CA an appeal from QBD (Mr Justice Bell) before Leggatt LJ, Hoffmann LJ, Swinton Thomas LJ : 30th November 1994.

JUDGMENT : LORD JUSTICE LEGGATT: Lord Justice Hoffmann will give the first judgment.

LORD JUSTICE HOFFMANN:

1. This appeal from Bell J raises an interesting point on the privilege which protects without prejudice communications.

2. The first plaintiff, Mr Muller, was a director and shareholder in a computer software company called Sagesoft Limited. On 12 September 1985 he consulted the defendants, a firm of solicitors, about a dispute with the other shareholder and directors. He was concerned that the majority of the board might dismiss him from his employment and thereby activate a provision of the articles of association by which a person ceasing to be employed by the company was obliged to sell all his shares to the other shareholders at a fair value fixed by the auditors. The solicitors advised that while still in employment he should put his shares out of the reach of the compulsory sale provision by transferring them to his wife. Under the articles, the board was obliged to register such transfer if presented duly stamped. But the solicitors thought that there was not enough time to have a transfer adjudicated and stamped before the board meeting at which Mr Muller feared that he would be dismissed. So, they presented the transfer with an undertaking to have it stamped. On 19 September 1985 the Board rejected the transfer, and purported to dismiss Mr Muller and activate the compulsory sale.

3. Mr Muller and his wife challenged the actions of the board. On 8 March 1988 they commenced proceedings against the other shareholders and the company. Negotiations followed and eventually an elaborate settlement agreement was signed in April 1989. They were able to retrieve a substantial amount from the disaster. The auditors had valued the shares of compulsory sale at £30,000. Under the settlement, Mr and Mrs Muller received E42,500 net of tax as compensation for loss of office; £36,127 as a contribution to legal costs; £50,000 for loss of their shares and an issue of new shares in the company which became worth over £2 million when the company was floated in December 1989.

4. The Mullers then turned their attention to the solicitors. On 14 May 1991 they issued the writ in these proceedings indorsed with statement of claim. It alleged that the solicitors had been negligent in submitting an unstamped transfer to the Board and said that this had precipitated Mr Muller's dismissal. The result was that he had been put in the position of having to sell his shares for £30,000. If he had kept them, they would have been worth over £4 million.

5. Paragraph 17 of the statement of claim then alleged that in a reasonable attempt to mitigate their damage, the Mullers had brought the earlier proceedings and compromised them. They gave credit for the shares and money received under the compromise in respect of the alleged wrongful deprivation of their shares.

6. The principal defence of the solicitors is that they acted reasonably and in any case did not precipitate Mr Muller's dismissal. They say that he would have been dismissed anyway. They also claim that the conduct and settlement of the earlier action was not a reasonable mitigation of damage.

7. The Mullers annexed a writ and statement of claim in the earlier proceedings to their statement of claim in this one. They have since also disclosed the letter before action and the final settlement agreement. But they say that they are entitled to withhold the letters and other documents leading up to the settlement on the ground that they were all part of without prejudice negotiations. Accordingly, Part 2 of Schedule 1 to their List of Documents listed among the documents for which privilege was claimed: *"letters, telexes, faxes and other communications and the notes of communications passing between the Plaintiffs, third parties or the Plaintiffs' solicitors and others, marked 'without prejudice' or otherwise sent or made in an endeavour to compromise proceedings."*

8. On the summons for directions the defendants sought production of these documents on the grounds that they were relevant in a way which did not infringe the without prejudice privilege or which fell within an exception to that privilege. Alternatively, it was said that the plaintiffs had waived the privilege, either by putting in issue the reasonableness of their conduct in mitigation or by partial

disclosure in the form of the letter before action, pleadings and settlement agreement. Master Hodgson refused to order production and Bell J affirmed his decision. The plaintiffs appeal.

9. Some of the decisions on the without prejudice rule show a fairly mechanistic approach, but the recent cases, most notably the decisions of this court in **Cutts v Head** [1984] Ch 290 and the House of Lords in **Rush & Tompkins Ltd v Greater London Council** [1989] AC 1280, are firmly based upon an analysis of the rule's underlying rationale.

10. **Cutts v Head** shows that the rule has two justifications. First, the public policy of encouraging parties to negotiate and settle their disputes out of court and, secondly, an implied agreement arising out of what is commonly understood to be the consequences of offering or agreeing to negotiate without prejudice. In some cases both of these justifications are present; in others, only one or the other. So, in Cutts v Head the rule that one could not rely upon a without prejudice offer on the question of costs after judgment was held not to be based upon any public policy. It did not promote the policy of encouraging settlements because as Oliver LJ said: *"As a practical matter, a consciousness of a risk as to costs if reasonable offers are refused can only encourage settlement...."*

11. It followed that the only basis for excluding reference to a without prejudice offer on costs was an implied agreement based on general usage and understanding that the party making the offer would not do so. Such an implication could be excluded by a contrary statement as in a **Calderbank** offer.

12. **Rush & Tompkins** on the other hand, is an example of the privilege resting purely on grounds of public policy without any element of implied agreement, because the party against whom the privilege was claimed was not a party to the negotiations. Rush & Tompkins were employed by the GLC as main contractors to build a housing estate. They employed a company trading as Carey Contractors as sub-contractors to do work on the site. Carey Contractors made a loss and expense claim against Rush and Tompkins which the GLC refused to pay. Rush & Tompkins commenced proceedings against both the GLC and Carey Contractors. Against the GLC it claimed a declaration that it was entitled to be indemnified against the claim by Carey Contractors and against both defendants it sought an inquiry as to the amount to which Carey Contractors were entitled.

13. After without prejudice negotiations, Rush & Tompkins concluded a global settlement with the GLC under which it was paid £1.2 million in respect of all its contractual claims (most of which were not in issue in the action) on the footing that it would meet any claims from its sub-contractors. Carey Contractors pursued its claim against Rush & Tompkins and sought discovery of the documents containing the without prejudice negotiations in order to ascertain what part of the £1.2 million had been allocated to its loss and expense claim. This was said to be relevant because it could constitute an admission by Rush & Tompkins that the claim was worth more than they were now saying. Rush & Tompkins claimed privilege.

14. The Court of Appeal ordered discovery on the grounds that once the negotiations between Rush & Tompkins and the GLC had borne fruit in a settlement, the without prejudice privilege came to an end, per Balcombe LJ at p 1290: *"If the negotiations succeed and a settlement is concluded, the privilege goes, having served its purpose."*

15. The House of Lords reversed the order and upheld the claim to privilege. Lord Griffiths cited with approval the following statement by Oliver LJ in **Cutts v Head** p 306 of the policy underlying the privilege: *"That the rule rests, at least in part, upon 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 ... may be used to their prejudice in the course of the proceedings .... 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."*

16. Lord Griffiths went on to say that the rule was not absolute: *"....resort may be had to the 'without prejudice' material when the justice of the case requires it. It is unnecessary to make any deep examination of*

these authorities to resolve the present appeal, but they all illustrate the underlying purpose of the rule which is to protect a litigant from being embarrassed by any admission made purely in attempt to reach a settlement."

17. He went on to mention some of the cases in which without prejudice material was admissible, e.g. if the issue is whether or not the negotiations have resulted in an agreement settlement. But he held that there was no rule by which the making of such a settlement automatically brought an end to the operation of the privilege: *"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."*

18. Finally, Lord Griffiths held that documents rendered inadmissible by the rule were also privileged from having to be disclosed on discovery.

19. The public policy basis of the rule is therefore to prevent anything said in without prejudice negotiations being relied upon as an admission. This appears from the passages which I have cited from Oliver LJ: *"....the desirability of preventing statements or offers in the course of negotiations for settlement being brought before the court of trial as admissions."* and Lord Griffiths himself: *"....the underlying purpose of the rule is to protect a litigant from any admission made purely in an attempt to reach a settlement."*

20. If one analyses the relationship between the without prejudice rule and the other rules of evidence, it seems to me that the privilege operates as an exception to the general rule on admissions (which can itself be regarded as an exception to the rule against hearsay) that the statement or conduct of a party is always admissible against him to prove any fact which is thereby expressly or impliedly asserted or admitted. The public policy aspect of the rule is not in my judgment concerned with the admissibility of statements which are relevant otherwise than as admissions, i.e. independently of the truth of the facts alleged to have been admitted.

21. Many of the alleged exceptions to the rule will be found on analysis to be cases in which the relevance of the communication lies not in the truth of any fact which it asserts or admits, but simply in the fact that it was made. Thus, when the issue is whether without prejudice letters have resulted in an agreed settlement, the correspondence is admissible because the relevance of the letters has nothing to do with the truth of any facts which the writers may have expressly or impliedly admitted. They are relevant because they contain the offer and acceptance forming a contract which has replaced the cause of action previously in dispute. Likewise, a without prejudice letter containing a threat is admissible to prove that the threat was made. A without prejudice letter containing a statement which amounted to an act of bankruptcy is admissible to prove that the statement was made; see **Re Daintrey** [1893] 2 QB 116. Without prejudice correspondence is always admissible to explain delay in commencing or prosecuting litigation. Here again, the relevance lies in the fact that the communications took place and not the truth of their contents. Indeed, I think that the only case in which the rule has been held to preclude the use of without prejudice communications, otherwise than as admissions, is in the rule that an offer may not be used on the question of costs; a rule which, as I have said, has been held to rest purely upon convention and not upon public policy.

22. This is not the case in which to attempt a definitive statement of the scope of the purely convention-based rule, not least because, as Fox LJ pointed out in **Cutts v Head** at p 316, it depends upon customary usage which is not immutable. But the public policy rationale is, in my judgment, directed solely to admissions. In a case such as this, in which the defendants were not parties to the negotiations, there can be no other basis for the privilege.

23. If this is a correct analysis of the rule, then it seems to me that the without prejudice correspondence in this case falls outside its scope. The issue raised by paragraph 17 of the statement of claim is whether the conduct of the Mullers in settling the claim was reasonable mitigation of damage. That conduct consisted in the prosecution and settlement of the earlier action.

24. The without prejudice correspondence forms part of that conduct and its relevance lies in the light it may throw on whether the Mullers acted reasonably in concluding the ultimate settlement and not in its admissibility to establish the truth of any express or implied admissions it may contain. On the

contrary, any use which the defendants may wish to make of such admissions is likely to take the form of asserting that they were not true and that it was therefore unreasonable to make them.

25. I do not think that interpreting the rule in this way infringes the policy of encouraging settlements. It may of course be said that a party may be inhibited from reaching a settlement by the thought that his negotiations will be exposed to examination in order to decide whether he acted reasonably. But this is a consequence of the rule that a party entitled to an indemnity must act reasonably to mitigate his loss. It would, in my judgment, be inconsistent to give the indemnifier the benefit of this rule but to deny him the material necessary to make it effective.

26. We were referred to several Canadian cases on the subject. One of these was the decision of the Ontario Court of Appeal **in I Waxman & Sons Ltd v Texaco Canada Ltd** [1968] 2 OR 642 which was mentioned by Lord Griffiths in his speech in Rush v Tompkins. The others were decisions at first instance. I need not refer to them because this case can be decided on the basis of the general principles laid down in **Rush & Tompkins** and **Cutts v Head** but I do not think that any of them are inconsistent with those principles.

27. I would therefore allow the appeal and order production of the documents.

LORD JUSTICE SWINTON THOMAS:

28. I agree with the judgment given by Lord Justice Hoffmann. I also agree with the judgment to be given by Lord Justice Leggatt, which I have seen, in draft.

29. When he gave his judgment, Bell J laid stress on the importance placed by Lord Griffiths in **Rush & Tompkins** on the public policy aspect which protected negotiations carried on without prejudice from being admissible in evidence. In my view, the judge was right to do so and as Lord Griffiths said: *"It would, as a matter of generality, place a serious fetter on negotiations ... if the parties knew that everything that passed between them would ultimately have to be revealed."*

30. However, different considerations apply to the present case. Different considerations apply because it is the litigants who were engaged in the previous without prejudice negotiations and have themselves put their own conduct in issue. In paragraph 17 of their statement of claim, the plaintiffs allege that they have made a reasonable attempt to mitigate their damage. Accordingly, they have alleged in settling their proceedings for the sum that they accepted, they acted reasonably. It is the plaintiffs who have brought the reasonableness of their conduct in issue. As Mr Sher QC rightly submitted, that allegation made by the plaintiffs would in reality not be justiciable without the court having sight of negotiations and correspondence. By bringing their conduct into the arena, and putting it in issue, the plaintiffs have, in my judgment, waived any privilege attached to Without prejudice negotiations and correspondence.

31. Accordingly, for that reason, and reasons set out by Lord Justice Hoffmann and to be set out by Lord Justice Leggatt, I too would allow this appeal.

LORD JUSTICE LEGGATT:

32. The plaintiffs have put directly in issue the reasonableness of that attempt to mitigate their loss which the plaintiffs say the compromise of their claim against Sagesoft constituted. As evidence of the compromise they have disclosed the letter before action and the compromise agreement itself, but not the documents by which it was arrived at.

33. In my judgment the plaintiffs cannot both assert the reasonableness of the settlement and claim privilege for the documents through which it was reached. They are relevant because the plaintiffs rely not only on the fact of settlement, but also on the reasonableness of it.

34. Discovery is sought not for the purpose of diminishing the protection afforded to the plaintiffs for any admissions that they may have made, but for the purpose of proving what they did. If they invoke the settlement for their own purposes, they must expect its worth to be evaluated by reference to the means by which it was achieved. There is no reason to suppose that the plaintiffs would have conducted themselves differently if they had appreciated that they might have to reveal what was written in course of settling the Sagesoft action.

35. I accept Lord Justice Hoffmann's thesis that for the reasons which he gives the 'without prejudice' correspondence falls outwith the scope of privilege. But even if the correspondence were privileged, I would reach the same conclusion on the ground of waiver. The waiver would relate to all matters relevant to the issues raised by the plaintiffs in the present action: cf. **Lillicrap v Nalder & Son** [1993] 1 WLR 94. Were it not so, public policy might be used as a guise for concealing what happened in the earlier action and that might result in double recovery. It would be inequitable not to order discovery. In any event, partial disclosure of privileged documents is a concept as implausible as the curate's egg. I consider that production of the letter before action and of the compromise agreement impliedly waived any privilege that might exist in relation to all the other documents relating to settlement.

36. For these reasons I agree that the appeal should be allowed. We will hear counsel as to the form of orders to be made. Before doing so I would particularly commend leading counsel on both sides for having promoted the efficient dispatch of the appeal by their thorough written arguments and economical oral submissions.

ORDER: Appeal allowed with costs in this court. Order for defendants' costs in cause in the court below. Counsel to provide Minute of order dealing with the production of documents. Leave to appeal to House of Lords refused.

MR M CRANE OC (Instructed by Baileys Shaw & Gillett, London, WC1N 3RH) appeared on behalf of the Plaintiff/Respondent.
MR J SHER OC and MR P CASTLE (Instructed by Berrymans, London agents for Messrs Crutes of Newcastle) appeared on behalf of the Defendants/Appellants.