All ER Rep 209). Other examples are given in *Phipson on Evidence* (13th edn, 1982) para 19–11; (c) there may be other exceptions (see *Phipson* para 19–11) but we do not think it appropriate to consider them further, since they do not arise in the context of the present case.

(6) The privilege extends to the solicitors of the parties to the *'without prejudice' negotiations* (see ***La Roche v Armstrong*** [1922] 1 KB 485, [1922] All ER Rep 311). However, we do not think it necessary or desirable to express any view on the question whether the privilege is valid against a third party (other than a party's solicitor) when no settlement has been reached by the parties to the *'without prejudice'* negotiations. ***Teign Valley Co Ltd v Woodcock*** (1899) Times, 22 July suggests that it may not be valid against such a third party; ***I Waxman & Sons Ltd v Texaco Canada Ltd*** [1968] 2 OR 452 is persuasive authority to the effect that it is valid against a third party in these circumstances. We can see that in such a case there is a balance to be held as between competing principles of public policy and this point should be left for decision in a case when the question arises fairly and squarely.

25. This appeal has been very well argued on both sides. For the reasons given above we allow it and make an order for specific discovery by Rush & Tompkins of the *'without prejudice'* correspondence between Rush & Tompkins and the GLC brought into existence for the purpose of reaching settlement with the GLC.

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