

In the matter of a notice of reference between Malcolm Electropainting Group, Claimants and West Midlands Passenger Transport Executive, acquiring authority, Re: Factory, Bilston Road, Monmore Green, Wolverhampton

INTERLOCUTORY DECISION OF THE LANDS TRIBUNAL : P.H.Clarke FRICS. 4th February 2003

1. (This is a decision on four interlocutory applications in a reference to determine the compensation payable for the compulsory acquisition of part of factory premises in Wolverhampton.
2. I heard these applications at a pre-trial review on 16 December 2002. Mr David Taylor of counsel appeared for the claimants; Mr Barry Denyer-Green of counsel appeared for the acquiring authority. I gave my decisions orally at the hearing and they were incorporated in an order dated 17 December 2002. My reasons, as requested by the parties, are set out below.
3. The facts can be stated shortly. The claimants occupied a factory in Bilston Road, Monmore Green, Wolverhampton (*"the Bilston Road premises"*) for their business of painting automotive components. The premises included a forecourt. The West Midlands Passenger Transport Executive (*"the PTE"*) compulsorily acquired a two metre strip of forecourt fronting Bilston Road and have built a tramway in the road as part of the Midland Metro light rail rapid passenger system. The PTE took possession of the land on 3 June 1996. The claimants have relocated the business formerly carried on at the Bilston Road premises to other premises of the Group at the Automotive Component Park, Wednesbury (*"the ACP premises"*). They seek compensation consequent on relocation of about £1.8m. The PTE contend that relocation was not reasonable and that compensation should be determined on the basis of loss at the Bilston Road premises, assessed at about £100,000. On 30 April 2002 the claimants referred the determination of compensation to this Tribunal. Each party were given leave to call three expert witnesses; expert reports have been lodged. The reference was listed for a three week hearing commencing on 22 April 2003.

Preliminary issue

4. The PTE seek the determination of the following preliminary issue:-
"Whether the claimants are entitled to have compensation assessed on the basis that, in consequence of the acquisition of the land the subject of this reference:-
(a) it was not reasonable to relocate the claimants' business from the industrial premises, Bilston Road, Monmore Green, Wolverhampton ("the Bilston Road Premises") to premises of the claimants at the Automotive Component Park, Wednesbury ("the ACP Premises"); or
(b) it was reasonable for the claimants to relocate the said business from the Bilston Road Premises to the ACP Premises."

The claimants oppose the application but agree this formulation if a preliminary issue is ordered.

5. In support of the application the PTE contend that relocation by the claimants was not reasonable and that they have failed to mitigate their loss. The evidence to support and rebut the relocation claim is substantial. If the preliminary issue is ordered there is the probability of considerable saving in time and expense. The Tribunal would need to decide the preliminary issue in any event before compensation can be determined on the correct basis; there would be no duplication of time or expense. If the preliminary issue is decided in favour of the PTE the evidence relating to plant and machinery will not require consideration and much of the present accountancy evidence will not be needed. The only evidence would be directed to disturbance for losses caused by the acquisition of the strip of forecourt. If the preliminary issue is determined in favour of the claimants then the subsequent hearing would not involve any duplication of matters raised at the preliminary hearing. There should not therefore be any overall increase in time and cost.
6. Mr Denyer-Green said that there is considerable merit in the contention of the PTE that it was not reasonable for the claimants to relocate their business. The alleged difficulties with the loading and unloading of lorries consequent on the acquisition of part of the forecourt cannot have been as serious as stated by the claimants. The year ended 31 March 1997 would have been the most serious year for disruption but the accountancy evidence shows an upward trend in turnover and net profit.

7. The claimants' objection to the application on the grounds that the PTE intend to argue that there was an opportunistic motive for relocation, which will require evidence regarding plant and machinery and the financial position, misses the point. The real issue is whether the acquisition had consequences that made relocation a reasonable decision. The only good ground that the claimants can put forward for relocation is that the loss of the two metre strip of forecourt would substantially restrict the current loading operations. There will be no duplication of evidence because none of the evidence as to plant and machinery and losses consequent on relocation will need consideration at a preliminary hearing. There are no opportunities for a settlement as matters now stand. The determination of the preliminary issue will greatly increase the possibility of a settlement.
8. The claimants oppose the application. Mr Taylor said that it is artificial to separate the reasonableness of relocation from the other issues. To do so will result in delay and increased costs. It is the claimants' case that the decision to relocate was made as a result of the vehicle movement and handling issues identified by Mr Cook, for the claimants, and responded to by Mr White. Although these issues could be dealt with in isolation from matters of valuation and accountancy, they are not the only issues relevant to the decision to relocate. The Tribunal will need to consider the claimants' other reasons for relocation. The PTE intend to argue that the decision to relocate had an opportunistic motive, in part the need to upgrade plant and machinery. Evidence from the claimants as to plant and machinery and finances will be needed (Mr Warburton and Ms Fowler). This evidence is relevant to the PTE's case. If reasonableness of relocation is dealt with as a preliminary issue it is likely that all or most of the witnesses will need to be called at both hearings – on reasonableness and quantum. This will lead to duplication of evidence with increased costs. There will also be delay in the final disposal of the claim.
9. I ordered the determination of the preliminary issue and have issued consequential directions. Rule 43(1) of the Lands Tribunal Rules 1996 gives the Tribunal power, on the application of a party, to order any preliminary issue in the proceedings to be disposed of at a preliminary hearing. Guidance as to this procedure is set out in Part 6 of the Lands Tribunal Practice Directions. Paragraphs 6.1 and 6.2 are relevant:-

"6.1 Rule 43 enables the Tribunal on the application of any party to proceedings to order any preliminary issue in the proceedings to be disposed of at a preliminary hearing. In appropriate circumstances the procedure may enable the proceedings to be concluded more expeditiously and expense to be saved, and parties are therefore encouraged to consider whether there are any issues in a case which can with advantage be dealt with in this way. For its part the Tribunal will draw the parties' attention to issues which in its view might usefully be determined under this procedure.

6. 2 Issues which may appropriately be the subject of a preliminary determination may be of law or of fact. Determination of a preliminary issue may effectively dispose of the whole case. Where it would not do so, however, it may nevertheless reduce the issues in the case and thereby avoid the cost and delay associated with the disclosure and inspection of documents, the preparation and exchange of experts' reports and valuations, and the pre-trial preparation on the part of solicitors and counsel, which the issues eliminated would otherwise have involved. On the other hand to attempt to deal as a preliminary issue with a matter which is not in reality severable from other issues in the case can lead to delay and increased cost."

On 8 November 2002 a letter was sent to the parties at my direction asking them to consider whether the question whether the claimants acted reasonably in their decision to relocate should be dealt with as a preliminary issue. I invited an application under rule 43(1).
10. The present position is that the claimants are seeking compensation of about £1.8m for losses consequent on relocation from Bilston Road to the ACP premises. Three expert reports have been lodged by the claimants relating to background and reasons for relocation, financial losses and the replacement of plant and machinery respectively. None of these reports deal with the PTE's basis of claim. The PTE put forward compensation of about £100,000 on the basis of estimated loss at Bilston Road consequent on the acquisition and the operation of the tramway. Three expert reports have been lodged relating to background and valuation, financial matters and the claimants' operations respectively. Some alternative figures of compensation have been calculated on the claimants' basis. There is, however, little attempt by the parties to grapple with the fundamental question of the *basis*

of compensation. Both parties have concentrated on *quantum*. The claim is on one basis with evidence wholly directed to that basis; the PTE's rebuttal is largely on a different basis with some evidence on the claimants' basis. There is therefore a lack of identification of common issues. This was emphasised by the claimants' solicitors in their application to the Tribunal dated 3 December 2002 for an extension of time to lodge rebuttal reports, when they referred to "the degree of 'mismatch' between the evidence of the experts on each side" which inhibits the narrowing of issues between the parties. This unsatisfactory position could, in my view, be substantially resolved by the determination as a preliminary issue of the basis of compensation.

11. In my judgment, in the circumstances of this case, the question of the reasonableness of relocation is a suitable issue for a preliminary hearing for four reasons. First, it is a discrete question which can be severed from quantum of compensation. There will be some overlap of evidence but I am satisfied that the evidence relating to the reasonableness of the claimants' decision to relocate can be largely separated from evidence relating to the loss when the basis of compensation has been determined. Second, there is unlikely to be any substantial increase in cost or time by the determination of a preliminary issue and there is potential for reduction in costs. Without prior resolution of the basis of compensation it will be necessary for both parties to adduce evidence as to relocation and the continued occupation of the Bilston Road premises resulting in time and cost in respect of the basis which it becomes unnecessary to consider following the determination of the preliminary issue. If the reference proceeds to a single hearing it will still be necessary to hear evidence on both basis and quantum and I do not think that dividing the proceedings into two hearings should increase cost and time materially. It may well reduce both by the exclusion of evidence on the disallowed basis of compensation. I accept that there may be some delay in the final determination of the claim but I do not regard this as sufficiently serious to override the merits of a preliminary issue. There need be no delay to the hearing fixed to commence on 22 April next, which has now been reduced from three weeks to a maximum of two weeks. Third, the ordering of this preliminary issue will focus the parties' minds on the basis of compensation, the fundamental issue which has so far been inadequately considered (even by the claimants with the burden of proof), and then on to the amount of compensation. After the determination of the preliminary issue both parties can calculate the compensation on a common basis without the need to produce alternative figures. This leads to my fourth reason, which is that the determination of the correct basis of compensation will materially increase the chances of a negotiated settlement or, at least, should greatly narrow the issues, reducing the time and cost of the second hearing.

Witness statement of Jake Malcolm

12. In her expert report as to financial matters, lodged on behalf of the claimants by Ms Sara Fowler, there are several references to a witness statement of Jake Malcolm. The PTE apply for an order that this statement should be disclosed or alternatively that no witness of fact should be called at the hearing unless there has been prior disclosure of their evidence by witness statement and rebuttal. The application states that Ms Fowler has relied on Mr Malcolm's statement as to matters of fact and as to the management thinking of the claimants. The PTE are entitled to see this document. They have requested production but the claimants have failed to comply.
13. Mr Denyer-Green said that it is curious as to why the claimants are reluctant to disclose this statement. It must be crucial to their position on relocation. Without the factual background and the claimants' thinking on relocation the witnesses of the PTE are prejudiced in their attempts to deal with this question. Mr Malcolm's statement cannot merely be instructions to Ms Fowler, it is crucial evidence.
14. The claimants oppose the application. Mr Taylor said that references to Mr Malcolm's statement in Ms Fowler's report are for the purpose of identifying and summarising her instructions. She has complied with her duty under paragraph 13.4(h) of the Practice Directions. The witness statement cannot be separated from her letter of instruction which is privileged from disclosure under paragraph 13.5 of the Directions. The claimants agree to the alternative order requested by the PTE as to the general exchange of witness statements.

15. I ordered specific disclosure of the witness statement of Jake Malcolm within seven days and gave further directions for the general exchange of witness statements relating to the preliminary issue.
16. This application is made under rule 33 and rule 39 of the Lands Tribunal Rules 1996. Rule 33 is concerned with the giving of evidence (orally, on oath or affirmation and by affidavit) and rule 39 with pre-trial reviews. In my view the power to order discovery in rule 34 is more appropriate, particularly rule 34(1)(a) (orders for delivery of documents), (b) (inspection of those documents by the other party) and (g) (delivery of witness statements). In opposing the application Mr Taylor referred to the Lands Tribunal Practice Directions, paragraphs 13.4(h) and 13.5. The former requires an expert report to contain a statement setting out the substance of all material instructions, including a summary of the facts and instructions given which are material to the expert evidence. Paragraph 13.5 states that these instructions will not be privileged from disclosure but the Tribunal will not order, in relation to those instructions, disclosure of any specific document unless it is satisfied that there are reasonable grounds to consider the statement of instructions to be inaccurate or incomplete.
17. The witness statement of Jake Malcolm is referred to by Ms Fowler in five paragraphs of her expert report, the context in each case being the provision of background facts and not instructions, as contended by the claimants. For example, in paragraph 1.5 Ms Fowler states that the effects of the compulsory purchase order and the background to the claim are more fully stated in the witness statement; in paragraph 1.7 she refers to an alternative painting process, Autophoretics, discussed in Mr Malcolm's witness statement; and in paragraph 3.21 Ms Fowler says that this statement details the competitive nature of the metal finishing business. It is clear that her evidence is based on background information provided by Mr Malcolm.
18. I reject the claimants' objection to this application. I do not regard the witness statement of Jake Malcolm, in the context in which it is referred to by Ms Fowler, as part of her instructions. A letter of instruction may well have been attached to it but I do not interpret the statement as part of those instructions. It is, as I have said, the factual background which forms part of the information on which Ms Fowler has based her expert opinion. It should be made available to the PTE independently of general disclosure of evidence of fact. Although there are some summaries of the facts given to her in Mr Malcolm's statement in Ms Fowler's report, they are brief and I am of the view that the PTE would be prejudiced by non-disclosure of this witness statement, whether or not Mr Malcolm is called to give evidence. Mr Denyer-Green said that he does not wish to see any letter of instruction to Ms Fowler; my order extends only to the statement and does not include any such letter.

Additional experts

19. Application is made by the PTE to call two additional expert witnesses, as to plant and machinery and highway matters respectively. The claimants have lodged an expert report by Mr Warburton dealing comprehensively with plant and machinery in support of a claim for £770,350. For the PTE plant and machinery is considered in the report of Mr MacLaverly, which mainly deals with financial matters. Highways matters are referred to in the expert reports of Mr Cook, for the claimants, and Mr White, for the PTE, both witnesses as to valuation and background.
20. Mr Denyer-Green said that plant and machinery values are in issue on the relocation basis. The proper question at this stage is whether either party will be prejudiced by allowing or disallowing this application. The PTE will be prejudiced if it cannot call a like expert as to plant and machinery values, dealt with by Mr Warburton. The claimants will not be prejudiced. It is agreed that they should be entitled to call rebuttal evidence. There is adequate time for such steps to be taken. Justice requires that the parties should be on an equal footing. With two plant and machinery experts agreement on certain matters is possible. The reason for the non-appointment of a plant and machinery valuer is not relevant to this application. But if it is then the reason is as follows. The claimants chose the timing of the reference and therefore had control over the appointment of experts and of the preparation of evidence. The PTE did not have this opportunity. The interval between the rule 42 direction and exchange was insufficient to find a plant and machinery valuer to replace one who was originally intended to be instructed. It was not clear that the claimants' evidence would be the same as advanced

in 2001. A mismatch of experts occurs from time to time and a party should not be prejudiced in consequence.

21. As to a highway expert, Mr Denyer-Green said that different considerations arise. The exchange of evidence has identified lorry movements as the principal issue relevant to relocation. Much of the information regarding such movements is uniquely known to the claimants. If this application is granted there will be no prejudice to the claimants. The PTE would not object to the calling of a highways expert by the claimants. Like experts are likely to agree matters. There would be prejudice to the PTE if they cannot have an expert to address matters solely within the unique knowledge of the claimants.
22. Opposing the application, Mr Taylor said that the PTE were first alerted as to a substantial plant and machinery claim in July 1996. Subsequently a Mr Nick Brown inspected the plant and machinery on behalf of the PTE. In July 1997 an interim claim included £765,000 compensation for plant and machinery. This was repeated in May 2001 with a formal claim. It should not therefore have come as a surprise to the PTE that the claimants have lodged an expert report on this issue. No good reason has been given why the PTE have failed to obtain a similar report. A valuer appointed at this late stage would have significant difficulty in assessing the value of the plant and machinery at the Bilston Road premises which has now been dismantled.
23. As to highways evidence, Mr Taylor said that vehicle movement and handling issues have long been given by the claimants as a reason for relocation. Both parties have adduced evidence on these matters (in the reports of Mr Cook, for the claimants, and Mr White for the PTE) and are therefore on an even footing. No reason has been given by the PTE for failure to make this application earlier. It is difficult to see what a highway and traffic consultant can add to the debate. If this application is granted there is a risk that the fixed hearing date will be jeopardised.
24. I refused this application in respect of the preliminary issue. In my judgment the PTE have been aware since at least 1996-97 that important elements in the claimants' case related to highway matters and vehicle manoeuvring and the replacement of plant and machinery. In a letter dated 3 July 1996 giving alternative claim figures there is reference to a claim for £400,000 for plant and machinery on relocation and losses due to the lack of a right turn into the Bilston Road premises and a smaller yard. A letter of 25 July 1997 includes a plant and machinery claim of £765,000, increased to £929,300 in a detailed claim in May 2001. Following the reference to this Tribunal on 30 April 2002 the claim was reduced to £770,350 as set out in the expert report of Mr Warburton. Expert reports were exchanged and lodged at the end of July 2002 but this application for additional experts was not made until 23 October 2002. The PTE chose to deal with the plant and machinery claim in the report of Mr MacLavery (11 pages of which deal with plant and machinery) and the highway and loading matters in the report of Mr White (six pages). It is, in my view, now too late for the PTE to add two additional expert witnesses to the three permitted on each side. They have chosen to rebut the claims in respect of plant and machinery and highway matters in the evidence of Mr MacLavery and Mr White. I do not think the PTE are prejudiced by this decision. In the preliminary issue the value of the plant and machinery claim will not be determined (and may never need to be determined) and highway and unloading matters will be considered by Mr Cook and Mr White respectively, both valuers. The claimants are not adducing evidence from a highway expert.
25. Following further submissions from Mr Denyer-Green I agreed to restrict this direction to the preliminary issue. Following determination of this issue it will be necessary to give fresh directions for further expert evidence in the light of the decision on the preliminary issue. The PTE can make an application for appropriate expert witnesses at that time.

Deletion of without prejudice evidence

26. The claimants apply to exclude parts of the expert reports of Mr MacLavery and Mr Cowley on the ground that they refer to a letter dated 3 July 1996 marked without prejudice.
27. Mr Taylor said that it is common ground that the without prejudice label does not of itself confer privilege on a document; the Tribunal must consider that document and determine its nature (*South*

Shropshire District Council v Amos [1986] 1 WLR 1271). He referred to the purpose of the without prejudice rule, as set out in the judgment of Fox LJ in *Cutts v Head* [1984] Ch 290 at 313-314 (cited with approval in *Amos* at 1276-7), and said that to achieve that purpose it must exclude all negotiations genuinely aimed at a settlement (see *Rush and Tompkins Ltd v Greater London Council* [1988] 3 WLR 939 at 942F). The proposition in *Buckinghamshire County Council v Moran* [1989] 2 All ER 225, that a letter which is an assertion of a party's rights or an attempt to argue his case is not privileged, is agreed but does not apply in this reference. The proposition in *In Re Daintrey ex p Holt* [1893] 2 QB 116 at 120, that the without prejudice label has no application unless terms are offered for the settlement of a dispute or negotiation, is not good law. The law is correctly stated in *Amos* at 1277: it is sufficient if the document forms part of negotiations, whether or not it contains an offer.

28. The relevant question is whether the letter of 3 July 1996 forms part of negotiations genuinely aimed at a settlement or whether it is merely an assertion of the claimants' rights? The purpose of the letter is apparent from the first paragraph which refers to a meeting, a discussion of the best way forward and a proposal for full and final settlement in advance of the worst effects of the scheme. Details of the proposal are set out on page 4 and there is a comparison of the alternative costs of relocation and remaining in the Bilston Road premises. This is not an assertion of the claimants' rights. If there is any doubt as to whether the letter of 3 July 1996 formed part of an attempt to reach a settlement, then the different facts of *Amos* and *Moran* are instructive. The letter is of the same character as the letter excluded in *Amos* and bears no resemblance to the letter admitted in *Moran*.
29. Mr Denyer-Green agreed that a document marked without prejudice is not conclusively or automatically rendered privileged: the document must be examined to determine its nature (see *Amos*). A letter marked without prejudice, which is an assertion of a party's rights or an attempt to argue his case, is not privileged (see *Moran*). This is also agreed. The issue concerns the nature of the letter of 3 July 1996. The PTE say that privilege cannot be claimed for this letter on the grounds that it asserted rights within the decision in *Moran*. The purpose of the letter was to claim compensation on a relocation basis (see pages 4-7). Furthermore, on page 8 of the letter there is a proposal to the effect that the PTE should show a commitment to the temporary relocation of the claimants' operations. It was not a letter in the ordinary course of negotiations. The letter falls on the *Moran* side of the balancing exercise. In *Daintrey* it was held that privilege cannot be claimed for a document that prejudices the recipient (at 119-120). This letter is inconsistent with the way in which the claimants now quantify their losses and the reasons for relocation. The PTE should be entitled to show the reasons given in 1996 for relocation. They will be prejudiced if they cannot show that part of the claimants' reasoning now differs from their position in 1996.
30. I look first at the evidence sought to be excluded. On page 5 of the Appendices to the expert report of Mr Cowley (for the PTE) is an entry in a Diary of Events:- "*Offer to settle claim 03.07.1996 Lambeth Smith Hampton made a "without prejudice" offer to settle at £830,000*"

In the expert report of Mr MacLavery (for the PTE) paragraphs 2.18 – 2.25 are headed "*Initial Claim*" and summarise the letter of 3 July 1996 with Mr MacLavery's conclusions. Paragraphs 4.19 (iii), 4.36 (iv) and 5.10 also refer to the figures in this letter. The parties have agreed that these parts of the report should be deleted if I find that the letter dated 3 July 1996 is inadmissible under the without prejudice rule. At the conclusion of submissions I ruled that this letter is inadmissible and that the agreed parts of the reports of Mr Cowley and Mr MacLavery be deleted. The reasons for this decision are set out below.
31. The without prejudice rule, in so far as it is relevant to this application, is set out in Halsbury's Laws of England, fourth edition reissue, volume 17(1) at paragraph 887:- "*Letters written ... during a dispute between the parties, which are written ... for the purpose of settling the dispute, and which are expressed or otherwise proved to have been made 'without prejudice', cannot generally be admitted in evidence. The rule does not apply to communications which have a purpose other than settlement of the dispute; thus, it does not apply in respect of a document which, from its character, may prejudice the person to whom it is addressed.*"

32. The principle underlying the rule is clearly explained in the judgment of Robert Walker LJ in *Unilever Plc v Proctor & Gamble Co* [2001] 1 All ER 783 at 789f:- "*In Rush & Tompkins Ltd v Greater London Council* [1988] 3 All ER 737 at 739-740, [1989] AC 1280 at 1299, Lord Griffiths said:

'The 'without prejudice rule' is a rule governing the admissibility of evidence and is founded on 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 LJ in Cutts v Head ([1984] 1 All ER 597 at 605-6, [1984] Ch 290 at 306): 'That the rule rests, at least in part, on public policy is clear from many authorities, and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should, as it was expressed by Clauson J in Scott Paper Co v Drayton Paper Works Ltd (1927) 44 RPC 151 at 156, be encouraged freely and frankly to put their cards on the table ... The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability. The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence.'

This well-known passage recognises the rule as being based at least in part on public policy. Its other basis or foundation is in the express or implied agreement of the parties themselves that communications in the course of their negotiations should not be admissible in evidence if, despite the negotiations, a contested hearing ensues."

33. Mr Taylor, for the claimants, relies on the decision of the Court of Appeal in *South Shropshire District Council v Amos* [1986] 1 WLR 1271. In this case the council made a discontinuance order under section 51(1) of the Town and Country Planning Act 1971 in respect of premises occupied by Mr Amos. Following confirmation he made a claim for compensation. On 14 October 1981 his agent wrote to the district valuer (acting for the council) a letter advising him of his appointment, referring to a forthcoming meeting and stating that a detailed claim would then be submitted. The letter was not marked without prejudice. At the meeting the claimant's agent produced a 20-page claim with supporting submissions headed without prejudice. This did not lead to agreement or a reference to the Lands Tribunal. After further correspondence the claimant's agent wrote to the district valuer a without prejudice letter on 21 May 1982 enclosing an amended claim also marked without prejudice. Further unsuccessful negotiations followed and the matter was then referred to this Tribunal. The member (W H Rees FRICS) ruled that the two claims should not be admitted in evidence. On an originating summons under section 12(6) of the Arbitration Act 1950, the High Court ruled that the two documents be admitted. On appeal the Court of Appeal held them inadmissible.
34. Parker LJ (giving the judgment of the court) said (at 1277E):- "*Bearing in mind the original expressed intention to negotiate, the fact that there was a dispute in existence, that it is common practice for such claims to be the subject of negotiation before the parties resort to a reference to the Lands Tribunal, and that the document as clearly marked 'Without Prejudice', we have no hesitation in concluding that those words should be given their ordinary effect. The position with regard to document B is in our view plainer. It was clearly written in the course of negotiation and was accompanied by a letter which was itself headed 'Without Prejudice.'* Both documents are in our view inadmissible."

He then said (at 1277H):- "*In order to avoid any possibility of future unnecessary disputes about such matters we conclude by stating that we agree with the judge (a) that the heading 'Without Prejudice' does not conclusively or automatically render a document so marked privileged, (b) that, if privilege is claimed but challenged, the court can look at a document so headed in order to determine its nature and (c) that privilege can attach to a document headed 'Without Prejudice' even if it is an opening shot. The rule is, however, not limited to documents which are offers. It attaches to all documents which are marked 'without prejudice' and form part of negotiations, whether or not they are themselves offers, unless the privilege is defeated on some other ground as was the case in In Re Daintrey, Ex parte Holt [1893] 2 QB 116"*

35. Mr Denyer-Green, for the PTE, relies mainly on the decision of the Court of Appeal in *Buckinghamshire County Council v Moran* [1989] 2 All ER 225. Here, the council acquired in 1955 a plot of land for future road works. The land was adjacent to some houses and was treated by successive owners of one of the houses as part of their garden. In December 1975 the council wrote to the owner asking him to supply details of the basis on which he was exercising rights over the plot. He replied in a without prejudice letter dated 20 January 1976 that he understood that he was entitled to use the land until the proposed road diversion was built. In later possession proceedings the admissibility of this letter was in issue. The Court of Appeal held that it was admissible. It was not an offer to negotiate but an assertion of the defendant's rights and could not fairly and properly be read as the opening of negotiations. It was not privileged despite the fact that it was marked without prejudice. The decision in *Amos* was distinguished.
36. Mr Denyer-Green also relies on part of the judgment in *In Re Daintrey ex p Holt* [1893] 2 QB 116. A creditor had presented a bankruptcy petition based solely on a letter dated 24 December 1892 from his debtor (against whom he had started proceedings to recover the debt but had not yet obtained judgment). The letter was headed without prejudice. It made an offer to compound for the debt and stated that the debtor could not pay his debts and would suspend payment unless the composition was accepted. The issue before the courts was whether this letter was admissible as an act of bankruptcy. In the county court it was decided that it was not. On appeal it was decided that the letter, although expressed to be without prejudice, was admissible in evidence to prove an act of bankruptcy upon the hearing of a bankruptcy petition. Giving the judgment of the court Vaughan Williams J said (at 120):- *"Moreover, we think that the rule has no application to a document which, in its nature, may prejudice a person to whom it is addressed. It may be that the words "without prejudice" are intended to mean without prejudice to the writer if the offer is rejected; but, in our opinion, the writer is not entitled to make this reservation in respect of a document which, from its character, may prejudice the person to whom it is addressed if he should reject the offer, and for this reason also we think the judge is entitled to look at the document to determine its character. The next question which arises is the question whether the document is of a character fulfilling the conditions to which the rule of exclusion applies. ...*
- It seems to us that some of the conditions are complied with, but not all. There was a dispute, for there was an action pending between the parties. There was an offer, i.e. the offer of a composition, which was intended to apply, amongst other things, to the petitioner's claim in the action; but the document, the letter of the debtor to the petitioner, was, in our opinion, more than this: it was a clear act of bankruptcy, and it was notice to the petitioner of such act of bankruptcy, and it seems to us that a notice of an act of bankruptcy cannot be given 'without prejudice' because the document in question was one which, from its character, might prejudicially affect the recipient whether or not he accepted the terms offered thereby."*
37. There are two questions for my determination. First, what was the nature and purpose of the letter dated 3 July 1996? Second, would the PTE be prejudiced by the inadmissibility of this letter?
38. I look first at the nature and purpose of the letter dated 3 July 1996. Is it a letter forming part of negotiations, marked without prejudice and therefore privileged from disclosure, as contended by Mr Taylor for the claimants, relying upon the decision in *Amos*. Or is it an assertion of the claimants' rights and therefore admissible, as contended by Mr Denyer-Green for the PTE, relying upon the decisions in *Moran* and *Daintrey*.
39. The letter was written on behalf of the claimants by Mr A N Cook of Lambeth Smith Hampton, who is still dealing with the claim and has lodged an expert report, to Mr N C Walton of DTZ Debenham Thorpe, who was acting for the PTE and whose firm still acts, expert evidence now being given by Mr P N White. The letter is marked "*without prejudice subject to contract*". I was not given the context in which it was written but possession of the Bilston Road premises had been taken on 3 June 1996 (one month earlier) and the first paragraph of the letter refers to a meeting in early May. Clearly, discussions regarding compensation were in progress at the time.
40. The first paragraph explains the reasons for the letter:- *"At the meeting you attended at Malcolm Enamellers' premises in early May it was agreed that the best way forward to consider my client's proposal of a full and final settlement in advance of the worse effect of the scheme, in order that they may take mitigating*

action to move some operations away from Bilston Road, would be for us to submit copies of the appropriate accounts and a calculation showing the likely levels of loss if action were not taken at an early date to relocate a significant proportion of the business being undertaken at Monmore Green."

The background to the claim is then set out. Copies of the claimants' trading and profit and loss accounts are enclosed with notes to the accounts on page 3 of the letter. Mr Cook then set out a proposal (page 4):- *"In order to mitigate the damage to the company as a result of the Centro Scheme at Monmore Green (as described above) my client has proposed that he bring forward the construction of Phase 2 at the Automotive Component Park and install machinery in that building to undertake much of the work which is currently undertaken at Monmore Green."*

This is followed by relative costs: the no-relocation option (£1,210,000) and mitigation by a temporary move to Automotive Component Park (£830,000). These figures are stated to be likely or hypothetical calculations which show that temporary relocation would be the cheaper option. The letter concludes (page 8):- *"I trust that in the light of the above you will feel able to recommend to Centro that the saving to the public purse will be substantial if Malcoms move their operation temporarily. However, because of the costs involved a commitment to this option is required from Centro."*

As previously stated, if this course of action is agreed my clients will be prepared (in order to avoid prolonged negotiations and uncertainty) to accept an early lump sum payment by your client towards the cost of the Automotive Component Park option in full and final settlement.

I look forward to hearing from you at the earliest opportunity ..."

41. I agree with Mr Taylor that this letter is a negotiating document within the decision in *Amos* and not an assertion of rights within *Moran*. The facts in *Moran* are completely different to those in this reference or to any compensation claim, where parties negotiate as a matter of course and cannot be said to be hostile litigants (or would-be litigants) as in *Moran*. In compensation negotiations an assertion of rights is a claim for compensation privileged from disclosure under the decision in *Amos*. Mr Denyer-Green relies upon part of the judgment of Slade LJ in *Moran* where he said (at 231G):- *"As I read the letter, it amounted not to an offer to negotiate, but to an assertion of the defendant's rights, coupled with an intimation that he contemplated taking his solicitors' advice unless the council replied in terms recognising his asserted rights. I cannot derive from the letter any indication, or at least any clear indication, of any willingness whatever to negotiate."*

It is clear, however, that the letter of 3 July 1996 is part of negotiations, at meetings and in correspondence, towards the settlement of a claim. It deals with the basis of compensation (no-relocation or temporary relocation), gives estimated alternative figures and finally seeks a decision on the proposed course of action (temporary relocation) and on an early lump sum payment by the acquiring authority. I cannot find in this letter an assertion of rights in the sense in which that expression is used in *Moran*, but find it more in the nature of the "opening shot" referred to in *Amos*.

42. The second question is whether the letter dated 3 July 1996 was written for a purpose other than settlement of a dispute and was of a character which may prejudice the PTE, to whom it was addressed? Mr Denyer-Green relies on part of the judgment of Vaughan Williams J in *Re Daintrey* (at 120) that the without prejudice *"rule has no application to a document which, in its nature, may prejudice the person to whom it is addressed."* In *Unilever* the obscurity of this sentence in the judgment is commented upon with the observation that *"it may contain the germ of the notion of abuse of a privileged occasion which has developed in later cases"* (per Robert Walker LJ at 795f). The facts in *Daintrey* are materially different to those in this reference. I cannot accept that the PTE are prejudiced by the exclusion of this evidence. In Mr Cowley's report it appears as a single item in a diary of events (expressed to be a without prejudice offer to settle). In Mr MacLaverly's report it is dealt with in more detail under the heading *"initial claim"* with the conclusion that *"I am unable to agree that Malcolm made the correct decision to move to the new ACP site based solely on the alternative claims as presented."* This evidence and conclusion are now excluded but my directions given on 17 December 2002 include provision for rebuttal expert reports to be lodged in respect of the preliminary issue by 31 March 2003. The burden of proof as to the reasonableness of relocation rests with the claimants, with a requirement for prior disclosure in

expert reports and witness statements to be followed by a reply by the PTE in witness statements and rebuttal expert reports. In my judgment, the PTE are not prejudiced by the exclusion of this evidence and will have full opportunity to deal with the claimants' case on relocation.

43. In my experience parties to compensation negotiations often change their positions in an attempt to substantiate their case or reach a settlement. I do not think that it can be said that such changes prejudice the other party and therefore become admissible in evidence (as in *Daintrey*). This would place an unacceptable fetter on negotiations and hinder attempts at a settlement, contrary to the public policy underlying the without prejudice rule.
44. For the reasons given above I have ordered that the letter dated 3 July 1996 is inadmissible under the without prejudice rule and that the references to it on page 5 of the Appendices to the expert report of Mike Cowley and paragraphs 2.18 – 2.25 (inclusive) and 4.19(iii), 4.36(iv) and 5.10 in the expert of report of Ross MacLavery shall be deleted.

Costs

45. These applications were heard at a pre-trial review which I called to consider the future conduct of the reference. The claimants made one successful application and resisted one application by the PTE; the PTE made two successful applications and one unsuccessful application. In the circumstances I ordered that the cost of the pre-trial review shall be costs in the reference.

Mr David Taylor instructed by DLA, solicitors, for the claimants

Mr Barry Denyer-Green instructed by The John Hughes Law Practice, solicitors for the acquiring authority