CA on appeal from Derby County Court (His Honour Judge Styler) before Tuckey LJ, Rix LJ. 26th April 2002.

JUDGMENT : LORD JUSTICE TUCKEY:

1. This is an appeal with this court's permission from a judgment of His Honour Judge Styler given in the Derby County Court on 22nd June 2001 in which, at the end of a two-day trial, the appellant, Mr Kajla, the defendant in the proceedings, was ordered to pay the claimant, Mr Uhbi, who traded as United Building and Plumbing Contractors, £4,708 plus £610 court fees and £3,000 costs.

2. This was a building dispute in which both parties acted in person, although the respondent was assisted by Mr Whiteland, who is the director of a debt collection company. The respondent claimed the balance of the contract price and extras for work which he carried out in 1998 to the appellant's sub-post office and shop in Derby. There was a dispute as to what the contract price was, which the judge resolved in the appellant's favour. The appellant denied any liability to pay for the extras claimed. The judge found that there was liability for all but one of these items. However, he found that some of the work carried out by the respondent was defective or incomplete, and reduced the claim to make allowance for this. The combined effect of these findings was to reduce the outstanding amount claimed by the respondent from £12,215 to the £4,708 which the judge awarded.

3. The appellant, represented pro bono today by Mr Camp of counsel -to whom we are very much indebted for his helpful written and oral submissions - attacks the judge's finding that the appellant was liable for the extras because in reaching this conclusion the judge relied on what the appellant was alleged to have said in settlement negotiations. He also complains about the judge's award of costs because it represented some part of Mr Whiteland's fees and did not properly reflect the outcome of the case.

4. The judge dealt with the settlement negotiations in the following passage of his judgment: *"It is of note that I heard evidence of a meeting in September [2000] when the defendant was seeking a compromise and discussed the contract with Mr Dol and Mr Sharma, both of whom gave evidence before me. The defendant denies that he offered £10,000 to the claimant to settle. Mr Sharma told me that not only did the defendant offer £10,000 but that the claimant refused it, much to Mr Sharma's irritation and, clearly, his amazement. What is significant, in my judgment, is that in the course of that meeting I am quite satisfied that Mr Kajla did admit to Mr Dol and Mr Sharma that he had asked for additional works to be done and that is why he realised that he needed to try and compromise this claim."*

5. No objection was taken at trial to the admissibility of the evidence of Mr Dol and Mr Sharma about this meeting, and there is no indication from the judgment that the judge gave any consideration to its admissibility. The appellant denied that he had made any such admission at the meeting.

6. Mr Camp says that the judge should not have admitted this evidence. "Without prejudice" privilege applies to offers and statements made in settlement negotiations, whether or not the "without prejudice" label is used, unless it can be shown that the parties expressly intended that they should be open. The judge, he says, had no general discretion to admit "without prejudice" evidence and it is not possible to say that he would have reached the same conclusion if he had excluded this evidence.

7. There is no doubt that Mr Camp's general submissions about what the law is are correct. It is not necessary to refer to the cases. But he does accept that evidence of this kind is admissible with the consent of the parties. However, Mr Camp says this exception should not apply to a litigant in person who cannot be taken to have consented merely because he did not object.

8. I think there would have been considerable force in this point if that is all that had happened. But here the appellant himself put in evidence about another meeting on 4th January 2001 at the Sikh temple in Derby which had also been convened to try and settle the dispute. The judge does not refer to this meeting in his judgment, and it may be that the appellant only adduced this evidence in response to the respondent's evidence about the other meeting. But I think it fair to infer that both parties must be taken to have consented to allow evidence of this kind to be given. I would, however, have been more hesitant to reach this conclusion if the judge's conclusion about extras had depended only upon this evidence. It did not. After the passage I have quoted, the judge continued:

"On this part of the case so far as the additional works are concerned I am bound to say I preferred the evidence of Mr Uhbi. He told me that items cropped up during the work and that Mr Kajla, who was a constant visitor, asked for the work to be done. ...

I have compared what the defendant has said about these works in his two statements. In some respects, as Mr Uhbi pointed out in evidence, they are contradictory. For example, items 3, 4 and 5: in one statement the defendant asserts that this work was included in the original contract yet in a second statement he claims that the claimant damaged the doors and therefore had to replace them. In the course of his evidence the claimant, Mr Uhbi, carefully went through each item explaining how it was additional to the improvement and security work contracted for. I accept the claimant's evidence about those works ..."

9. These reasons alone amply justify the judge's conclusion, in my judgment. They were not and could not be criticised by Mr Camp.

10. So I turn to the judge's order for costs. In the discussion which follows his judgment, the respondent and Mr Whiteland explained to the judge that Mr Whiteland's fees, based on the time he had spent helping with the litigation, amounted to something just short of £4,000. But in a further passage the respondent made it clear that this total included a sum of £1,441 for sheriff's fees. Those sheriff's fees had been incurred by the respondent after he had obtained a judgment in default of defence against the appellant which he was trying to execute. That judgment was subsequently set aside, but there seems no doubt that those fees were incurred as a result of the appellant's failure to enter a defence and in Mr Uhbi's justified efforts to enforce the judgment which he had obtained in his favour.

11. In the discussion about costs with the judge, the judge did not question whether the costs claimed by the respondent for what Mr Whiteland had done were recoverable in principle, but merely reduced the total to £3,000 for reasons of proportionality and because the respondent had lost on the issue about the contract price.

12. Mr Camp says the judge had no jurisdiction to make any order in relation to Mr Whiteland's fees. CPR 48.6 contains the powers to make orders for costs in favour of litigants in person. Paragraph (3) of this rule says: *"Costs allowed to the litigant in person shall be-*

(a) such costs which would have been allowed if the work had been done or the disbursements made by a legal representative on the litigant in person's behalf;

(b) the payments reasonably made by him for legal services relating to the conduct of the proceedings; ..."

13. Sub-paragraph (c) is not relevant and there is nothing in the rest of this part of the rule which sheds light on the point which Mr Camp has made.

14. Looking at the wording of the rule, sub-paragraph (a) deals with the litigant in person's own time and disbursements which he has made which would have been recoverable if made on his behalf by a legal representative. This is not apt to cover fees paid or due to Mr Whiteland to assist with the litigation, since no such disbursement would be made by a legal representative. Sub-paragraph (b) relates to "legal services", which are not defined by the rules. The notes in the White Book suggest that this sub-paragraph was intended to cover partial legal services; in other words some legal advice or assistance short of full representation. But I think the sub-paragraph is referring to services which are "legal"; that is to say, services provided by or under the supervision of a lawyer. On the face of it, Mr Whiteland was not providing such services. Therefore the judge had no jurisdiction to award the respondent any part of Mr Whiteland's fees.

15. But if the judge had realised this, he could still have awarded the respondent costs for his own time in preparing and presenting his case. It is self-evident from what happened and made clear by the document which has been put before us this morning that Mr Uhbi worked throughout alongside Mr Whiteland in the preparation and presentation of his case at trial.

16. However Mr Camp takes a further point which is that the judge should have taken into account his finding that the appellant had made an offer of £10,000 which the respondent did not better at trial. We think this is a valid point. Fully reflecting that offer would have resulted in the respondent getting his costs as a litigant in person up to the time it was made (September 2000) and the appellant getting his costs after that time. Just looking at their respective costs in that way would probably result in the

appellant being better off than the respondent. But we think that justice would be met by saying that those costs should cancel one another out. The result of which would be no order for costs either way. But this is subject to two qualifications. The first is that the judge's order included court costs of £610. Those costs would have been incurred at the beginning of the process and I can see no reason why that order should be disturbed. Secondly, the £1,441 for sheriff's costs was not part of Mr Whiteland's fees. Such fees would be recoverable as a disbursement by a litigant in person. As these fees were incurred as a result of the appellant's failure to respond to the claim, I think the respondent is entitled to recover them. For the reasons I have given he is not entitled to recover Mr Whiteland's fees.

17. The upshot is that I would allow this appeal and set aside the judge's order that the appellant should pay £3,000 costs and substitute an order that the appellant should pay £1,441 costs. Otherwise the judge's order should stand.

18. **LORD JUSTICE RIX**: I agree.

ORDER: Appeal allowed to the extent that the judge's order that the appellant should pay £3,000 costs is set aside and the figure of £1,441 substituted; respondent to pay the appellant's costs of the appeal assessed at £400. (Order not part of approved judgment)

MR C CAMP (Instructed by the Bar Pro Bono Unit, London WC1R 5AZ) appeared on behalf of the Appellant
THE RESPONDENT appeared on his own behalf