BEFORE LORD JUSTICE PARKER and LORD JUSTICE BALCOMBE : 28th July 1986

LORD JUSTICE PARKER: On 8th November 1986 the respondents made a discontinuance order under section 53(1) of the Town and Country Planning Act 1971 (the 1971 Act) in respect of the business use by the appellant, Mr. Amos, of premises known as The Forge, Middleton, in the County of Shropshire. That order was duly confirmed by the Secretary of State under section 51(4) of the 1971 Act on 13th July 1977. On 13th December 1977 Mr. Amos made a written claim for compensation pursuant to section 170(2) of the 1971 Act. That claim consisted in a single page document specifying the heads under which compensation was claimed. It did not contain any quantification of the amount claimed. It stated inter alia "*The Claimant wishes the amount of compensation to be negotiated with his agent.....*"

Although correspondence ensued, it is common ground that no figures or particulars were submitted on behalf of Mr. Amos until October 1981.

On the 14th of that month David Allberry & Co., chartered surveyors who had then been appointed Mr. Amos' agents, wrote to the respondents' District Valuer advising him of their appointment.

Their letter included the following paragraph:
"*A meeting with the District Council has been arranged, as you know, for Tuesday next, 20 October, at which we shall be present. It is our intention at that meeting to submit a detailed claim on our client's behalf, the intention being that such a claim will be full and final under all heads and which will be included in the reference to the Lands Tribunal, the papers for which are currently in course of preparation".*

This letter was not headed "Without Prejudice".

Despite what was said in that letter, however, what the agents in fact produced at the meeting was a twenty page document headed "Without Prejudice". It contained full particulars of the claim then being advanced together with submissions in support of the claim. We shall hereafter refer to it as Document "A".

It did not result in the acceptance of the claim as put, or to an agreed compromise figure or to a reference to the Lands Tribunal, to which disputed questions of compensation are by section 179 of the 1971 Act to be referred. It was, after some correspondence, later superseded by an amended document in similar form and of similar length also marked "Without Prejudice" to which we shall refer as Document "B". This was sent by David Allberry & **Co. to** the District Valuer under cover of a letter dated 21st May 1982. That letter was itself marked "Without Prejudice" and was in the following terms:
"Further to our letter of 2 February we now enclose our client's claim in the above matter together with supporting documents.
"We would be glad to have the opportunity of a meeting in order to discuss this claim with a view to negotiating a settlement and once you have studied the documents, we will be grateful if you could suggest a date for such a meeting".

Negotiations ensued but were unsuccessful, and on 20th October 1983 the matter was referred to the Lands Tribunal under section 179 of the Act.

In the course of correspondence relating to the reference between solicitors, the respondents' solicitors wrote to the appellant's solicitors on 17th February 1984:
"I refer to previous correspondence and to your client's 'Without Prejudice' claims of 20th October 1981 and 21st May 1982. The Council does not accept that a claim for statutory compensation can be made on a 'without prejudice basis', particularly in view of the provisions of section 4 of the Land Compensation Act 1961 relating to costs. Would you please confirm that the claims are to be treated as 'open' claims; if not will you please submit an open claim, including full details of professional fees and earlier items previously omitted. If you adopt the latter course the Council will contend that its liability for costs (if any) should only run from the date of delivery of an open, particularised claim".

The appellant's solicitors were not prepared to agree to the two documents, being Documents "A" and "B", being treated as "open" claims and the question whether they should be admitted in evidence came before a Member of the Lands Tribunal, Mr. W.H. Rees F.R.I.C.S., for determination on a pre-trial review on 15th March 1985. He determined that the two documents should not be admitted in evidence and so ordered on 10th April 1985.

By originating summons issued pursuant to section 12(6) of the Arbitration Act 1950 and Rule 38 of the Lands Tribunal Rules 1975 and dated 10th June 1985, the respondent applied in the Queen's Bench Division of the High Court for an order that the two documents be admitted in evidence. On 21st January 1986 the matter was heard before Mr. Justice Gatehouse. The application succeeded.

The learned judge was referred to two authorities, In **re Daintrey,** [1893] 2 Queen's Bench 116 and **Norwich Union Life Insurance Society v. Ton Waller Ltd**., [1984] 270 Estates Gazette 42. In the first of these cases it was held that a letter headed "without prejudice", which clearly contained an offer to settle pending litigation but which was also a clear act of bankruptcy, could be put in evidence on the hearing of a bankruptcy petition on the ground that it was "one which from its character, might prejudicially affect the recipient whether or not he accepted the terms offered thereby". In the course of giving the judgment of the court Mr. Justice Vaughan Williams said:

"In our opinion the rule which excludes documents marked 'without prejudice' has no application unless some person is in dispute or negotiation with another, and terms are offered for the settlement of the dispute or negotiation, and it seems to us that the judge must necessarily be entitled to look at the document in order to determine whether the conditions, under which alone the rule applies, exist.

"The rule is a rule adopted to enable disputants without prejudice to engage in discussion for the purpose of arriving at terms of peace, and unless there is a dispute or negotiations and an offer the rule has no application. It seems to us that the judge must be entitled to look at the document to determine whether the document does contain an offer of terms".

In the second of the two cases Mr. Justice Harman said:

"The rule is, as Mr. Wood, in my view, absolutely correctly submitted, a rule of public policy based upon the proposition that it is better to settle than to fight - I paraphrase Mr. Wood, but I think that is not unfair as a way of putting what he was submitting. It is, in my judgment, an accurate description of the purpose of the rule, and it also, in my judgment, illuminates the occasions on which the rule arises, and they are entirely in accordance with Vaughan Williams J's formulation. The rule has no application unless some person is in dispute or negotiation with another. Here, the letter of August 4 1982 was written, not quite out of the blue, because there had been that rather inept inspection letter written eight months earlier, but written at a time when there was, so far as anything before me goes, no view, position, attitude or anything else emanating from or evidenced by the tenant. The matter at that stage was, in my view, entirely an opening shot, and an opening shot in a situation where no war had been declared and no dispute had arisen. Indeed 'shot' may be an inapt word to apply to it. As it seems to me, this letter was not written in the course of negotiation, which must imply that each side has expressed a view and that a modus vivendi between them is being proposed, nor had a dispute been constituted, whether by litigation, arbitration or mere verbal or oral threats over the back fence of two neighbouring properties. It seems to me beyond any question that this rubric 'Without Prejudice' can only be effectively used where one has an extant disagreement - dispute, issue, call it what you will - or extant negotiations with both sides having set up their own position in them. As it seems to me, this letter, being the initiating letter, could not appropriately be so headed, and I therefore hold against Mr. Wood's first argument. In my view, it is not governed by the rubric attached to it 'Without Prejudice', which words remain part of it and are material as part of its writing for the purpose of understanding what it really says but which do not have the effect of validly claiming privilege".

The learned judge in our view quite correctly concluded that in holding that an initiating letter could not effectively or appropriately be headed "without prejudice" Mr. Justice Harman erred. If this were so no-one could safely proceed directly to an offer to accept a sum in settlement of an as yet unquantified claim.

He accordingly proceeded on the basis stated by Mr. Justice Vaughan Williams and considered whether the two documents were offers to settle a dispute, which it was conceded had been in existence since December 1977 when the appellant had put in his original claim. He concluded that they were not, but were particulars of the original unspecified claim to compensation. In reaching his conclusion he did not however have before him the letters of 14th October 1981 and 21st May 1982; nor did he have the benefit of being referred to the judgment of Lord Justice Fox in **Cutts v. Head,** [1984] Chancery 290 at 313 where, having referred to **Walker v. Wilsher,** 23 Queen's Bench Division 335 and **In re Daintrey** (supra) he said:

"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 L.J. in ***Walker v. Wilsher,*** *23 Q.B.D. 335, 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, at p.339: 'The agreement that the letter is without prejudice ought, I think, to be carried out in its full integrity'*

"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".

That passage is important for two reasons. First it shows that the rule depends partly on public policy, namely the need to facilitate compromise, and partly on implied agreement. Secondly it shows that the rule covers not only documents which constitute offers but also documents which form part of discussions on offers, i.e. negotiations.

In the present case the appellant had indicated from the very outset that he wished, through his agents, to negotiate. There was then correspondence leading up to the letter which preceded document "A". That letter certainly indicated that the document when submitted was intended to be "open" but when produced it was marked "without prejudice". This prima facie means that it was intended to be a negotiating document. The prima facie inference, therefore, is that the agents had changed their intention. This might have been displaced had there been evidence that, when tendered, it was so tendered on the same basis as originally indicated but there was no such evidence and it is not without significance that when the question was first raised by the respondents' solicitors in their letter of 17th February 1984 they did not say that the document or its successor were "open".

It was contended merely that it was impossible to make an effective "without prejudice" offer. That contention was not pursued before us, in our view rightly. It is without foundation. Bearing in mind the original expressed intention to negotiate, the fact that there was a dispute in existence, that it is common practice for such claims to be the subject of negotiation before the parties resort to a reference to the Lands Tribunal, and that the document was clearly marked "Without Prejudice", we have no hesitation in concluding that those words should be given their ordinary effect. The position with regard to Document "B" is in our view plainer. It was clearly written in the course of negotiation and was accompanied by a letter, which was itself headed "Without Prejudice". Both documents are in our view inadmissible.

It was for these reasons that we allowed the appeal on the conclusion of the argument. The order of the learned judge must be set aside and an order made that neither Document "A" nor Document "B" be admitted in evidence on the hearing by the Lands Tribunal of the appellant's claim to compensation.

In order to avoid any possibility of future unnecessary disputes about such matters we conclude by stating (1) that we agree with the learned judge (a) that the heading "without prejudice" does not conclusively or automatically render a document so marked privileged; (b) that, if privilege is claimed but challenged, the court can look at a document so headed in order to determine its nature; and (c) that privilege can attach to a document headed "without prejudice" even if it is an opening shot. The rule is however not limited to documents which are offers. It attaches to all documents which are marked "without prejudice" and form part of negotiations, whether or not they are themselves offers, unless the privilege is defeated on some other ground as was the case in **In re Daintrey**.

(ORDER: Appeal allowed, with costs in Court of Appeal and below)