Without prejudice

Rush and Tomkins Ltd v Greater London Council & Another [1988] 3 All E.R. 737 represents the latest word from the House of Lords on the admissibility or otherwise of without prejudice correspondence. The facts giving rise to this case are not uncommon in the building industry. They involved the admissibility of documents headed without prejudice which had passed between the proprietor and the builder and which ultimately resulted in settlement of claims under a building contract between those parties. The question arose whether the documents were still privileged in any subsequent litigation by sub-contractors against the builder.

The builder, Rush and Tomkins, had entered into a contract with the Council to build 639 dwellings at Ealing in England. They engaged Carey Plant Hire as sub-contractors to carry out ground works required under the main contract. The completion of the contract was subject to much disruption and delay between June 1976 and January 1979, and Carey claimed for loss and expenses against Rush and Tomkins under their sub-contract. Rush and Tomkins maintained they were entitled to be reimbursed by the Council in respect of these claims, but the Council would not agree to Carey's claim and, consequently, the builder would not pay it. As a result, to resolve the deadlock, the builder commenced proceedings against the Council as first defendant and Carey as second defendant in which it claimed an enquiry into the loss and expense to which Carey was entitled to under the sub-contract, and a declaration that it was entitled to be reimbursed for this loss and expense by the Council.

Before these proceedings came to trial, the builder settled the action against the Council in which the builder accepted the sum of 1,200,000 pounds for all outstanding claims under the main contract. It was a term of this settlement that Rush and Tomkins would accept direct responsibility for all sub-contractors claims, including Carey's claim.

The terms of this settlement were disclosed to Carey, but the settlement did not show what valuation had been put on Carey's claim, in arriving at the global settlement figure of 1,200,000 pounds. Carey therefore sought to have discovered the documents leading up to the compromise, in the hope that they would show what amount had been allowed for in the settlement as part of their claim. It was argued by Carey that, as the action between the Council and the builder had been settled, this correspondence was no longer privileged.

The House of Lords reviewed the without prejudice rule, confirming that it was a rule governing the admissibility of evidence and was founded on the public policy of encouraging litigants to settle their differences rather than to litigate. They approved the well known extract from the judgment in the case of *Cutts v Head*, a leading case often used in the arbitration field, relating to offers of compromise, where the offer is often expressed to be without prejudice except as to costs.

The *Cutts v Head* passage approved was as follows:

> The without prejudice rule rests at least in part on public policy. This public policy is that the parties should be encouraged as far as possible to settle their disputes without resorting to litigation and should not be discouraged by the knowledge that anything that has been said in the course of such negotiations for settlement being brought before the court at trial as admissions on the question of liability.

The House of Lords pointed out that the rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing. It was pointed out that the application of the rule is not even dependent on the use of the phrase "without prejudice", and if it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those negotiations will as a general rule not be admissible at the trial and cannot be used to establish an admission or partial omission. The House of Lords therefore dismissed the Court of Appeal's analysis that the expression "without prejudice" had to be used in correspondence, and indicated that it wasn't necessary to use those words, if it was clear from the circumstances that the parties were seeking to compromise the action.

The House of Lords, in particular Lord Griffiths, examined all the authorities relating to without prejudice settlements and concluded that the wiser course was to protect without prejudice communications between parties to litigation from production to other parties in the same litigation. It was pointed out, that in multi-party litigation, it is not an infrequent experience that, if one party takes an unreasonably intransigent attitude, it makes it extremely difficult to settle with him. In such circumstances, the House of Lords thought it would place a serious fetter on negotiations between the other parties, if they knew that everything that passed between them would ultimately have to be revealed to the obdurate litigant. What in fact would happen would be that nothing would be put on paper.

Therefore, the House of Lords concluded that without prejudice correspondence entered into with the object of effecting compromise of an action remained privileged after the compromise had been reached and litigation connected with the same subject matter occurred, whether between the same or different parties and, furthermore, was also protected from subsequent discovery by other parties to the same litigation. It therefore followed that Carey was not entitled to discovery of without prejudice correspondence which had passed between the Council and the builder leading up to the settlement of their action. Consequently, the decision of the Court of Appeal was overturned.

In my view, this decision does not affect the position, where a party fails to adhere to terms of settlement, which have been reached in litigation or arbitration, and then seeks to avoid the consequences of that settlement. The successful conclusion of those settlement negotiations gives rise to a contract, which is as enforceable as any other contract concluded otherwise. Consequently, if one party

failed to carry out the provision of the terms of settlement, the other party would still be free to issue proceedings to seek to enforce that settlement leading up to and giving rise to the actual contract which emanated from those settlement negotiations. This may necessarily include without prejudice correspondence.

- **John Pilley, Victorian State Director, BISCOA. Reprinted with permission from the Building Dispute Practitioners' Society Newsletter.**

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NEXT ISSUE

The next issue of the Newsletter, amongst other things, shall include:

- comment upon the NSW Law Reform Commission's Discussion Paper entitled "Training and Accreditation of Mediators";
- comment upon the Legislation and Policy Division of the NSW Attorney General's Department's Issues Paper entitled "Limitation of Professional Liability for Finanacial Loss";
- a paper on Joint Ventures, additional to those published during 1989;
- *Rheem Australia v Federal Airports Corporation*, Qld Supreme Court, Carter J., 6 December 1989, a decision on non-compliance with the notice provisions of the arbitration clause in NPWC3; and
- *Xuereb & Anor v Viola & Ors*, Supreme Court of NSW, Cole J. 27 November 1989, a decision which involved the rejection of the report of a referee appointed under Part 72 of the Supreme Court Rules.