CA on appeal from Judge Rudd sitting as a judge of the Queen's Bench Division in Southampton (His Honour Judge Rudd) before Pill L.J. and Sir Murray Stuart-Smith. 30th June 2000.

JUDGMENT : Pill L.J.

1. This is an appeal by the claimant, Gnitrow Ltd., against a judgment of Judge Rudd sitting as a judge of the Queen's Bench Division at Southampton on 18 April 2000. The judge ordered that the claimant's proceedings against Cape Plc. ("Cape") be stayed until the claimant gave to Cape disclosure of an agreement made between the Iron Trades Insurance Co. ("Iron Trades") and Turner & Newalls Ltd. ("Newalls"). The agreement was identified by the reference to it in the judgment of Judge Michael Kershaw Q.C. in **V.S.E.L. v. Cape Contracts** [1998] P.I.Q.R. P207.

2. The claimant (or its predecessors) operated a shipyard at Cowes, Isle of Wight, from the 1930s until the 1970s. Its employees, like those of the employees at many shipyards, were exposed to asbestos dust in the course of their employment. Eighteen of the Cowes employees brought claims, and through its insurers, Iron Trades, the claimant has settled those claims. Cape and Newalls (or their predecessors) were specialist independent contractors at the shipyard. It was, in the main, the independent contractors who worked with the asbestos, Cape's employees, for example, applying lagging to the pipework and Newall's fixing bulkheads on ships under construction or repair at the shipyard. In doing that work, both companies almost certainly contributed to the pattern of exposure to which the claimant's employees were subject, though the pattern of exposure may well have varied from trade to trade and individual to individual. A share of the responsibility is also likely to be attributed to the claimant as employer.

3. In the present action, the claimant seeks indemnity or contribution from Cape with respect to the sums paid to its employees. The claim is made under its contract with Cape and under the Civil Liability (Contribution) Act 1978. Section 1(1) of the Act provides: *"Subject to the following provisions of this section, any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise)."*

   Section 2(1) provides: *"Subject to subsection (3)below, in any proceedings for contribution under section 1 above the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question."*

   The limitations in subsection (3) do not arise in the present case.

4. The trial of the action has been fixed for 2 October 2000 with a time estimate of four weeks. Newalls is not a party. That is because the claimant's insurers, Iron Trades, have, on a national basis, reached an agreement as to the contribution which Newalls will make in shipyard asbestosis cases. Cape have obtained a stay of the present action until that agreement is disclosed to them. Both Cape and Newalls operated nationally at shipyards at the material times.

5. The settlement of the employee's claims by the claimant as employer is to be applauded. The agreement between the claimant's insurers and Newalls will also have the effect of avoiding costly and protracted litigation in the courts. The agreement, the precise terms of which we have not seen, makes global provision for contribution, notwithstanding that upon investigation, the appropriate level of contribution might vary from case to case. Cape submit that they are entitled to see the agreement. It is relevant to what contribution they should make to the employee's damages.

6. The judge found that the agreement was relevant in the present action and was not protected by privilege. He attached importance to the "overriding objective" in the Civil Procedure Rules, which is to enable the court to deal justly with cases. That requires that everyone is on an equal footing, which requires proper and full exchange of information. The judge added that ""with a view to saving expense, it is important that both sides are in the best possible position to consider Part 36 offers and the best way of doing that is a cards on the table approach to this particular agreement"

7. Judge Michael Kershaw Q.C. came to the opposite conclusion in **V.S.E.L. v. Cape Contracts** [1998] P.I.Q.R. P207, relying on the speech of Lord Griffiths in **Rush & Tompkins Ltd. v. Greater London Council** [1989] A.C. 1280. Lord Griffiths stated, at p. 1305: *"I have come to the conclusion that the wiser course is to protect 'without prejudice' communications between parties to litigation from production to other*

parties in the same litigation. In multi-party litigation it is not an infrequent experience that one party takes up an unreasonably intransigent attitude that makes it extremely difficult to settle with him. In such circumstances it would, I think, place a serious fetter on negotiations between other parties if they knew that everything that passed between them would ultimately have to be revealed to the one obdurate litigant. What would in fact happen would be that nothing would be put on paper but this is in itself a recipe for disaster in difficult negotiations which are far better spelt out with precision in writing. If the party who obtains discovery of the 'without prejudice' correspondence can make no use of it at trial it can be of only very limited value to him. It may give some insight into his opponent's general approach to the issues in the case but in most cases this is likely to be of marginal significance and will probably be revealed to him in direct negotiations in any event. In my view this advantage does not outweigh the damage that would be done to the conduct of settlement negotiations if solicitors thought that what was said and written between them would become common currency available to all other parties to the litigation. In my view the general public policy that applies to protect genuine negotiations from being admissible in evidence should also be extended to protect those negotiations from being discoverable to third parties."

8. We were told that the substantive proceedings between V.S.E.L., who were in the same position as the claimant in the present action, and Cape, dealing with shipyards in the North West of England, were settled just before the trial. A settlement has also been achieved with Cape with respect to shipyards in the North East of England.

9. For the claimant, Mr. Owen submits that the agreement is privileged as having been made without prejudice and also that it is not relevant to the trial of liability in the present action. As to privilege, Mr. Owen accepts that Lord Griffiths in **Rush & Tompkins Ltd. v. Greater London Council** was considering negotiations prior to settlement rather than the terms of the resulting settlement but submits that the reasoning applies, in the present context, equally to the terms of settlement. In litigation involving more than two parties, it would discourage two of them from settling if they knew that the terms of settlement were disclosable to the other parties.

10. Mr. Owen accepts that the defendant does not claim to recover, and should not be permitted to recover, more from Cape and Newalls than it has paid to its employees. He accepts that the judge could be given such information as is necessary to prevent excessive recovery.

11. For the defendant, Mr. Block submits that the terms of the agreement between the claimant's insurers and Newalls is relevant as evidence of their assessment of their respective contributions to the damages paid. In considering the overall apportionment, it will assist the court to know Newall's agreed contribution. That contribution is a good starting point for the judge's assessment of overall responsibility. It is further submitted that it will assist the defendant in deciding the extent of any Part 36 offer he makes if it knows the terms of the agreement. The defendant is litigating about the difference between the contributions agreed in the settlement between the claimant and Newalls and the sum paid to the employees. Disclosure of documents is not a two-stage process: if the terms of settlement are relevant at any stage, they are relevant at the present stage.

12. In the present context, I cannot accept that the privilege which attaches to negotiations conducted without prejudice covers the agreement made between the claimant's insurers and Newalls. While I accept that, as against parties to litigation who are not parties to the settlement, the mischief identified by Lord Griffiths may arise if the terms of the settlement are disclosed, that does not justify extending the principle which prevents a party from revealing what another party has said in the course of negotiations to cover the present situation.

13. I agree with Mr. Owen, however, that the terms of the settlement between the defendant and Newalls are not relevant to the task which it is the duty of the judge to perform, that is, to apportion responsibility for the damage in question as between the three parties. His task is the same whether Newalls is a defendant in the action, a third party brought in by Cape or not a party at all. The judge will assess the evidence which the parties to the action choose to call and, on the basis of that evidence, apportion responsibility as between the claimant, Cape and Newalls. It will involve assessing Newall's degree of responsibility, because, in the present context, Cape will be responsible only for that share which is the responsibility neither of the claimant nor of Newalls. The claimant and

Cape are entitled to call evidence to prove Newall's share. The position is the same in contract as under the Act of 1978 because, under the contract pleaded, Cape is liable to indemnify the claimant only for loss and damage arising "*by reason of any breach of duty (statutory, contractual common law) on the part of the defendant"*- Cape - "*its servants or agents*"

14. The relevance in the present action of the agreement between the claimant and Newalls is in the fact that the claimant is not permitted to recover more than it has paid to its employees. To ensure that there is no excess recovery, it is necessary to know what contribution Newalls has made to the relevant sums. Disclosure is appropriate for that reason. It is also information relevant to Cape making a realistic Part 36 payment and responding realistically to a Part 36 offer from the claimant. That accords with the overriding objective of enabling the court to deal with the case justly.

15. I would confine such disclosure to the defendant. While a judge would normally be relied on not to be influenced by his knowledge of the terms of a settlement between a party to the action and one who is not a party, it is preferable not to permit the judge to see it until it is necessary for him to do so in order to ensure that there is no excess recovery by the claimant. The settlement may have been reached for commercial reasons, such as the saving of costs, and with the intention of achieving a global settlement covering all cases without the need for detailed analysis of the merits of each particular case or even each particular shipyard. The agreement may not accurately reflect the view even of its parties with respect to a particular case. I would liken the situation to that arising when a Part 36 payment has been made. C.P.R., r. 36.19(2) provides: "The fact that a Part 36 payment has been made shall not be communicated to the trial judge until all questions of liability and the amount of money to be awarded have been decided." I would extend that approach to cover the terms of this settlement.

16. My conclusions are as follows.
    (1) Those terms of the national agreement between the claimant's insurers and Newalls which provide for the settlement as between them of claims arising out of operations at the Cowes shipyard should be disclosed to Cape, so far as they provide for the apportionment of such liability. That will enable Cape to make a Part 36 offer with knowledge relevant to that offer.
    (2) The judge should not be told the terms until he has made his apportionment of responsibility on the basis of evidence called, the terms not being relevant to that task. If necessary, the relevant terms can be shown to the judge when he has completed that task so that he can ensure that the claimant recovers no more than it has paid to its employees.

17. I would confine my conclusion upon the application of this procedure to present circumstances, that is, where a claimant has settled for a fixed sum a specific claim against him and seeks only an indemnity or contribution with respect to the sum paid by him. Other situations will require separate consideration. The circumstances would be different, for example, if a claimant in an action for damages for personal injuries, where damages were at large, were to settle with one of two defendants. It could be a severe disincentive to negotiations generally if, by declining to negotiate, a party can routinely claim the advantage of knowing what other parties have agreed before condescending to negotiate for himself.

We will hear counsel as to what order is appropriate to give effect to these findings.

Sir Murray Stuart-Smith. I agree.

Appeal allowed on terms.

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Davies Arnold Cooper.
R. F. Owen Q.C. for the claimant.
Neil Block for the defendant.