CA on appeal from the High Court (His Honour Judge G.Baker QC) before Sir Thomas Bingham MR, Evans LJ, Aldous LJ. 11th May 1995.

JUDGMENT : THE MASTER OF THE ROLLS:

1. This is an appeal by a barrister against a wasted costs order made against him under Section 51 of the Supreme Court Act 1981 and Order 62 rule 11 of the Rules of the Supreme Court. The order was made on 28 March 1994 by His Honour Judge Geoffrey Baker QC sitting as a deputy judge of the High Court in Leeds. On that date the Judge aborted a personal injuries trial which he was conducting in circumstances for which he held the barrister responsible. The barrister appeals, contending that the order was wrongly made both in substance and procedurally.

2. The action in question had a regrettably long history. On 16 February 1984 the plaintiff was working at a timber yard in Boroughbridge in North Yorkshire when he suffered an accident. He consulted solicitors who on 4 March 1985 wrote to the defendant giving notice of the accident and of the plaintiff's intention to claim damages. The defendant passed this letter to its insurers who on 19 March 1985 replied to the plaintiff's solicitors in a standard form of letter seeking details of the plaintiff's allegations of negligence and of his injuries and asking for a copy of a medical report if such existed. The plaintiff's solicitors promptly answered the insurers' enquiries, writing on 27 March 1985 to give further details of the accident and of the plaintiff's injuries and to explain their intentions so far as a medical report was concerned. On 10 May 1985, not having heard from the insurers, the plaintiff's solicitors wrote again asking whether the insurers were prepared to deal with the matter and indicating that an application would be made for legal aid if they were not. The insurers' claims superintendent replied on 28 May 1985, in a letter which is central to this appeal and to which I shall hereafter refer as "*the letter*". The letter read "*We have now completed our investigations into the circumstances of your client's accident and confirm that we are prepared to negotiate a settlement on a compromise basis, arguing that your client ought not to have used the platform as a means of access.*
If you will provide us with a copy of any medical evidence you have in this case .... our representative Mr Thompson, will arrange to discuss both cases.
Meanwhile, would you please advise if your client intends to return to work in the near future.
We await to hear from you."

3. On 31 May 1985 the plaintiff's solicitors wrote to the insurers referring to a request which they had made for a medical report and suggesting an inspection of the vehicle involved in the accident. They looked forward to the opportunity of meeting the insurers "*and engaging in further negotiations*". Letters were then exchanged concerning medical reports and examinations and on 2 August 1985 a letter was written by the insurers to the plaintiff's solicitors on which a note was jotted of a discussion two months later on 15 October 1985. This note recorded an agreement to meet at the defendant's works to discuss liability and settlement when the insurers' medical report would be to hand. Having heard nothing, the plaintiff's solicitors wrote to the insurers again on 7 March 1986 expressing surprise that they had not received a copy of the insurers' medical report and asking them to attend to this. They added : *"We are anxious to engage in further discussions with you and if this matter is not to be settled we must commence proceedings immediately"*. On 19 March 1986 the plaintiff's solicitors wrote again to the insurers indicating that they proposed to begin proceedings without further notice unless the insurers settled the claim on a 100% basis within 7 days of the letter. On 14 April 1986, as appears from a note on a copy letter in the insurers' correspondence file, there were brief discussions between the insurers and the plaintiff's solicitors at which an offer of settlement was made on a 50/50 basis. The insurers reminded the plaintiff's solicitors of this offer in a letter of 15 October 1986, but on 20 October 1986 the plaintiff's solicitors roundly rejected the offer as wholly unacceptable.

4. On 22 January 1987 the plaintiff issued particulars of claim in the Harrogate County Court. On 19 February 1987 the defendant served its defence. This admitted that the plaintiff had suffered some back trouble, but otherwise put negligence, causation and damage squarely in issue. It was alleged that the accident had been caused wholly or in part by the negligence of the plaintiff. Further and better particulars were asked and given on both sides. The pleadings proceeded on the basis of a fully contested action.

5. On 27 March 1990 the defendant served its list of documents. In part 1 of schedule 1 it listed the documents which it did not object to produce. These documents included much of the correspondence which I have mentioned, including the letter. The documents so listed included the insurers' copy letter on which the note of the 15th October 1985 discussion was written but did not include the copy letter on which the discussion of 14 April 1986 was noted.

6. There was difficulty in finalising the medical evidence and there was accordingly delay in fixing a date for the trial. The case was due to be tried in September 1993. On that occasion, however, the fixture had to be vacated, on the day, because it appeared that there was not enough time for the judge who was to hear the case to complete it. It was therefore necessary for the hearing to be put over to a later date.

7. The trial was then fixed for 28 March 1994. On that date the parties, with their legal advisers and witnesses, attended for the hearing. Before the hearing began, the barrister (who was instructed for the plaintiff) learned from his opponent that the defence intended to introduce medical records obtained from the plaintiff's general practitioner and a video not previously disclosed. He in turn told his opponent that he proposed to refer the judge to the letter, which did not appear in the trial bundle. Counsel for the defendant objected strongly, indicating that the letter contained a bona fide offer to compromise and that it was accordingly, as he suggested, inadmissible in evidence. He said that if the barrister attempted to refer the judge to the letter he would ask that the hearing be adjourned to another judge. The barrister contended that the letter, not being marked "without prejudice", was to be regarded as an open letter and so admissible in evidence. Counsel for the defendant made plain that he rejected that view.

8. When the hearing began, the barrister began to open the plaintiff's case in the usual way. He referred to various medical issues. Counsel for the defendant then intervened and indicated his intention to rely on the bundle of documents obtained from the plaintiff's general practitioner, not included in the trial bundle, which he intended to use as part of his attack on the plaintiff's credibility. Reference was also made to the video previously made of the plaintiff, and not disclosed to the plaintiff's advisers, which the defendant proposed to put in evidence. The barrister invited the court's assistance in seeking the exclusion of both the medical records and the video, but it is evident from the transcript that such support was not forthcoming from the judge. It would appear that the barrister was irritated, if no more, by what he regarded as the unfair tactics of the defence, and at that stage referred the judge to the letter, describing it as an open letter which partially admitted liability. Counsel for the defendant immediately intervened, but the barrister repeated that the letter contained a partial admission and he went on to say that the letter admitted liability subject to an argument about contributory negligence. The judge read the letter and expressed concern that, although not marked "without prejudice", it was nonetheless privileged from production as a letter clearly written with a view to settlement. He went on to say that the letter tended to poison his mind, by inducing a belief that the defendant was accepting a measure of liability. Counsel for the defendant applied for the trial to be stopped on the basis that the defendant's position was manifestly prejudiced and after hearing further argument the learned judge accepted that submission. He said *"Now, I have not been referred to any of the authorities, and I must assume, with experienced counsel, that there are none which affect the principle that communications made between parties which are expressly or impliedly with a view to settlement and compromising the action are privileged from production, and that this is so whether they are headed "**without prejudice**" or not. One knows that there are many cases where the letters are headed "without prejudice" when clearly it is desired to place something on record which is not without prejudice at all. But the converse can also apply, and in my judgment this is one of those cases where, for reasons best known to the insurance company, it was saying it was prepared to negotiate a settlement on a compromise basis. It is inviting discussion of the damages, and I agreed with Mr May that if that were to be used and put in evidence it would more likely than not be to indicate that there is some liability upon the defendant here. Indeed, that is the object of putting it in, and the express object of putting it in.*

In my judgment this is a letter which should never have been put in at all, and if the defendant takes the view, which it is entitled to take, that I would be even to some extent influenced against it and in favour of the

plaintiff, then this is a matter which goes to the root of the dispute between the parties and I don't feel that they are wrong in taking that view. After all, we all know that justice should not only be done but should be seen to be done, and I am quite sure that the defendant would have a substantial grievance if in trying to effect a settlement it has put itself in a position where a court was holding against it, and may have done so on the basis of its attempt to settle a case in which it was really not liable at all.

In those circumstances I think the defendant is entitled to require that another judge tries this case who has not had sight of these or any other settlement letters. In those circumstances the defendant's application for an adjournment succeeds."

9. After the short adjournment, counsel for the defendant applied for a wasted costs order against the barrister. For that purpose he referred the court to a report in The Times of the recent Court of Appeal decision in **Ridehalgh v Horsefield** (since reported at [1994] Ch 205). Having referred the judge to that report in some detail, counsel for the defendant accepted that the barrister might wish more time to deal with the matter, although he asked that if there were to be a later hearing it should be reserved by the judge to himself. The barrister was then invited to make his comment on the guidelines set out in the authority. In doing so, he accepted sole responsibility for what had occurred. As to the timing of a decision on wasted costs, he expressed no view one way or the other. He expressed willingness to leave it to the judge to decide whether the application should be dealt with there and then or whether a decision on it should be deferred. He said that he felt able to make such points as he wished on that occasion, and did not invite the court to adjourn to enable him to seek representation or advice.

10. The judge then gave his ruling on this application. He referred to the exchanges between counsel before the hearing had begun, and to the course of events at the hearing before him. He repeated the views which he had already expressed on the inadmissibility of the letter, and criticised the barrister for having put it in. He observed that if there were to be an issue on its admissibility the correct procedure would have been to arrange for that issue to be determined before the hearing by a judge who would not be conducting the trial. He continued *"For my own part, I cannot see an argument succeeding that this was not a letter written with a view to settlement. The question then is . who is to pay the costs ? I think [counsel for the defendant] was for saying that if the plaintiff had won his claim and got some damages the costs might have been recovered from him, because he otherwise could not discharge them. And for all I know that may well still be the position. But he takes the alternative course, which he has taken with reluctance, that if it is not possible to recover any costs from any other source they must be pursued against the plaintiff's counsel.*

*The ways in which such claim should be made, when it should be made, how it should arise, when it should be determined, and what sort of principles the judge should apply have all been dealt with in the guidelines. "**It was only when, with all allowances made,**" said the Master of the Rolls**, " an advocate's conduct of court proceedings was quite plainly unjustifiable that it could be appropriate to make a wasted costs order against him".** Well, I think this is a plain case.*

The procedure is that the matter must be fair and simple and as summary as fairness permitted, and the respondent lawyer was to be very clearly told what he was said to have done wrong. I do not think anyone could argue that this is a complicated situation and that [the barrister] could have failed to appreciate what it is that was alleged : either he shouldn't have brought it in, or he should have had a preliminary point taken before a judge to decide on its admissibility. He chose to introduce the letter suddenly and without any real justification from what was going on.

The question remains whether I should take the view that [the barrister] should show cause why he should not be made liable for the costs. I don't think that it's incumbent upon me to make that order, for the simple reason that he has himself heard what is alleged, he has had the opportunity to address me, he has accepted his responsibility for the act which was the cause of it all, and he finally said that he didn't think he could add anything else and would be prepared to answer any questions which the court had. I couldn't find any questions that seemed to me to be necessary and so prima facia the application should succeed.

The matter that yet remains is the two stages of the court's discretion. Clearly there was power in the court in its discretion to say that there shouldn't be any further proceedings, no further enquiry. I can't see what further enquiry would be helpful in this case.

Finally, even if the court were satisfied that the legal representative had acted unreasonably or negligently so as to waste costs it was not bound to make an order but would have to give sustainable reasons for the exercise of its discretion in that way. Well, with the best will in the world, I cannot see that it would be proper to exercise discretion not to make an order. I am, therefore, bound to say that an order should be made in this case and, unless [the barrister] has anything that he wishes to add, I make it."

11. There was considerable discussion about the precise terms of the order, but the order in fact made simply provided that the action be adjourned generally and that there be a wasted costs order against the barrister.

12. Events then took an unusual turn. On 30 March 1994 the plaintiff's solicitors attended upon the judge in person in the absence of any representative of the defendant in the action. It was then drawn to his attention that the letter had been listed by the defendant in part 1 of schedule 1 of its list of documents, a fact not previously mentioned at any point in the discussion between counsel or between counsel and the judge. The judge then decided, in the light of this information, that the wasted costs order made against the barrister should be suspended and that leave to appeal against the wasted costs order should be granted. Save that he undoubtedly intended to grant, and did grant, leave to appeal against the wasted costs order the effect of this order is a matter of some doubt, not least because he later referred to the "discharge" of the wasted costs order.

13. In challenging the judge's order on behalf of the barrister, Mr Rupert Jackson QC contended that the letter was to be regarded as an open letter, not marked "without prejudice" and not forming part of any negotiation or attempt to compromise, and so admissible in evidence. From this it followed that, in his submission, the barrister had been entitled to refer to the letter and the judge had been wrong to hold otherwise. I am unable to accept that submission. In **Rush & Tompkins Limited v Greater London Council** [1989] AC 1280 at 1299G Lord Griffiths said, in a speech with which the other members of the House agreed, at page 1299G, as follows *"[The "without prejudice" 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 negotiations being unsuccessful they are not to be referred to in 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 settlement and the public interest in full discovery between parties to litigation."*

14. This rule is stated in Cross on Evidence (7th Edition, 1990) at page 452 in these terms *"Obviously it is in the public interest that disputes should be settled and litigation reduced to a minimum, so the policy of the law is in favour of enlarging the cloak under which negotiations may be conducted without prejudice. This policy is carried out by means of a rigorous insistence on the absence of any magic in the form of words used by the parties, everything being made to depend upon their intention and the objective circumstances of the case, but difficulty occasionally arises as to the scope and effect of the privilege. ....It is unnecessary to use the words, or any equivalent, if it is clear from the surrounding circumstances that the evidence is part of a continuing negotiation, or obtained pursuant to one. Conversely, use of the phrase is inefficacious if the statement is not made as part of a genuine attempt to negotiate a settlement."*

15. Mr Jackson argued that the letter was quite simply the insurers' response to the plaintiff's solicitors' letter beforeaction, and was not to be regarded as an offer of compromise. It may have been an answer to the letter before action ; it was plainly, as I think, an offer to compromise, since the effect of the letter was to offer settlement on the basis of a reduction to reflect the plaintiff's own negligence. No

reference was made to any letter after the letter at the hearing on 28 March 1994, and it may very well be that neither the barrister nor counsel for the defendant then had or read those letters. Be that as it may, it seems to me clear that the letter was a bona fide offer by the insurers to explore the possibilities of settlement on a compromise basis, and the rule is clear that unless a party makes plain its intention that such an offer should be treated as an open offer it is covered, for public policy reasons, by the cloak of privilege. In my judgment, the judge reached the right conclusion on this point.

16. Mr Jackson then argued that even if the letter was prima facie inadmissible, it became admissible as a result of the defendant's inclusion of the letter in part 1 of schedule 1 of its list of documents as a letter which it did not object to producing. I do not accept this argument. In **Rabin v Mendoza & Co** [1954] 1 WLR 271 at 273 Denning LJ described as *"undoubted"* the proposition that production may be ordered of documents even though they may not be admissible in evidence. He did, however, hold that where documents had come into being under an express or tacit agreement that they should not be used to the prejudice of either party, an order for production will not be made. It may be observed that in the ordinary situation inter partes production is unlikely to be an issue, since the other party will already have either the original or a copy of relevant letters. In **Rush & Tompkins** above at page 1303A, Lord Griffiths said *"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] AC 581."*

17. The Supreme Court Practice 1995 treats the "without prejudice" rule as relating to admissibility and not production . see paragraph 24/5/17. It seems to me clear, both on authority and in practice, that the listing of a letter in part 1 of schedule 1 of the list of documents, irrespective of whether it could or should be more appropriately listed elsewhere, does not have the effect of rendering the document admissible if it is otherwise inadmissible. In the present case, the barrister did not in any event base his conduct on the defendant's list of documents, and at no stage before the wasted costs order was made was there any reference to the inclusion of the letter in part 1 of schedule 1 of the list.

18. No complaint of impropriety was made against the barrister, nor was it suggested that he had behaved unreasonably. The thrust of the case against him was that in the circumstances his conduct had been negligent. Mr Jackson challenged this finding, arguing that even if the barrister had been wrong his error was not such as to brand him as negligent given the high standard of proof required to establish professional negligence : see **Saif Ali v Sydney Mitchell & Co** [1980] AC 198 at pages 218 and 220. It was urged that even if the barrister had made an error of law, it did not follow from this that he had been negligent, since even a reasonably competent and careful practitioner may from time to time make an error of law. For my part, I fully accept that it is not necessarily negligent to make a legal error. Some legal errors may be negligent, others may not. If, in the heat of the moment, the barrister had introduced this letter, either in the course of his opening or in cross examination, believing (although wrongly) that the letter was admissible when it was not, I would hesitate to conclude that such conduct was negligent. In this case, however, the barrister was alerted to the existence of an issue on this point before the hearing began. He was not, of course, obliged to accept the truth or correctness of any assertion made informally by his opponent, but unless he was sure that that assertion was incorrect he was in my view bound, appreciating the possible consequences, to satisfy himself that his own view was correct or probably correct and to defer making any forensic use of the letter until he had done so. It may well be that there are other ways in which the matter could have been handled, either at an earlier stage or on 28 March, but it is unnecessary to explore those. I feel bound to share the judge's view that the barrister, having been alerted to the contention of the defendant's counsel and the possible consequences if his own view were held to be wrong, should not have proceeded to use the letter until he was as sure as he could reasonably be of the legal position.

19. Mr Goldstaub QC, who represented the defendant on the hearing of this appeal, submitted that the letter was not only inadmissible but devoid of probative value. He submitted that the insurers' opinion on the merits of the plaintiff's claim was entirely irrelevant to any issue in the action, and that the letter was accordingly mere prejudice. In any event, he suggested, no inference of any weight could be drawn from the willingness of the insurers to explore the possibility of compromise at a stage

when the plaintiff's claim appeared to be relatively modest and economic arguments would probably have favoured a compromise settlement. I see very considerable force in these submissions. Whatever the insurers' judgment at an earlier stage, it would seem to me that once liability was squarely in issue and the facts fell to be fully investigated, the risk of serious prejudice to the defendant as a result of the court seeing the letter was relatively slight. Many judges would, I think, have brushed the letter aside even if it was shown to them, and continued the hearing of the action without paying regard to it. It is perhaps a pity that the judge did not take that course. This is not, however, an argument that sits comfortably in the mouth of the barrister : he considered the letter of sufficient value to justify putting it before the judge ; his opponent had made clear the course which he would adopt if the barrister did show the letter to the judge ; and the barrister could not be confident that if the defendant sought an adjournment the court would be bound to refuse it. It seems to me that once counsel for the defendant had made his position plain, the barrister pursued the course which he did at his peril. It was a course which he could safely pursue only if he was sure, and reasonably sure, that his opinion on the relevant law was correct.

20. It was submitted for the barrister, with reference to **Ridehalgh v Horsefield**, that the procedure adopted in this case was irregular. In **Ridehalgh** the court gave certain guidelines on the proper approach to applications for wasted costs orders, seeking to reconcile the need to ensure that any procedure adopted would be fair with the need to prevent such applications blossoming into an expensive and time-consuming litigious industry. It was argued on behalf of the barrister that the procedure adopted in this case violated the Court of Appeal guidelines, in that the judge did not wait until the end of the trial before making an order, nor did he adopt the two-stage procedure of first deciding whether to invite the representative to show cause and then giving the legal representative an opportunity to show cause on a separate occasion before exercising his discretion whether or not to make an order, nor did he specify clearly the complaint made against the barrister.

21. I am not persuaded that these complaints are justified on the facts of this case. It must be remembered that the Court of Appeal was seeking to give guidelines, and was not prescribing an inflexible procedure to be adopted in every case whatever the circumstances. Here, both the court and the barrister were alive to the guidelines which the Court of Appeal had laid down.

22. The judge was to have no further contact with the case, and it would seem to me inappropriate for him to have assigned the application for a wasted costs order to a different judge or to have deferred further consideration of the matter to a later date unless the barrister, for plausible reasons, sought such deferment. I consider that the barrister was fully alive to the complaint made against him. He could have sought a deferment of the application in order either to take advice or seek representation but he did not do so. He was an established junior of over 20 years' call, well able to look after himself. He took the view that there was nothing that could usefully be said on his behalf on any later occasion which he could not say there and then, and in this judgment he was in my view correct. Nothing which has been advanced in argument on this appeal leads me to conclude that the barrister was unfairly prejudiced in any way by the procedure which was adopted and to which he did not at the time object. I do not think he was the victim of procedural impropriety or unfairness.

23. There is one respect in which the order made by the judge was in my view defective. Order 62 rule 11 (1) (a) of the Rules of the Supreme Court requires that a wasted costs order shall *"specify in the order the costs which are to be so disallowed or met..."*. The judge's order did not do so. If it were to stand it would have to be amended.

24. As is clear from my reasons already given, I would for my part have concluded that the judge's decision to make a wasted costs order against the barrister was sound. I have, however, had the benefit of reading the judgments of Evans and Aldous L.JJ., both of whom have reached the opposite conclusion. I am not persuaded that my own conclusion is wrong, and there are a number of points on which I would take issue. I am, however, conscious that in **Ridehalgh v Horsefield** at page 236 G the Court said *"It is only when, with all allowances made, an advocate's conduct of court proceedings is quite plainly unjustifiable that it can be appropriate to make a wasted costs order again him."*

And at page 237 D the point was repeated *"Where there is room for doubt, the respondent lawyers are entitled to the benefit of it. It is again only when, with all allowances made, a lawyer's conduct of proceedings is quite plainly unjustifiable that it can be appropriate to make a wasted costs order."*

25. In the light of the conclusions reached by My Lords I do not think it would be right for me to conclude that the barrister's conduct was "quite plainly unjustifiable" and I feel bound to defer to their contrary view.

26. In these circumstances I agree that the barrister's appeal should be allowed and the wasted costs order set aside.

LORD JUSTICE EVANS:

27. This case came on for hearing before His Honour Judge Geoffrey Baker Q.C. sitting as a deputy judge of the High Court at Leeds on 28 March 1994. The barrister representing the plaintiff referred during his opening address to a letter from the defendants' insurers to the plaintiff's solicitors dated 28 May 1985. The central issue in this appeal is whether he was negligent in doing so. He made the reference in the following terms : *"There's a letter, which is an open letter, and partially admits liability".*

28. Counsel for the defendants objected, on the ground that the letter contained an offer to enter into compromise negotiations and therefore was privileged between the parties and inadmissible in evidence against the defendants. The judge upheld the objection. In the course of submissions he was told something of discussions which had taken place between counsel before the trial began.

29. There had been two disagreements between them, and it is clear that the two matters were linked in the barrister's mind. First, he was told that the defence would rely upon the contents of a lever-arch file of documents obtained from the plaintiff's general medical practitioner and upon a video recording which had been made surreptitiously of the plaintiff since his accident. This signalled an all-out attack on the plaintiff's creditworthiness. The video film had not been disclosed previously and the medical documents were not included in the bundles which had been agreed for use at the trial. This may have been because the doctor was required first to produce them under a subpena duces decum at the trial, but it seems that the documents had been obtained in advance, with the consent of the plaintiff's solicitors, and that a copy of the file had been made available to them, although unfortunately the barrister had not seen it. He, understandably, felt a sense of grievance that he was not forewarned of this material, but whether he should have held the defendants' representatives responsible or his own instructing solicitors is less clear.

30. The second matter was the letter of 28 May 1985 which the barrister then told counsel for the defendants he proposed to rely upon as an admission by or on behalf of the defendants that they were under some measure of liability for the plaintiff's accident, subject to their defence of contributory negligence.

31. There was a tenuous basis for linking the two matters, as the barrister did. The letter, if it had the effect which he thought it did, indicated that contributory negligence and, perhaps, the extent of the plaintiff's injuries were the only live issues for the judge to decide. On the other hand, the general attack on the plaintiff's creditworthiness suggested that the defendants disputed that they had any liability for accident, which was their pleaded case throughout. Hence the value, as the barrister saw it, of an admission that they were to some extent at least to blame.

32. The letter was not included in the trial bundles. However, it was not marked 'without prejudice' and apparently it had been regarded by both parties' representatives as part of open i.e. non-privileged correspondence. It was the only reply to what clearly was an open letter from the plaintiff's solicitors dated 27 March, which was followed by a reminder dated 10 May, and there was no suggestion in later correspondence that it should be regarded as 'without prejudice' or privileged in any way. The defendants' solicitors included it in Schedule 1 Part 1 of their List of Documents when formal discovery took place, with no question of privilege being raised. That fact was unknown both to the barrister and to counsel for the defendants at the time. It did, however, cause the judge apparently to reconsider his decision that the barrister was negligent and that a wasted costs order should be made

him when he was told about it two days later on 30 March and his unfortunately worded further direction was given.

33. These were not the only respects in which the proceedings had an unsatisfactory history. The plaintiff's accident took place more than ten years previously, on 16 February 1984, and the letter in question had been in existence for nearly nine years. The trial first came on for hearing in September 1993 but the judge had insufficient time for the hearing, only one day, and the case was re-fixed for March 28 with a three-day estimate. Then only three days were available, and if the plaintiff was to be cross-examined at length from the extensive medical records and other material including the video film, even that estimate was at risk. The pressure of time also meant that it was wholly impracticable to obtain any kind of preliminary ruling from another tribunal, if the admissibility of the May 28 letter was objected to, without a further adjournment of the trial. If the trial judge was invited to make the ruling and held that it was inadmissible, and also considered that he was thereby prejudiced and disqualified from proceeding to hear the trial, then the same consequence would follow.

34. This was the unhappy state of affairs when the barrister rose to address the judge. Counsel for the defendants had forcefully made it clear that if the letter was referred to he would object to its admissibility and, if successful, would invite the judge to adjourn the trial. On the other hand, if the letter contained an informal admission of liability, subject to the defence of contributory negligence, then that would assist the plaintiff's case and also tend appreciably to shorten the trial.

35. Apart from the difficulties with regard to the medical documents and the video recording, there had been fault on both sides in relation to the May 28 letter. It, or the relevant sentence in it, was one which "a competent solicitor" would have headed "without prejudice" (per Lord Griffiths in **Rush and Tompkins Ltd. v. G.L.C.** [1989] A.C. 1280 at 1299G). Although it was not written by the defendants' solicitors but by the claims department of their insurers, they had previously indicated that they were aware of the distinction between open and without prejudice correspondence. Their standard form of letter dated 19 March included :

"(8)Our enquiries are complete. Without admission of liability, we offer your client £..... plus reasonable costs, to be agreed.

(9)Our enquiries are complete and, without prejudice, it will be our intention to put forward a settlement proposal ...."

although neither of these paragraphs was marked as relevant in the letter sent in the present case.

36. It was not beyond the bounds of possibility that the defendants might seek to rely on an open offer in general terms to negotiate a compromise settlement as an indication of reasonableness and good faith on their part. Such a possibility, if it existed, was confirmed rather than otherwise by the inclusion of this and other letters, with individual references, in the defendants' list of documents, which their solicitors had prepared. On the plaintiff's side, the letter should have been included in the trial bundles if it was to be relied upon. If it had been, any objection to its admissibility could have been decided at some form of preliminary hearing.

37. Although I have set out these background circumstances in some detail, and they are not wholly irrelevant to the issues raised by the appeal, it is important in my judgment to bear in mind that the question whether the barrister acted negligently depends upon the standards expected of a reasonably competent practitioner situated as he was on the morning of the trial. His previous involvement in the case, if there was any, is not criticised, and if he was negligent on this occasion then the fact, if it was the fact, that there were shortcomings in the preparation of the case for trial does not avail him.

38. 'Without prejudice' correspondence between the parties to an action or their representatives is inadmissible in evidence and is usually described as 'privileged', but this is possibly a misnomer if it is taken to mean that the documents in question are privileged from production at the stage of discovery. They consist of communications between the parties and the contents therefore are not confidential to either of them, although there may be scope for a claim for privilege where, for example, manuscript notes have been made on the original document by the receiving party or on a copy retained by the sending party. Nevertheless, such correspondence is described as "jointly

privileged" in Cross on Evidence (7th ed. page 452) and it is now well established that the privilege and its inadmissibility in evidence depend upon the fact that the contents consist of negotiations which were intended to be 'without prejudice' rather than upon the use of those words or any other magic formula.

39. Nevertheless, it must be possible for 'open' negotiations to take place, if only because one party might wish to claim credit for being reasonable if no settlement is achieved and the dispute comes to trial. So a difficulty arises when, as here, an offer to negotiate is made but there is no express indication that the offer is not to be referred to at the trial if no settlement results.

40. It is submitted on behalf of the barrister that the May 28 letter not only was not marked "without prejudice" but also was the only reply to open letters, and was itself followed by correspondence, none of which was so marked. The defendants' insurers could have been expected, it is submitted, to acknowledge the letters which they had received in an open but non-committal reply, accompanied by a separate offer to negotiate which would clearly be intended to be 'without prejudice'. That would have been the usual course, but equally it cannot be doubted in my judgment that the letter was intended both as an acknowledgement and as an offer to negotiate. The correct analysis, therefore, if the offer was made without prejudice, may be that only that part of the letter which made the offer was protected by the privilege.

41. I agree with my Lords and with the Judge that the offer was made without prejudice although not marked as such. If an agreement to this effect is necessary, then it is established by the fact that the plaintiff's solicitors responded in terms which confirmed that the correspondence should be regarded as an attempt to compromise the action, which as a general rule would not be admissible at the trial and could not be used to establish an admission or partial admission (per Lord Griffiths in **Rush and Tompkins Ltd. v. G.L.C.** at page 1299H).

42. But this not mean that the barrister was negligent to raise the issue when he did. Whether he was negligent depends in my judgment upon three factors. First, was it so clear that the offer was made 'without prejudice' although not marked as such that the contrary was unarguable? Secondly, is it relevant for thgis purpose that no claim for privilege was made in the defendant’s list ? Thirdly, was it negligent to raise the issue at the trial, even if it was arguable in the plaintiff’s favour, when the result of an adverse ruling was or might well be that the trial would have to be adjourned yet again for hearing by a different judge?

43. Taking these questions in reverse order, I find it difficult to condemn the barrister in negligence for raising an issue which, it if was arguable in his client's favour, could be of substantial benefit to his case. The fact that a further adjournment might become necessary if the argument failed was due to the unfortunate history and combination of circumstances to which I have referred. The costs of an adjournment could be made the subject of a special order if the circumstances on examination justified that course. If the point was arguable, then to hold that the barrister was negligent to raise it because of the fear that a wasted costs order might be made against him personally would be to expose him to the risk of a conflict of loyalties which should not be allowed to occur: see **Ridehalgh v. Horsefield** [1994] Ch. 205 at 235A.

44. The second question appears to have been answered by the judge in the barrister's favour, when he was made aware of the contents of the Defendants' List on March 30. At least, he appears then to have regarded the plaintiff's submission against privilege as arguable. Although on examination the defendants' solicitors' inclusion of the May 28 letter in Schedule 1 Part 1 of their list was not inconsistent with the claim for privilege, this nevertheless in my judgment was a feature of the case which justified the barrister in obtaining the Court's ruling. The question which then arises is whether the barrister can rely upon it when both he and counsel for the defendant were unaware of it on March 28. I do not see why he should not. His conduct must be judged by the standard of a reasonably competent practitioner who was in possession of all the relevant facts. One such fact was the terms of the Defendant's List. The barrister fell short of that standard by reason of his unawareness of this fact which was favourable to him, but it does not follow that he cannot rely upon it to establish the propriety of what he in fact did.

45. Finally, therefore, the first question has to be considered in the light of these answers to the second and third.

46. The judge held that "*For my own part, I cannot see an argument succeeding that this was not a letter written with a view to settlement"*, and later, "*Well, I think this is a plain case"*. However, he also described the course which should have been adopted in his view when questions of admissibility or privilege arose. *".... it is always possible to have a hearing so that the matter can be determined from the beginning"*. He continued : *"The case was fixed for hearing. The plaintiff well knew what the defendants' attitude was and what their contentions would be. In my judgment it is not the right way to deal with it to open the case .... and then to bring out this letter ...."*.

He said that the plaintiff's lawyers should have arranged some form of preliminary hearing, and this was not done. He then described the allegation of negligence, which he found was proved, as this: *"either he shouldn't have brought it in, or he should have had a preliminary point taken before a judge to decide on its admissibility. He chose to introduce the letter suddenly and without any real justification from what was going on"*.

47. Nowhere does the judge say that it would have been wrong, and negligent, to have raised the issue at a preliminary hearing. Strictly that would be the position if the point was wholly unarguable, and a wasted costs order would have been equally appropriate if the plaintiff's lawyers had done as the judge suggested they should have done. I am not sure that this inference is sufficiently strong to contradict the judge's clear statement *"this is a plain case"*, but I do read his observations as indicating that he was as much critical of the barrister for raising the issue when he did, as of the fact that he raised it at all. Moreover, his reference to the plaintiff's representatives well knowing what the defendants' attitude was could well explain why he made his second order on March 30, when he was made aware of the contents of the defendants' Lists.

48. The judge's overall conclusion on the second occasion was apparently that the barrister should not stand convicted of negligence. I have reached the same conclusion, taking all these factors into account. The barrister was in an unenviable situation as the result of a catalogue of previous errors, and if it was arguably correct that his client was entitled to rely upon all the terms of the open letter dated 28 May then it was not negligent for him to raise that issue for decision by the judge. He did not make his position any easier by the abrupt manner in which he did raise it and by his possibly rather petulant reaction to what he saw as unhelpful tactics by the defendants' representatives, although those faults were redeemed by his frank and courageous response when the applications for an adjournment and for a wasted costs order were made. The question of admissibility and privilege was not entirely clear and it deserved a ruling by the Court. For these reasons, in my judgment, the judge's ruling on March 28 should not stand and the appeal should be allowed.

Procedure

49. The Times report of the Court of Appeal's decision in **Ridehalgh v. Horsfield** was available to the defendants' representatives during the midday adjournment and a copy of it was shown to the barrister a few minutes, we were told, before the judge sat to hear the wasted costs application at 2 p.m. Events have demonstrated that it would have been better if the hearing had been deferred for further consideration by both parties, if only because then the contents of the defendant's List would have become known before the hearing took place. The general desirability of following the guidelines already established by this Court is therefore underlined. But in the circumstances of the present case, where the barrister did not object to a summary hearing, I do not consider that he now has any valid ground of complaint.

LORD JUSTICE ALDOUS:

50. In 1984 Mr. Mark William Sampson was employed by John Boddy Timber Limited and in February of that year was operating a side-lift truck. He had cause to get out of the cab of the truck onto a platform which collapsed causing him to fall and injure his back and groin.

51. Mr. Sampson consulted solicitors over his injuries who wrote on his behalf seeking compensation from his employers. They referred the claim to their insurers who from then on dealt with it on the

defendants' behalf. Unfortunately the matter could not be resolved by agreement and proceedings were issued on behalf of Mr. Sampson on 22nd January, 1987. In his pleading, he alleged negligence and breach of statutory duty. The defence admitted the accident, denied liability and alleged in the alternative that Mr. Sampson had been guilty of contributory negligence.

52. The proceedings were transferred to the High Court in 1993 and the action was set down for trial to start on 21st September, 1993. Unfortunately the judge who had been allocated to hear the action did not have sufficient time available and the case had to be adjourned. It was re-fixed to start on 28th March, 1994.

53. It seems that on the morning of the trial counsel for the plaintiff was handed by counsel for the defendants a lever arch file containing the plaintiff's medical records that had been obtained by the defendants upon service of a subpoena duces tecum and he was also told or reminded of a video of the plaintiff that the defendants had. From that it became apparent to the plaintiff's counsel that the plaintiff's credit was to be attacked. He for his part told the defendants' counsel that he intended to introduce into the hearing a letter dated 28th May, 1985 that had been written by the defendants' insurers. Counsel for the defendants asserted that the letter was inadmissible as it was "without prejudice". Counsel for the plaintiff disagreed, but it was clear to him that if the letter was introduced, counsel for the defendants would object to it and if the objection was sustained, would apply for the trial to be adjourned to be heard by another judge.

54. After opening the basic facts, counsel for the plaintiff sought a decision from the judge as to whether the letter of 28th May, 1985, was admissible. He told the judge that the letter was an open letter which partially admitted liability, but was subject to objection by the defendants. Thereafter the judge heard submissions. On behalf of the plaintiff, it was submitted that the letter was an open letter and admissible as an admission against interest. Counsel for the defendants submitted that it was a "without prejudice" letter and was inadmissible and privileged. The judge held: *"This letter which is dated 28th May, 1985, which is an open letter, says this: '**We have now completed our investigation into the circumstances of your client's accident,**' Which itself is an important matter because it shows such investigations were made and completed. Then it goes on: '.... and we confirm that we are prepared to negotiate a settlement on a compromise basis arguing that your client ought not to have used the platform as a means of access.'It then goes on to discuss the medical evidence in this and another case and goes on to say that once that has been provided they will arrange to discuss the case further.*

Leaving out the other case for the moment, the clear tenor of that letter is that the insurance company was prepared to negotiate a settlement, and any insurance company indicating that it is prepared to negotiate a settlement is, by implication, saying, "There are matters which have come to light which may make it likely that we should be paying because we shall be found to be at least partially responsible for the accident". It is not really a question of whether it is prejudicial to the defendant or not, because [the barrister] has made it clear that he would be prepared to, and would be intending to, rely on it as a partial admission, and would even use it at a later stage in cross-examination.

Now, I have not been referred to any of the authorities, and I must assume, with experienced counsel, that there are none which affect the principle that communications made between parties which are expressly or impliedly with a view to settlement and compromising the action are privileged from production, and that is so whether they are headed "without prejudice" or not. One knows that there are many cases where the letters are headed "without prejudice" when clearly it is desired to place something on record which is not without prejudice at all. But the converse can also apply, and in my judgment this is one of those cases where, for reasons best known to the insurance company, it was saying it was prepared to negotiate a settlement on a compromise basis. It is inviting discussion of the damages, and I agree with [the barrister] that if that were to be used in evidence it would more likely than not be to indicate that there is some liability on the defendant here. Indeed, that is the object of putting it in, and the express object of putting it in.

In my judgement this is a letter which should never have been put in at all, and if the defendant takes the view, which it is entitled to take, that I would be even to some extent influenced against it and in favour of the plaintiff, then this is a matter which goes to the root of the dispute between the parties and I do not feel that they are wrong in taking that view. After all, we all know that justice should not only be done but should be seen to be

done, and I am quite sure that the defendant would have a substantial grievance if in trying to effect a settlement it has put itself in a position where a court was holding against it, and may have done so on the basis of its attempt to settle a case in which it was really not liable at all.

In those circumstances I think the defendant is entitled to require that another judge tries this case who has not had sight of these or any other settlement letters. In those circumstances the defendants' application for adjournment succeeds."

55. Thereafter counsel for the defendants asked for an order that the costs thrown away should be paid by the plaintiff and that as the plaintiff was legally aided he wished to consider whether it was appropriate for him to seek a "*wasted costs*" order against those advising the plaintiff. As it was after 1.00 p.m., the case was adjourned to 2.15 p.m. when the hearing was resumed. By that time counsel for the defendants had acquired a copy of the Times report of the Court of Appeal judgment in **Ridehalgh v. Horsfield** which had been handed down on the 26th January and is now reported at [1994] Ch 205. Counsel read the report to the judge and submitted that a wasted costs order should be made on that day. Counsel for the plaintiff accepted that he was wholly responsible for the decision to introduce the letter into the proceedings.

56. Thereafter the judge gave judgment. In that judgment he recited the background to the case, how the letter came to be introduced, the basis of the application for the wasted costs order, namely negligence, and concluded that an order should be made that the counsel for the plaintiff should pay the wasted costs. After discussion that was the order that was made.

57. Two days later, on the 30th March, 1994, the plaintiff's solicitors approached the judge and informed him that the letter of 28th May had been included in Part I of Schedule I of the defendants' list of documents. The result was another judgment in these terms: *"N. B. I later saw the solicitor for the plaintiff, and upon hearing his representations (that no objection had been taken in the list of documents to the admissibility of the letter, and it had in fact been included in the list as not being objected to, I discharge the order for costs."*

58. The judge should not have given that judgment. However its significance is that the judge appears to have come to the conclusion that the fact that the letter of 28th May, 1985, was included in Part I of Schedule I of the defendants' list of documents meant that either counsel had not been negligent or that the letter was admissible in the proceedings.

59. This is an appeal by counsel for the plaintiff against the order of His Honour Judge Baker Q.C. whereby he ordered that there be a wasted costs order against the plaintiff's counsel. On behalf of the Appellant it was submitted that, (1) the judge erred in holding that the letter of the 28th May was inadmissible; (2) the order should be set aside as the procedure adopted at the hearing was inappropriate and unfair; (3) there was no negligence; (4) that the judge should not have exercised his discretion so as to make the order that he did.

Admissibility

60. Evidence as to negotiations between parties seeking to resolve a dispute is not in general admissible whether or not the negotiations are stated to be "*without prejudice*": see **Rush & Tomkins Ltd. v. Greater London Council** [1989] 1 A.C. 1280. In that case, the plaintiffs had entered into a building contract with the GLC and had engaged the second defendants as subcontractors. Negotiations between the plaintiffs and the GLC, in correspondence marked "without prejudice", resulted in a compromise with the result that the plaintiffs discontinued the action against the GLC. The second defendants sought discovery of the "without prejudice" correspondence between the plaintiffs and the GLC. The House of Lords held that the correspondence was not discoverable as it was privileged. At page 1299D Lord Griffiths came to consider the "without prejudice" rule. He stated: *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 enquiry 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 of offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the questions 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 also head any negotiating correspondence 'without prejudice' to make clear beyond doubt that in the event of 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."

Lord Griffiths went on to hold at p. 1301D: 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."

61. At p. 1303 Lord Griffiths considered whether there was a difference between admissibility and discoverability and concluded, at p. 1305: "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."

62. The decision as to whether the letter of 28th May, 1985, was covered by the "without prejudice" rule did not depend upon whether the letter was headed "without prejudice", but had to be taken in the light of all the surrounding circumstances. The decision depended on whether the particular letter was part of negotiations genuinely aimed at a settlement.

63. The plaintiff's accident happened on 16th February, 1984, and Mr. Sampson consulted his solicitors soon thereafter with the result that they wrote to the defendants on 4th March, 1985.

64. That letter stated: *"We are instructed to hold you responsible for this accident which was caused by your failure to supply our client with a safe system of work. In these circumstances he claims damages for his personal injuries and other losses. No doubt you will forward this letter to your insurers and we will look forward to hearing from them as soon as possible."*

65. The reply to that letter came from the defendants' insurers. It was dated 19th March, 1985, and was in standard form with crosses in boxes to indicate the paragraphs that were applicable, namely paragraphs 3, 4 and 5. Those paragraphs were as follows.

"(3) Please let us have detailed allegations of negligence and/or breach of statutory duty.
(4) What is the extent and nature of your injury? Is it alleged that there is a continuing disability?
(5) If you have a medical report, please let us have a copy. Also confirm that should we consider it necessary we will be granted facilities to have your client medically examined."

66. The plaintiff's solicitors replied on the 27th March giving information as to how the accident happened and details of the injuries suffered by Mr. Sampson. That letter was followed by a reminder of the 10th May, 1985, in this form: *"We refer to our letter of 27th March and should be pleased to hear from you as to whether you are prepared to deal with this matter because if not we will apply for legal aid immediately rather than incurring the expense of a medical report which is the next step we would otherwise wish to be taking."*

67. So far the communications between the parties were undoubtedly not covered by *the "without prejudice"* rule.

68. The defendants replied by the letter of the 28th May. It was not headed "*without prejudice*", it stated: *"We thank you for your letter of the 10th May.*
We have now completed our investigations into the circumstances of your client's accident and confirm that we are prepared to negotiate a settlement on a compromise basis, arguing that your client ought not to have used the platform as a means of access.
If you will provide us with a copy of any medical evidence you have in this case .... our representative Mr. Thompson, will arrange to discuss both cases.
Meanwhile, would you please advise if your client intends to return to work in the near future. We await to hear from you."

69. To that the plaintiff's solicitors replied on 31st May, 1985, stating: *"In the case of Sampson we have already requested a medical report and will communicate with you again when it arrives. We note what you say about the platform and we think it necessary for us to inspect the side loader in question in order to form our own conclusions about the matter. Could you arrange a suitable time for such an inspection? Assuming this will not be for at least a month or so we may by then have our medical reports in both cases so we could perhaps take the opportunity of meeting you and engaging in further negotiations."*

70. Thereafter correspondence passed between the parties concerning medical reports, but without much progress being made.

71. This prompted the plaintiff's solicitors to write on the 7th March, 1986: *"We refer to our previous correspondence and are surprised that we have not heard from you with a copy of Mr. Shea's report. Could you please attend to this without delay. We are anxious to engage in further discussions with you and if this matter is not to be settled we must commence proceedings immediately."*

72. The plaintiff's solicitors wrote again on 19th March stating: *"It is now some five months since our client was examined by Mr. Shea in Leeds and you have not communicated with us. Please take this letter as notice that if our client's claim has not been settled on a 100% basis within seven days of the date of this letter we shall commence proceedings without further notice, shall serve your Insured direct and pursue our client's claims through the Courts. The deadline for settlement is 10.00 a.m. on the 26th March, 1986."*

73. Thereafter legal aid was obtained and the proceedings were started on 22nd January, 1987.

74. For myself, I conclude that the letter of the 28th May was covered by the *"without prejudice*" rule. The use of the words "*negotiate a settlement on a compromise basis*" indicate that the writer was attempting to negotiate a settlement. I believe that view is confirmed by the reply of the plaintiff's solicitors when they said *".... so we could perhaps take the opportunity of meeting you and engaging in further negotiations"*. Further the conclusion that the letter of the 28th May was the start of negotiations was emphasised by the letters of the 7th March and the 19th March to which I have referred; both of which talk about discussions and settlement. True the letter of the 28th May was written in reply to an open letter and was the only reply to that letter, but that does not mean that it was not the start of negotiations. True the letter was included in Part I of Schedule I of the defendant's list of documents and that notice was given in the list that it could be inspected, but that did not render it admissible in evidence though it may have amounted to a waiver of privilege. I therefore believe that the judge rightly concluded that the letter was not admissible in evidence.

Procedure

75. In **Ridehalgh v. Horsfield** [1994] Ch 205, the Court of Appeal considered four appeals against "wasted costs" orders. The judgment of the court reviewed the background to such orders and the jurisdiction given to the courts. Amongst other things, the Court of Appeal dealt with the procedure that should be adopted when such an order is sought. At p. 238G the Court of Appeal said: *The procedure to be followed in determining applications for wasted costs must be laid down by courts so as to meet the requirements of the individual case before them. The overriding requirements are that any procedure must be fair and that it must be as simple and summary as fairness permits. Fairness requires that any respondent lawyer should be very clearly told what he is said to have done wrong and what is claimed. But the requirement of simplicity and summariness means that elaborate pleadings should in general be avoided. No formal process of discovery will be appropriate. We cannot imagine circumstances in which the applicant should be permitted to interrogate the*

respondent lawyer, or vice versa. The hearing should be measured in hours, and not in days or weeks. Judges must not reject a weapon which Parliament has intended to be used for the protection of those injured by the unjustified conduct of the other side's lawyers, but there must be astute control of what threatens to become a new and costly form of satellite litigation."

That passage does not need any explanation, but it is clear that an essential requirement of fairness is that the person against whom the wasted costs order is sought must be *"very clearly told what he is said to have done wrong".*

76. The Court of Appeal went on at p. 239 to consider the terms of 0. 62, r. 11(4) and stated: *"Although Order 62, rule 11(4), in its present form requires that in the ordinary way the court should not make a wasted costs order without giving the legal representative 'a reasonable opportunity to appear and show cause why an order should not be made', this should not be understood to mean that the burden is on the legal representative to exculpate himself. A wasted costs order should not be made unless the applicant satisfies the court, or the court itself is satisfied, that an order should be made. The representative is not obliged to prove that it should not.*

But the rule clearly envisages that the representative will not be called on to reply unless an apparently strong prima facie case has been made against him and the language of the rule requires a shift in the evidential burden"

What is a reasonable opportunity to appear and show cause will depend on the circumstances of each case. However the opportunity must, to be reasonable, enable the person to take advice, if he desires to do so, and make such enquiries as are reasonably necessary.

77. The allegation made against counsel for the plaintiff, which to be acceptable had to be clearly made, was that the letter of the 28th May was so manifestly a without prejudice letter that the consequence of putting it before the judge was foreseeable to a reasonably competent lawyer (transcript p. 31H - 32 A). Counsel accepted that the decision to show the letter to the judge was his. However, it is important to realise that he was not charged with failing to obtain a preliminary hearing at which the admissibility of the letter could have been decided and that he never accepted responsibility for any such failure. The defence to the allegation was that the letter was at least properly arguable as admissible. That being so, it is also important to note that it was not alleged that his decision to introduce the letter was negligent, if his view as to admissibility was properly arguable. The charge laid against him was that the letter was so manifestly inadmissible that it was negligent to show it to the judge.

78. Unfortunately the judge did not concentrate upon the allegation of incompetence made against counsel. At p. 39 of the transcript of his judgment, he said: *In this connection I find that I must say this, where questions of admissibility arise or privilege arise it is always possible to have a hearing that that matter can be determined from the beginning. An appointment can be fixed for a judge to deal with it. It can then be either adjudicated upon or adjudicated upon and appealed, as the case may require. This case was fixed for hearing. The plaintiff well knew what the defendants' attitude was and what their contentions would be. In my judgment it is not the right way to deal with it, to open the case on the basis that this is a contest as to liability and damages, and then during the course of some exchanges in the middle of the opening to bring out this letter and put it in so that the judge sees it, especially when the letter did not appear to have any direct connection or nexus with the matters which were being discussed."*

79. The judge went on to hold that he could not see an argument succeeding that the letter was not written with a view to settlement and therefore held the letter to be inadmissible. He concluded at p. 41 of the transcript: *"The procedure is that the matter must be fair and simple as summary as fairness permitted and the respondent lawyer was to be very clearly told what he was said to have done wrong. I do not think that anyone could argue that this is a complicated situation and that [the counsel] could have failed to appreciate what it is that is alleged; either he should not have brought it in, or he should have had a preliminary point taken before a judge to decide on its admissibility. He chose to introduce the letter suddenly without any real justification from what was going on."*

80. The judge came to consider whether he should require counsel to show cause as to why he should not be liable for the costs and concluded that that was not necessary as counsel had had an opportunity to

address him and because counsel had accepted that he was responsible for the act which was the cause of all the costs being thrown away. In those circumstances the judge made the wasted costs order.

81. I have no doubt that the judge came to his conclusions because he thought that either the letter should have not been introduced or a preliminary hearing arranged to enable the court to decide on admissibility. That was not the allegation made against plaintiff's counsel. The allegation was that the letter was manifestly inadmissible and therefore any act based on a conclusion to the contrary would be negligent. That being so, it would have been appropriate to make counsel pay the costs if the letter had been considered at a preliminary hearing. Thus the suggestion that it would have been appropriate for the question of admissibility to be tried as a preliminary point would not have affected the conclusion that a "wasted costs" order was appropriate, but would perhaps have made a difference as to the amount of costs that had been thrown away.

82. I have come to the conclusion that the reasons that the judge gave for coming to the conclusion that he did cannot be supported in that he failed to confine himself to the allegation made against counsel. He may be right that, having regard to doubts as to the admissibility of the letter, it was negligent not to have sought a preliminary hearing, but that was not established as being the fault of counsel and also was not the allegation made against him.

83. I am also uncertain as to whether counsel for the plaintiff was given a reasonable opportunity to show cause as to why the order should not be made. The possibility of a wasted costs order arose at about 1.15 p.m. After the adjournment, counsel for the defendants applied for the order against counsel for the plaintiff. He submitted that the matter should be disposed of there and then, but indicated that, if an adjournment was sought, he would not resist it.

84. It is clear from the transcript that counsel understood that the only allegation made against him was that he was negligent when deciding that the letter was properly arguable as admissible. It is also apparent that he never sought an adjournment, though he suggested to the judge that he might feel that he should take legal advice. His concluding remarks pointed out that "at this stage" he could not sensibly say any more.

85. In my view it is unfortunate that the matter was dealt with in such haste. The Court of Appeal pointed out in Ridehalgh that the procedure must be fair. In this case it was alleged that counsel had been negligent and little opportunity was given for him to reflect upon that allegation. Even so, I do not believe that that is a ground upon which this appeal should succeed. Counsel was given the opportunity to seek an adjournment and decided for good or ill not to do so.

Negligence

86. The Court of Appeal in **Ridehalgh** indicated the true meaning of the word "negligent" in this jurisdiction. At p. 233 the Court said: *"We are clear that 'negligent' should be understood in an untechnical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession.*

In adopting an untechnical approach to the meaning of negligence in this context, we would however wish firmly to discountenance any suggestion that an applicant for a wasted costs order under this head need prove anything less than he would have to prove in an action for negligence; 'advice, acts or omissions in the course of their professional work which no member of the profession who is reasonably well informed and competent would have given or done or omitted to do;' an error such as no reasonably well-informed and competent member of that profession could have made: See ***Saif Ali v. Sydney Mitchell & Co.*** *[1980] A.C. 198, 218, 220, per Lord Diplock."*

87. The Court of Appeal went on to point out that a legal representative should not be considered to be negligent because he acts for a party who pursues a claim which is bound to fail unless to do so amounted to an abuse of the process of the court.

88. A similar view was expressed by the Court of Appeal in **Abraham v. Jutsun** [1963] 1 W.L.R. 658. In that case the Court had awarded costs against a solicitor advocate because a point taken in argument was thought to be thoroughly bad and unmeritorious. Lord Denning M.R., after holding that the Court had power to make the order as to costs and that the points taken by the solicitor were fairly

arguable said, at p. 663: *"As it turned out, both points were bad points. But Mr. Putnam was not the judge of that. The magistrates had their clerk to advise them on the law. He was to advise them whether the points were good or bad. It was not for the advocate to do so. Appearing, as Mr. Putnam was, on behalf of an accused person, it was as I understand it, his duty to take any point which he believed to be fairly arguable on behalf of his client. An advocate is not to usurp the province of the judge. He is not to determine what should be the effect of legal argument. He is not guilty of misconduct simply because he takes a point which the tribunal holds to be bad. He only becomes guilty of misconduct if he is dishonest, that is, if he knowingly takes a bad point and thereby deceives the court. Nothing of that kind appears here."*

Harman L.J. said, at p. 664: *The court under its inherent jurisdiction and under the rules can always control a solicitor and go to the length of making him pay personally costs which have been thrown away, but thrown away either by his misconduct or by his negligence, which is only a negative form of misconduct. Now if it be misconduct to take a bad point, a new peril is added to those of the legal profession, and unless a bad point be taken, knowing it to be bad and concealing from the court, for instance, an authority which shows it clearly to be a bad point, then it would be a very dangerous doctrine indeed to says the advocate ought to be mulcted in the costs because he took a point which failed."*

89. An act or omission will amount to negligence, if it is one which no advocate who is reasonably well informed and competent would have done or omitted to do. However, a competent advocate may take a point which is fairly arguable and, as pointed out by Lord Denning, is under a duty to do so if it be in the interest of his client. The test is not whether a point is good or bad or even manifestly bad, but whether it is fairly arguable. To place the standard any different, such as manifestly wrong, would be contrary to the public interest in that it would require an advocate to consider the risk he was incurring when carrying out his duty to place his client's case before the court even though that case will fail.

90. In the present case, I believe that the legal background would have been known to competent counsel. Thus he would know that settlement negotiations in correspondence headed "*without prejudice*" were not admissible in evidence. He would also know that the omission of the words "*without prejudice*" was not conclusive in that correspondence forming part of genuine negotiations towards a settlement also fell within the rule.

91. I have already held that the letter of the 28th May fell within the "without prejudice" rule, but that does not mean that the contrary was not fairly arguable. If it was, then this appeal must be allowed.

92. I have come to the conclusion that it was fairly arguable that the letter of the 28th May did not fall within the "without prejudice" rule. On the one side, the letter refers to a willingness to negotiate and was so understood in later correspondence. However the letter was not headed "without prejudice"; it was written in response to an open letter and was the only response to that letter; it did not lead to any meaningful negotiations and it was inserted into Part I of Schedule I of the defendants' list of documents. That was an indication that the defendants did not see the letter as part of the without prejudice correspondence. It seems that the fact that the letter was included in Part I of Schedule I of the defendants' list of documents was not in the mind of counsel and therefore could not affect a decision as to whether he had properly fulfilled his duty to his client, but the issue is whether the letter could be fairly argued as not being within the "*without prejudice*" rule and the fact that the letter was contained in Part I of Schedule I of the list of documents does reflect upon that issue. It certainly affected the judge as is apparent from his attempt to suspend the order two days after his judgment.

93. For my part I would allow the appeal and set aside the order made by the judge as I do not believe that the allegation of negligence which was raised against the counsel for the plaintiff was made out.

Order: Appeal allowed with costs.

MR RUPERT JACKSON QC and MR R STEWART (Instructed by Messrs Reynolds Porter Chamberlain, London WClV 7HA) appeared on behalf of the Appellant

MR ANTHONY GOLDSTAUB QC and MR C J ALDERSON [MR A BERESFORD 115-95] (Instructed by Messrs Nelson & Co, Leeds LS3 1LF) appeared on behalf of the Respondent