Judgment : His Honour Judge John Newey QC. QBD. Official Referees' business. 31st July 1987

1. In this case the plaintiffs, Simaan General Contracting Co, a company incorporated under the laws of the United Arab Emirates, whose address is in Abu Dhabi, have brought an action against the defendants, Pilkington Glass Ltd, a company incorporated in England, claiming damages for negligence in the supply of coated glass units.

2. The glass units were for installation in an office building which the plaintiffs were building as contractors. ICA Group Feal, an Italian company, were sub-contractors for curtain walling, nominated by the employer's supervising officer, and the defendants were suppliers to them. There was no contract between the plaintiffs and the defendants.

3. The plaintiffs issued and served their writ on 4 March 1986 and delivered their statement of claim on 30 April. The defendants have, or are about to deliver, a defence denying liability, and I have given directions ending with a hearing date 15 June 1987, and an estimated length of 12 days. On 8 May 1986 the defendants issued a summons under RSC Ord 23, r 1(1)*(a)* seeking security for costs from the plaintiffs on the grounds that they are ordinarily resident out of the jurisdiction.

4. The summons came before me on 18 July, when affidavit evidence was relied on by both parties. To an affidavit of Mr David Rose, a partner in the firm of solicitors acting for the plaintiffs, was exhibited a letter from Mr C R Bayley, a solicitor for the defendants, dated 14 February 1986, part of which reads: *'Without prejudice, having seen the correspondence you will no doubt be aware that [the defendants have] offered to supply, without charge, up to a total of 50 replacement units for the building. The supply of such units would be subject to a formal agreement in full and final settlement of the various parties' claims arising out of this matter.'*

5. Mr Rose deposed in his affidavit that since receipt of the letter he had been supplied by the plaintiffs with further documents— *'which make it clear that there had been negotiations between all relevant parties … for the compromise of the claims relating to the defective glass supplied … with the defendant offering to replace 50 glazing units on the basis which was understood to include their delivery to Abu Dhabi.'*

6. Assuming that the plaintiffs have a valid claim and that the number of defective units does not exceed 50, their replacement by new units would not be sufficient to compensate the plaintiffs, for, according to para 14 of the statement of claim, the supervising officer is requiring that the whole of the curtain walling be taken down and replaced.

7. Counsel for the plaintiffs submitted that on a summons for security for costs the court may properly take into account evidence of offers in settlement made by the defendants, even if they were made 'without prejudice', in order to decide whether the plaintiffs are likely to succeed in the action and whether it would be just to them to require them to provide security. Counsel for the defendants submitted that evidence of ***'without prejudice'*** offers is wholly inadmissable on applications for security.

8. Both counsel agreed that there is no reported case in which it has been decided whether evidence of 'without prejudice' offers may be given on summonses for security for costs. I was referred to cases and to notes in *The Supreme Court Practice 1985* concerning the circumstances in which security should be ordered and those in which 'without prejudice' offers may be mentioned. I decided to reserve judgment and at counsel's request I am giving it in open court.

9. ***Sir Lindsay Parkinson & Co Ltd v Triplan Ltd*** [1973] 2 All ER 273, [1973] QB 609 concerned an application for security for costs against a plaintiff company, which was believed to be unable to pay the defendant's costs if unsuccessful, under s 447 of the Companies Act 1948 by a defendant who had made an open offer in settlement. Lord Denning MR said that the Court had a discretion whether to order security which it would exercise 'considering all the circumstances of the particular case' (see [1973] 2 All ER 273 at 285–286, [1973] QB 609 at 626–627). He listed circumstances suggested by counsel, including whether the company had a good prospect of success, whether there was an admission by the defendant, on the pleadings or elsewhere, that money was due and whether the application for security was being used oppressively so as to try to stifle a genuine claim. He then said ([1973] 2 All ER 273 at 286, [1973] QB 609 at 627): *'I am quite clear that a payment into court, or an open*

offer, is a matter which the court can take into account. It goes to show that there is substance in the claim: and that it would not be right to deprive the company of it by insisting on security for costs.'

10. Cairns LJ agreed with Lord Denning MR. He thought that on the information available to the court the plaintiff was likely to recover more than had been offered by the defendant in an open letter. He thought that the proper view was that the defendant had in effect got security to the extent of the offer. Cairns LJ said ([1973] 2 All ER 273 at 287, [1973] 1 QB 609 at 628): *'I am not impressed by the argument that this would be likely to hinder parties from paying into court or making an offer … In any case where the plaintiff … has a prospect of recovering some sum in proceedings, it is a matter of simple prudence on the part of defendants … to make a payment in or an offer which will relieve them of having to pay in the long run what may be a heavy bill of costs resulting from a comparatively small award in favour of the plaintiff … '*

11. It is public policy to encourage litigants to settle their differences and, since they are most unlikely to negotiate satisfactorily if every word which they utter and every offer which they make can be quoted against them later, the general rule has long been that nothing which is written or said 'without prejudice' can be referred to in court subsequently without the consent of all parties concerned.

12. To the general rule there are exceptions. In ***Walker v Wilsher*** (1889) 23 QBD 335 at 338 Lindley LJ referred to letters written without prejudice being considered in a case in which a question of laches was raised and, at least in my experience, they are referred to freely without protest on applications to strike out for want of prosecution.

13. In ***Chocoladefabriken Lindt & Sprungli AG v Nestlé Co Ltd*** [1978] RPC 287 at 289–290 Megarry V-C, while recognising that a result of the 'without prejudice' rule might be to prevent the true case coming before the judge, left open the question of whether it could be relied on in 'any case in which there are grounds for believing that the rule is going to be used to perpetrate some fraud or dishonesty'.

14. In ***Calderbank v Calderbank*** [1975] 3 All ER 333, [1976] Fam 93, a case in which a husband had applied for financial provision or a property adjustment order under the Matrimonial Causes Act 1973, the Court of Appeal held that the wife's offer of a home to the husband before the proceedings were heard could be taken into account on the issue of costs. Cairns LJ referred to types of proceedings where protection as to costs has been afforded to parties who wish to compromise and for whom payment into court is not an appropriate method, such as a sealed offer in the Lands Tribunal. He said ([1975] 3 All ER 333 at 342, [1976] Fam 93 at 106): *'Counsel for the husband drew our attention to a provision in the Matrimonial Causes Rules 1968, SI 1968/219, with references to damages which were then payable by a co-respondent, provision to the effect that an offer might be made in the form that it was without prejudice to the issue as to damages but reserving the right of the co-respondent to refer to it on the issue of costs. It appears to me that it would be equally appropriate that it should be permissible to make an offer of that kind in such proceedings as we have been dealing with and I think that that would be an appropriate way in which a party who was willing to make a compromise could put it forward.'*

15. In ***Cutts v Head*** [1984] 1 All ER 597, [1984] Ch 290 the Court of Appeal held that an offer of settlement made before the trial of an action in a letter expressed to be ***'without prejudice'*** but reserving the right to bring the letter to the attention of the judge on the issue of costs after judgment if the offer is refused is admissible on the question of costs without the consent of all parties, in all cases in which a payment into court would not be appropriate. Oliver LJ said ([1984] 1 All ER 597 at 605, [1984] Ch 290 at 306):

> *'(1) The protection from disclosure of without prejudice negotiations rests in part on public policy and in part on convention (ie an express or implied agreement that the negotiations shall be protected). (2) There is no public policy which precludes a conventional modification of the protection to the extent suggested in* **Calderbank v Calderbank** *… As a practical matter, a consciousness of a risk as to costs if reasonable offers are refused can only encourage settlement … '*

16. The effect of ***Calderbank v Calderbank*** and ***Cutts v Head*** has now been given statutory effect by a new r 14 inserted in RSC Ord 22.

17. It is obvious that the same considerations should be taken into account by a court hearing a summons under Ord 23, r 1 as one under s 447 of the 1948 Act (now s 726(1) of the Companies Act 1985). They

include, therefore, the plaintiffs' prospects of success, any admission by the defendant and whether the application is made oppressively. In ***Sir Lindsay Parkinson & Co Ltd v Triplan Ltd*** [1973] 2 All ER 273 at 286, [1973] QB 609 at 627, Lord Denning MR said that payments into court and open offers were matters which the court could take into account. No doubt he would today add ***'Calderbank letters'***, which are the equivalent of payments in. Lord Denning MR did not mention ***'without prejudice'*** offers and possibly he meant to exclude them by implication. Cairns LJ referred to ***'offers'*** without classification, but in the case before the Court of Appeal the offer was an ***'open'*** one.

18. Evidence as to ***'without prejudice'*** negotiations could assist a court in forming views as to a plaintiff's prospects of success and whether a defendant is endeavouring to stifle an action. Because of its qualified nature a ***'without prejudice'*** offer could not, I think, constitute an admission.

19. To allow one party to give evidence of ***'without prejudice'*** communications without the consent of another would be in direct conflict with the general rule excluding such evidence and with the public policy which supports it. Defendants sued by plaintiffs resident abroad or by companies likely to get into financial difficulties would be deterred from exploring possibilities of settlement and making sensible offers for fear of prejudicing their prospects of being able to obtain security for costs. In particular a defendant who has obtained an order for security intended to relate to preparations for trial only would be most unwilling to take any action which might prevent him from obtaining a second order for security in respect of trial costs.

20. To the extent that the general rule is based on convention, as Oliver LJ stated in ***Cutts v Head*** that it is, for a party to adduce evidence of 'without prejudice' matters would be a breach of convention by him.

21. In striking-out applications, it is not the content of ***'without prejudice'*** negotiations but the fact that they took place which may be material as excusing delay. Defendants who make payments into court or who write ***Calderbank*** letters are making offers, which they intend should be mentioned in open court in appropriate circumstances. They do so, instead of making fully ***'without prejudice'*** offers, for tactical reasons and because of possible costs advantages. A defendant who has the misfortune to be sued by a plaintiff against whom it may be difficult to enforce an order for costs should not be at a disadvantage in obtaining security because he has, for whatever reason, made attempts to settle the case.

22. In my opinion, evidence of ***'without prejudice'*** negotiations is not admissible on summonses for security for costs and the passages in Mr Rose's affidavit and in Mr Bayley's letter relating to such negotiations should be disregarded. For reasons which I gave on 18 July, I think that the plaintiffs should give the defendants security for costs in the sum of £20,000.

Order accordingly.

Romie Tager instructed by Solicitors: Michael Conn & Co (for the plaintiffs);
D M Harris instructed by C R Bayley, St Helens (for the defendants).