HOUSE OF LORDS SESSION 2008–09

[2009] UKHL 16

on appeal from:[2008] EWCA Civ 7

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Ofulue and another (FC) (Appellant) *v* Bossert (FC) (Respondent)

Appellate Committee

Lord Hope of Craighead
Lord Scott of Foscote
Lord Rodger of Earlsferry
Lord Walker of Gestingthorpe
Lord Neuberger of Abbotsbury

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LORD HOPE OF CRAIGHEAD

My Lords,

1. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Neuberger. I agree with it, and for the reasons he gives I would dismiss the appeal and make the order that he proposes. I also agree with my noble and learned friends Lord Rodger of Earlsferry and Lord Walker of Gestingthorpe. I wish only to add a few words of my own on the question whether the offer to purchase the property in the letter of 14 January 1992 that was written on the Bosserts' behalf by their solicitors can be relied on by the Ofulues in these proceedings as an acknowledgement.

2. Sometimes letters get headed "without privilege" in the most absurd circumstances, as Ormrod J observed in *Tomlin v Standard Telephones & Cables Ltd* [1969] 1 WLR 1378, 1384. But where the letters are not headed "without prejudice" unnecessarily or meaninglessly, as he went on to say at p 1385, the court should be very slow to lift the umbrella unless the case for doing so is absolutely plain. The principle which the court should follow was that expressed by Sir John Romilly MR in *Jones v Foxall* (1852) 15 Beav 388, 396. If converting offers of compromise into admissions of acts prejudicial to the person making them were to be permitted no attempt to compromise a dispute could ever be made. The basis for the rule has been explained more fully by Oliver LJ in *Cutts v Head* [1984] Ch 290, Lord Griffiths in *Rush & Tomkins Ltd v Greater London Council* [1989] AC 1280 and Robert Walker LJ in *Unilever plc v The Procter & Gamble Co* [2000] 1 WLR 2436. With the benefit of those explanations it may be re-stated in these terms. Where a letter is written "without prejudice" during negotiations with a view to a compromise, the protection that these

words claim will be given to it unless the other party can show that there is a good reason for not doing so.

3. In this case there is no doubt that the letter of 14 January 1992 was written in the course of a genuine attempt to settle the proceedings for possession which were then in existence between the parties. It does not contain an admission in so many words that the Ofulues were the owners of the property. But the offer in the last sentence of the letter to purchase it from them can be construed as an express acknowledgement of this fact. In any event it was an implied acknowledgment which was sufficient for the purposes of section 29(2) of the Limitation Act 1980. Can this be used to defeat the defence to the proceedings which have now been issued in which the Ofulues seek an order declaring that their title to the property has not been extinguished?

4. This question would not have arisen if the claimants had not allowed their claim for possession to fall asleep following the breakdown of the attempt at settlement. As it is, the Ofulues allowed so much time to pass that they must now challenge Ms Bossert's assertion that the title has passed to her by way of adverse possession. That is why the present claim has been brought. The letter of 14 January 1992 was written within 12 years of the start of these proceedings. What grounds are there for saying that, notwithstanding the fact that it was written "without prejudice", it can be founded on as an effective acknowledgment for the purposes of section 29(2) of the 1980 Act?

5. In *Cutts v Head* [1984] Ch 290 at p 306 Oliver LJ said that the rule that protects without prejudice negotiations from disclosure rests, at least in part, upon public policy. As he explained, the public policy justification essentially rests on the desirability of preventing statements or offers made in the course of negotiations being brought before the court of trial as admissions on the question of liability. At p 310 he said that the public policy protects negotiations from disclosure "whilst liability is still in issue". In that case the offer was unacceptable, the case went to trial and the question was whether the offer could be referred to on the issue of costs. The situation in this case is that the negotiations were not successful but the application for possession in the original action has been struck out. So there is no question of seeking in that action to rely on the letter of 14 January 1992 before the court of trial. The question which this formulation of the public policy justification gives rise to is whether the protection from disclosure has any effect beyond the life of the action which the parties were attempting to settle when they entered into the negotiations.

6. In *Rush & Tomkins Ltd v Greater London Council* [1989] AC 1280, 1299 Lord Griffiths said that the effect of the phrase was that, as a general rule, in the event of the negotiations being unsuccessful the negotiations were not to be referred to at the subsequent trial. At p 1300 he said that the rule was not absolute and that resort may be had to the "without prejudice" material for a variety of reasons when the justice of the case requires it. In that case the second defendants sought disclosure of correspondence marked "without prejudice" between the plaintiffs and the first defendants which had resulted in those parties reaching a compromise. It was held that admissions made to reach a settlement with a different party within the same litigation were also inadmissible whether or not settlement was reached with that party. Lord Griffiths said at p 1305 that the wiser course, in multi-party litigation, was to protect "without prejudice" communications between parties to litigation from production to other parties in the same litigation. In that case the question whether the protection would continue to be available in any subsequent proceedings between the same parties with reference to the same subject matter was not in issue.

7. In *Unilever plc v The Procter & Gamble Co* [2000] 1 WLR 2436 the claimant sought to rely on the defendant's alleged threat to take proceedings in the United Kingdom in respect of an alleged infringement of a patent, made in the course of a without prejudice meeting with reference to proceedings that had been brought in France, to justify the taking of proceedings for a declaration of non-infringement in this jurisdiction. The claimant was not seeking to make use of the alleged threat in the proceedings which were the subject of the negotiations for settlement. In a sense it had nothing to do with those proceedings at all. It would not have been relevant to anything that was to be determined at the trial. As Robert Walker LJ noted at pp 2444-2445, there are various situations in which the without prejudice rule does not prevent the admission into evidence of what one or both parties said or wrote. None of those situations apply to this case. But the general approach which he recommended provides valuable guidance. At pp 2448-2449 he said that to dissect out identifiable admissions and withhold protection from the rest of without prejudice communications would not only create huge practical difficulties but would be contrary to the underlying objective, founded partly in public policy and partly in the agreement of the parties, of giving protection to the parties so that they could speak freely about all issues in the litigation when seeking compromise. These comments show that this is not a situation in which arguments that resort to procedural or linguistic technicalities are appropriate.

8. The argument that the letter cannot be relied on as an acknowledgment faces two difficulties which have persuaded my noble and learned friend Lord Scott of Foscote that the rule does apply in this case. The first is the product of a change of circumstances. The issue that is being litigated between the parties now is not the issue that was being litigated when the letter was written in January 1992. In fact it was not an issue that was in dispute between the parties at that time at all. The second is a more subtle aspect of the same point. It is whether the protection that the rule gives in without prejudice negotiations to an admission against interest extends to an acknowledgment of what at the time it was made was an agreed fact.

9. Normally, when negotiations are entered into with a view to settling a claim that has already been brought, one or other of two things happens: either they result in an agreement or they break down and the claim proceeds to judgment. If they result in agreement, the letter that was written without prejudice is available to show what the agreement was. If the claim proceeds to judgment, the protection remains in place while liability is still in issue but it ceases to have any purpose when the court has resolved the dispute. This case is unusual because the negotiations did not result in an agreement and the claim did not proceed to judgment. It went to sleep and was then struck out. But I would hold that this turn of events did not remove the need for protection. The dispute had not been resolved, so there was still a risk that things said in the letter might be used to the Bosserts' prejudice. The issue which had given rise to the original proceedings had not gone away. Ultimately of course, if the Bosserts remained in possession and no further steps were taken against them, they would acquire a right of ownership under the provisions of the Limitation Act 1980. But so long as the Ofulues remained the owners and the dispute was unresolved one way or another there was a risk that things said in the letter might be used against them. The precise way in which they might be used against them is beside the point. The public policy grounds for the rule would be contradicted if the protection was not available in fresh proceedings to replace those which were struck out.

10. The Ofulues' title was not in issue when the letter was written, as it was common ground in the original proceedings that they were the owners of the property. The Bosserts had already admitted that the Ofulues were the owners in their Defence. So acknowledging that this was so as part of the attempt to achieve a compromise was giving nothing away. It has now become the focus of the fresh proceedings that have been brought. On the other hand the offer of a compromise did contain within it an implied admission that the Bosserts's defence to

the claim for possession was unsustainable. The question whether this makes any difference can be tested in this way. Could the writer of the letter have made the offer that it contains without acknowledging the Ofulues' ownership? The answer to that question must be, no. It is obvious that an offer to purchase, which is what this was, could not have been made without that acknowledgment. There is no need in this case to explore the outer limits of the rule which were discussed in *Bradford & Bingley plc v Rashid* [2006] UKHL 37, [2006] 1 WLR 2066. The acknowledgment cannot be said to be unconnected with, or to fall outside the area of, the offer to compromise. It was a necessary part of it.

11. The argument that the acknowledgment can, following Hoffmann LJ's reasoning in *Muller v Linsley & Mortimer* [1996] PNLR 74, 79 and in *Bradford & Bingley plc v Rashid* para 16, be viewed simply as a fact independently from any admission that can be spelled out of it faces the same difficulty. How could the writer have avoided this aspect of his communication when he was making his offer to purchase the property? I do not see how he could reasonably have been expected to have said or done anything differently. As Lord Walker says at para 51, by one and the same words, he was both admitting the Bossert's need to purchase the property if they were to retain possession of it and acknowledging the Ofulues' ownership. The protection which the rule gives to that admission must apply equally to the acknowledgment. They are two sides of the same coin.

12. I think that the public policy basis for not allowing anything said in the letter to be used later to her prejudice provides Ms Bossert with all she needs to defeat the argument that the implied admission that it contains can be used as an acknowledgment against her in these proceedings. The essence of it lies in the nature of the protection that is given to parties when they are attempting to negotiate a compromise. It is the ability to speak freely that indicates where the limits of the rule should lie. Far from being mechanistic, the rule is generous in its application. It recognises that unseen dangers may lurk behind things said or written during this period, and it removes the inhibiting effect that this may have in the interests of promoting attempts to achieve a settlement. It is not to be defeated by other considerations of public policy which may emerge later, such as those suggested in this case, that would deny them that protection.

LORD SCOTT OF FOSCOTE

My Lords,

13. The litigation which has led to this appeal to your Lordships began with a Claim Form issued on 30 September 2003 whereby the appellant, Mrs Ofulue, and her husband, claimed possession of 61 Coborn Road, Bow, London E3, from the respondent, Ms Bossert. Mr and Mrs Ofulue were, and had been since 1976, the registered proprietors of the property. They had not, however, at least since 1981, been in actual possession of the property. In 1981 or 1982 the respondent and her father had been allowed into occupation of the property by a former tenant of Mr and Mrs Ofulue and the respondent, together with her father until his death in 1996, had occupied the property ever since. It is, therefore, not surprising to find that her defence to the possession claim is based on a claim to have been in adverse possession of the property for a period in excess of 12 years (see section 15 of the Limitation Act 1980).

14. The appellant's response to this adverse possession defence relies on section 29(2)(a) of the 1980 Act -

> "(2) If the person in possession of the land . . . in question acknowledges the title of the person to whom the right of action has accrued –
>
> (a) the right shall be treated as having accrued on and not before the date of the acknowledgement …"

Section 30(1) of the Act requires that a section 29 acknowledgement "must be in writing and signed by the person making it" but subsection (2) enables the acknowledgement to be made "by the agent of the person by whom it is required to be made".

15. Two documents are relied on by the appellant as constituting effective section 29 acknowledgements of title. Both documents came into existence in earlier possession proceedings that had been brought by the appellant and her husband against the respondent and her father. The earlier possession proceedings had been commenced in 1989. The Statement of Claim, served on 26 June 1990, pleaded in paragraph 1 the

plaintiffs' title to 61 Coborn Road and in paragraph 2 that the defendants had wrongfully taken possession of the property and were wrongfully retaining possession. The respondent and her father served their Defence on 18 July 1990. Paragraph 1 of the Defence admitted paragraph 1 of the Statement of Claim and was, accordingly, an admission of Mr and Mrs Ofulue's title to 61 Coborn Road. The Defence went on to claim (in paragraph 6) that Mr Bossert had become in equity the tenant of 61 Coborn Road, or, alternatively (paragraph 8) was entitled to remain in possession pursuant to an oral agreement with Mr Ofulue for the grant of a fourteen year lease. No adverse possession claim was made, for the Bosserts had not yet been in possession for the requisite twelve years. The three paragraphs of the Defence to which I have referred contain, perhaps individually but certainly collectively, a clear acknowledgement of Mr and Mr Ofulue's title to 61 Coborn Road. The Defence, signed by counsel instructed by the Bosserts' solicitors, is the first of the documents on which the appellant relies as a section 29 acknowledgement. Her problem is that the date of the document, July 1990, is more than twelve years before 30 September 2003, the date when the current possession proceedings were commenced.

16. The second document relied on as a section 29 acknowledgement also came into existence for the purposes of the first possession proceedings. On 12 August 1991 Geoffrey Levine & Co., the Bosserts' solicitors, wrote to Mr and Mrs Ofulue's solicitors communicating an offer by their clients to purchase the freehold of 61Coborn Road from Mr and Mrs Ofulue for £20,000. The letter was headed "Without Prejudice". The Ofulues' solicitors replied on 19 December 1991, in a letter headed "Without Prejudice save as to Costs", indicating that they would advise their clients, whose instructions on the offer they had not yet received, that the £20,000 offered was inadequate. This led to a further letter from the Bosserts' solicitors, dated 14 January 1992, also headed "Without Prejudice", increasing to £35,000 the sum offered. This revised offer was not accepted and although, in a letter dated 20 January 1992, the Ofulues' solicitors continued the bargaining, the negotiations ran into the sand.

17. The letter of 14 January 1992 is the second document relied on by the appellant as a section 29 acknowledgement of her and her husband's title to 61 Coborn Road. The letter does contain a clearly implied acknowledgement of Mr and Mrs Ofulue's title to the property and its date is within twelve years of the commencement of the current possession proceedings. The appellant's problem, however, is that the letter was marked, as the associated correspondence had been marked,

"Without Prejudice" and that marking, it is submitted, bars its admissibility into evidence in the present proceedings.

18. Before addressing the critical issue of the admissibility into evidence of the 14 January 1992 "Without Prejudice" letter, it is convenient to refer to the fate of the first possession proceedings. Following the service of the Defence in July 1990 the case was transferred from the High Court to the Shoreditch County Court and a Directions Hearing took place on 17 July 1991. It appears that Lists of Documents were shortly thereafter exchanged but that nothing else was done to prosecute the action and, on 26 April 2000, the appellant's claim, 1996, became automatically stayed pursuant to the Civil Procedure Rules. On 1 February 2002 an application by the appellant to lift the stay was issued and on 16 April 2002 the case was struck out. She, therefore, had to commence fresh possession proceedings at a time when, subject to her ability to pray in aid a section 29 acknowledgement of title, her title was barred under section 15 of the 1980 Act. The twelve years adverse possession period would have long since expired.

19. As my noble and learned friend Lord Neuberger of Abbotsbury has observed in paragraph 73 of his opinion, which I have had the advantage of reading in advance of writing my own, there are two live issues which your Lordships must decide. The first is whether the admission of title in the Defence in the first proceedings can be regarded as a continuing acknowledgement, effective for section 29 purposes until, in April 2002, the case was struck out. On this issue I am in respectful agreement with Lord Neuberger that, for the reasons he has given (paras 80 to 84 of his opinion), it cannot. Section 29(2) (a) refers to "the date of the acknowledgement", subsection (3) to "the date of the payment", and subsections (4) and (5) to "the date of the payment or acknowledgement". In my opinion, the scheme of section 29 is as incompatible with an acknowledgement in writing being treated as a continuing acknowledgement extending into the future beyond the date on which it was given, as would be a payment being accorded a continuing effect. Both a section 29 acknowledgement and a section 29 payment start time running as from the date on which the acknowledgment or the payment was made. The concept of a continuing acknowledgement is, in my opinion, incompatible with the section. The Bosserts' defence in the first proceedings constituted, in my opinion, a section 29 acknowledgement on the date it was signed, and perhaps again on the date it was served, and would have been capable of constituting a further acknowledgement on any subsequent date on which it was, so to speak, re-published, e.g. by being re-served after an amendment had been made. But nothing that could constitute a

re-publication ever happened and the Defence's effect as a section 29 acknowledgement was, in my opinion, spent on the expiry of twelve years after it had been served, at the latest.

20. It follows that, in my opinion, the appellant must rely on the Without Prejudice letter of 14 January 1992. On this point Lord Neuberger, and my noble and learned friends Lord Hope of Craighead and Lord Walker of Gestingthorpe have expressed the view that the public policy that encourages the negotiated settlement of actions requires that the 14 January 1992 letter be held inadmissible in evidence in the present action. My Lords I have the misfortune to disagree. I believe that that result of this appeal would represent a marked extension of the Without Prejudice rule that previous judicial authority does not warrant and that public policy does not require.

21. The Bosserts' Defence in the first possession proceedings became spent as a section 29 acknowledgement but remains, in my opinion, of importance in providing the context against which the purpose of the 14 January 1992 letter must be assessed. There was no issue between the parties to the first possession proceedings about the Ofulues' title to the property. The Ofulues' ownership, never in issue, was admitted in the Defence and was the basis on which the Bosserts' pleaded claims to be entitled to remain in possession had been formulated and on which the settlement negotiations were throughout conducted. What was suggested in the letter of 12 August 1991 that started off the without prejudice negotiations was the acquisition by the Bosserts of the freehold of 61 Coborn Road in place of their disputed claim to a tenancy or lease. The ensuing negotiations related to the amount that the Bosserts should pay for that enhanced interest, an interest that they could not claim in the then current proceedings. It would, of course, have been out of the question for that correspondence to have been admitted in evidence (otherwise than with the consent of both parties) if the first possession proceedings had progressed to a trial, but not because of any admission regarding the Ofulues' title.

22. The early cases, which established the rule that without prejudice settlement negotiations were to be immune from admission into evidence on the trial of the issues sought to be settled, provide no warrant for extending the rule to other actions involving other issues. In *Whiffen v Hartwright* (1848) 11 Beav. 111 Lord Langdale M.R. upheld an objection to the production of letters passing between the parties' respective solicitors and written "… with a view to an amicable adjustment of the questions in issue in *this* suit …" (emphasis added).

In *Hoghton v Hoghton* (1852) 15 Beav. 278 Sir John Romilly M.R. said at 314 that he would disregard "… admissions made solely for the purpose of compromise". The acknowledgement of title contained in the 14 January 1992 letter cannot be described as an *admission* made for the purpose of compromise. It was the common ground on the basis of which the Ofulues' pleaded claim to possession was made and the Bosserts' pleaded defences were formulated. At 321 the Master of the Rolls said that "communications made with a view to an amicable settlement ought to be held very sacred for if parties were to be afterwards prejudiced by their efforts to compromise, it would be impossible to attempt an amicable arrangement of differences." But he was not speaking of matters referred to in the communications that were never in issue but were common ground between the parties. In *Jones v Foxall* (1852) 15 Beav. 388 Sir John Romilly MR at 396 fulminated against attempts to introduce into evidence offers of compromise "made without prejudice to the *rights* of the parties" (emphasis added). In that case, unlike the present case, the rights protected by the Without Prejudice label were the contested rights in issue in the case. In *Hoghton v Hoghton* the issue had been whether a resettlement of settled estates should be set aside on, essentially, undue influence grounds. The without prejudice communications must have proceeded on the footing that the Hoghton sons, or grandsons, were legitimate offspring and, therefore, potential beneficiaries of the settled estates. If, subsequently, an illegitimacy issue had arisen and some content of the without prejudice communications, common ground at the time, had become relevant to the illegitimacy issue, why should the communications not have been given in evidence on that new issue? What public policy argument would exclude the evidence? How can protection of common ground facts and matters on the basis of which compromise negotiations are being conducted be seriously thought to be necessary for the encouragement of such negotiations?

23. The more modern cases, too, treat the protection afforded by without prejudice negotiation as a protection in relation either to the proceedings or to the issues sought to be settled. In *Cutts v Head* [1984] Ch. 290 the question for decision was whether the content of settlement offers made "without prejudice" could be admitted into evidence for costs purposes. Oliver LJ examined, at 306, the policy justification for the protection afforded by the "without prejudice" label.

> "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 as 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*" (Emphasis added)

He went on at 307

> "Once, however, the trial of the issues in the action is at an end and the matter of costs comes to be argued, this can have no further application for there are no further issues of fact to be determined upon which admissions could be relevant."

Applying these remarks to the present case, the acknowledgement of the title contained in the letter of 14 January 1992 was in no sense "an admission of fact to be determined" in the action. The Ofulues' title was the basis both of their possession claim and of the Bosserts' pleaded defence.

24. Fox LJ, while agreeing with Oliver LJ as to the result, placed the protection to be afforded to the "without prejudice" offers not only on public policy but also on implied agreement between the parties (see 314 B). Insofar as implied agreement is the juridicial basis of protection given to without prejudice offers or negotiations, the protection must, in my opinion, extend as far as but no further than the parties can reasonably be taken to have agreed. And I can see no sensible basis on which it can be supposed that the parties' implied agreement extended to providing immunity from discovery or admission into evidence of factual statements that were common ground between the parties and the basis on which their respective cases in the litigation rested.

25. In *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280 this House examined the scope of the protection afforded by the "without prejudice" label. The plaintiffs, Rush & Tompkins, having

entered into a building contract with the GLC, the first defendants, and engaged the second defendants as sub-contractors, commenced proceedings against the GLC for, *inter alia*, a declaration that the GLC was liable to re-imburse them the sums for which they might be held liable to pay the second defendant, and against the second defendants for an account and enquiry as to the amount due from them to the second defendants. Without prejudice negotiations between Rush & Tompkins and the GLC led to a compromise under which the GLC paid to Rush & Tompkins £1.2 million and Rush & Tompkins undertook responsibility for all claims made by the second defendants. The second defendants then sought an order against Rush & Tompkins for discovery and production for inspection of the without prejudice documents that had led to the compromise agreement with the GLC. Lord Griffiths, with whose opinion each of the other members of the Appellate Committee agreed, cited, at 1299, with approval, the passages from the judgment of Oliver LJ in *Cutts v Head* (supra) that I have cited and commented, at 1300 C/D that the "without prejudice" authorities

> "… all illustrate the underlying purpose of the rule which is to protect a litigant from being embarrassed by any admission made purely in an attempt to achieve a settlement."

If that is the underlying purpose of the rule it can hardly apply in the present case to the acknowledgement of title in the 14 January 1992 letter. The Bosserts' offer to purchase had certainly been made in an attempt to achieve a settlement but the acknowledgement of title implicit in the offer cannot possibly be described as an "admission made purely to achieve a settlement". It was the basis of their own pleaded defence. Be that as it may, Lord Griffiths continued, at 1300 E/F to comment that

> "There is also authority for the proposition that the admission of an 'independent fact' in no way connected with the merits of the cause is admissible even if made in the course of negotiations for a settlement."

The Ofulues' title to 61 Coborn Road was in no way connected with the *merits* of the cause being litigated. After referring to *Waldridge v Kennison* (1794) 1 Esp 142 with some lack of enthusiasm Lord Griffiths then said that

> "If the compromise fails the admission of the facts made for the purpose of the compromise should not be held against the maker of the admission and should therefore not be received in evidence"

The acknowledgement of the Ofulues' title to 61 Coborn Road cannot be described as an "admission … for the purpose of the compromise". It had been common ground between the parties throughout. At 1301 Lord Griffiths summed up:

> "I would therefore hold 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."

This summary must be read together with the foregoing discussion by Lord Griffiths of the rule and its purposes.

26. My Lords, Lord Griffiths' remarks in the *Rush v Tompkins* case, representing as they do the ratio of the House's decision in that case, cannot, in my respectful opinion, be taken to permit the extension of the "without prejudice" rule to cover a statement of fact that, far from being an issue in the litigation, is common to the pleaded cases of both parties. Whether or not such a statement can sensibly be regarded as an "admission", it cannot be described as an admission against interest (see *Unilever Plc v The Proctor & Gamble Co.* [2000] 1 WLR 2436, 2448H-2449A per Robert Walker LJ).

27. Another authority to which I should refer is the judgment of Hoffmann LJ (as he then was) in *Muller v Linsley & Mortimer* [1996] PNLR 74. The plaintiff sued solicitors for professional negligence. The damages he sought to recover related to loss he suffered when dismissed as a director of a private company leading to a forced sale of his shares in the company. The plaintiff had sued the other shareholders but the action was settled after without prejudice negotiations. In his action against the solicitors the plaintiff pleaded that the settlement of his action against the other shareholders had represented a reasonable attempt to mitigate his loss. The solicitors then sought discovery of the without prejudice documents that had led to the settlement. The Court of Appeal allowed the solicitors' appeal and ordered production of the

documents. Leggatt and Swinton Thomas LLJ based their decision on the implied waiver by the plaintiff of the protection from discovery that the without prejudice rule might otherwise have provided. But Hoffmann LJ based his decision on an analysis of the public policy that underlay the without prejudice rule and concluded, at 79D, that

> "The public policy aspect of the rule is not … concerned with the admissibility of statements which are relevant otherwise than admissions i.e. independently of the truth of the facts alleged to have been admitted."

He cited *In re Daintrey; Ex p Holt* [1893] 2 QB 116 as an example

> "A without prejudice letter containing a statement which amounted to an act of bankruptcy is admissible to prove that the statement was made" (79F)

and, at 80A, expressed the opinion that

> "the public policy rationale is … directed solely to admissions."

28. If Hoffmann LJ's view as expressed in the *Muller* case is correct, this appeal must be allowed. The acknowledgement of title contained in the 14 January 1992 letter was not an *admission* by the Bosserts. It was, as I have repeated, I fear *ad nauseam*, the basis on which their pleaded Defence was based.

29. The final authority to which I should refer is *Bradford & Bingley Plc v Rashid* [2006] 1 WLR 2066, in which this House had to consider whether a letter from a debtor containing an offer to pay "as a final settlement" a considerably lesser amount than the outstanding amount due could constitute an acknowledgement of the debt for the purposes of section 29(5) of the 1980 Act. The letter had not been marked "without prejudice". The Appellate Committee were in agreement that the letter constituted a clear acknowledgement. The majority concluded that the without prejudice privilege did not apply to open correspondence that

did not form part of compromise negotiations but Lord Hoffmann, repeating the views he had expressed in *Muller* about the scope of the public policy rationale for the without prejudice rule, said that

> "… the without prejudice rule, so far as it is based upon general public policy and not upon some agreement of the parties, does not apply at all to the use of a statement as an acknowledgement for the purposes of section 29(5)…" (2072E)

and that

> "All an acknowledgement does under section 29(5) is to allow the creditor to proceed with his case. It lifts the procedural bar on bringing the action" (2072 G).

30. My Lords, I must now try to draw the threads together. This is not a case in which an issue of discovery arises. The appellant has the 14 January 1992 letter in her possession. The issue is whether that letter can be admitted in evidence as an acknowledgement of title for section 29 purposes. The only basis on which the letter could be excluded would be by the application of the without prejudice rule and there are two alternative bases on which that rule might have to be applied, namely, public policy and implied agreement. Both were discussed by Fox LJ in *Cutts v Head* (supra) and by Hoffmann LJ in the *Muller* case.

31. I would, for my part, rule out implied agreement as a possible basis for applying the without prejudice rule in this case. The extent of the implied agreement between the parties that can be spelled out of the without prejudice label under which the 1991/1992 settlement correspondence was conducted was that the correspondence would not be admissible at the trial of the then pending action, or in any other proceedings in which the issues in that action were live issues. To give any greater extent than that to the agreement than can be implied from the correspondence would surely divorce the application of the rule from any reasonable consensual basis. Why should the parties be thought to have had anything in mind other than that the correspondence was without prejudice to their respective cases in the pending litigation? If the without prejudice rule is to be applied so as to exclude the 14 January 1992 letter from admission into evidence in the present case as

an acknowledgement of the appellant's title, the justification for that application must, in my opinion, be public policy.

32. The public policy justification for refusing to allow a without prejudice communication in the course of compromise negotiations to be given in evidence is that to do so might inhibit parties to a dispute from settling their dispute without recourse to litigation, or, if litigation were already pending, without recourse to a trial, or, if a trial were in progress, without troubling the judge. These are important public policy considerations, but they are not the only ones. The policy approved by Parliament and enacted in section 29 of the 1980 Act is that title to land should not be lost if, within the twelve year limitation period prescribed by section 15, the person in adverse possession has made a written acknowledgement of the title of the owner of the land. In *Cutts v Head* Oliver LJ and Fox LJ both came to the conclusion that the public policy underlying the without prejudice rule did not, after the conclusion of the trial, bar the admissibility of without prejudice communications for the purpose of decisions as to what costs orders should be made.

33. In Matthews & Malek's Disclosure 3rd Ed. (2007) at paras. 11.127 to 11.132 the authors deal with the extent of the without prejudice evidential rule and, at para. 11.129 are listed a number of situations where without prejudice communications have been admitted into evidence in subsequent litigation for other purposes. These include - constituting an act of bankruptcy (*In re Daintrey; Ex p Holt* [1893] 2 QB 116), a severance of a joint tenancy (*McDowell v Hirschfield Lieson & Rumney*, The Times, 13 February 1992), a trigger for a rent review clause (*Norwich Union Life Insurance Society v Tony Waller Ltd* (1984) 270 EG 42, disapproved on another point in *South Shropshire DC v Amos* [1986] 1 WLR 1271), seeing whether the negotiations give rise to an estoppel (*Hodgkinson & Corby Ltd v Wards Mobility Services Ltd* [1997] FSR 178) and for the purpose of explaining delay when resisting a laches defence or a strike out for want of prosecution application. All these examples, and the others referred to at para. 11.128, have in common that the purpose of admitting the without prejudice communication into evidence was not to assist in establishing the case of the party in question on any of the disputed issues that the without prejudice communications had been attempting to settle. The purpose, independent of the issues in dispute, was to establish some independent fact.

34. In the present case, the fact sought to be established by the admission into evidence of the without prejudice 14 January 1992 letter

is that on that date the respondent acknowledged the appellant's title to 61 Coborn Road. That fact was not only a fact not in dispute in the proceedings sought to be settled but was the common ground basis on which each side had pleaded its case. How can it sensibly be argued that the possibility of admission into evidence, in future litigation that neither party could have had in mind, of letters recording the acknowledgement of common ground facts could act as an inhibitory factor, discouraging attempts to settle the then current action? A public policy rule should not be allowed to extend further than the public policy in question requires and to apply the rule mechanistically, without regard to the limits that the purpose underlying the rule should dictate, cannot, in my respectful opinion, be right.

35. It may be that Lord Hoffmann is right in the view he expressed in *Rashid* (para.16) that the without prejudice rule, insofar as it is based on public policy, does not apply to the use as a section 29 acknowledgement of a statement contained in a without prejudice letter. In the present case, however, that result can be justified, more securely and perhaps less contentiously, by the proposition that the public policy rule does not apply where the statement in question is common ground between the parties, is the basis on which they have pleaded their respective cases and where the absence of the protection afforded by the rule cannot sensibly be thought to be apt to inhibit their attempts at compromise. There has been no previous case in which the without prejudice rule has been held to apply to a statement with those characteristics. There is no reason of policy that I can discern why your Lordships should extend the rule so as to cover such a statement and there are, in my opinion, reasons of statutory policy, evident in section 29, why your Lordships should not. I would allow this appeal.

LORD RODGER OF EARSLFERRY

My Lords,

36. I have had the advantage of considering in draft the speech to be delivered by my noble and learned friend, Lord Neuberger of Abbotsbury. I agree with it and, for the reasons he gives, I too would dismiss the appeal. I add a few observations on the general issue raised by the without prejudice letter of 14 January 1992.

37. In *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280 the plaintiffs, Rush & Tompkins, were the main contractors for a building project. They sued their employers, the Greater London Council, as first defendants, and one of their subcontractors as second defendants. Rush & Tompkins and the Council entered into negotiations which led to the settlement of the claim against the Council. The subcontractors then sought discovery of the pre-settlement correspondence between the plaintiffs and the Council in order to use it in defence of the continuing claim by the plaintiffs against them. This House held that, although the correspondence contained relevant material, the subcontractors were not entitled to recover it. The decision is important because it establishes that not only the parties to the correspondence, but third parties also, are prevented from making use of the contents of without prejudice correspondence. This in turn shows that, while part of the justification for excluding reference to what was said is to be found in the understanding of the parties to the relevant correspondence or negotiations, the rule is actually a privilege which forms part of the general law of evidence and is based on public policy. So, unless the parties make some agreement to narrow or broaden its effect, the scope of the privilege is a matter of general law and is not based on the supposed boundaries of a notional agreement between the parties.

38. Over the years the courts have recognised certain exceptions to the privilege which are made when the justice of the case requires it. They were helpfully summarised in the judgment of Robert Walker LJ in *Unilever plc v The Procter & Gamble Co* [2000] 1 WLR 2436, 2444-2445. As Lord Griffiths noted in *Rush & Tompkins* [1989] AC 1280, 1300D-G, there is also some authority to the effect that an admission of an "independent fact", lying outside the area of the offer to compromise, is admissible. That approach has been developed in the Court of Session in cases which were discussed by my noble and learned friend, Lord Hope of Craighead, in *Bradford & Bingley plc v Rashid* [2006] 1 WLR 2066, 2075-2077, paras 26-30.

39. Undoubtedly, it would be possible to carve out an exception along those lines. The question is whether creating such an exception would be consistent with the overall policy behind the rule. Pretty clearly, Lord Griffiths thought not. In *Rush & Tompkins* [1989] AC 1280, 1300F-G, he went out of his way to emphasise that the exception in *Waldridge v Kennison* (1794) 1 Esp 142 "should not be allowed to whittle down the protection given to the parties to speak freely about all issues in the litigation both factual and legal when seeking compromise and, for the purpose of establishing a basis of compromise, admitting

certain facts." In my view there must indeed be a significant danger that allowing in evidence of admissions of "independent facts" would undermine the effectiveness of the rule as an encouragement to parties to speak freely when negotiating a compromise of their dispute. As was said many years ago,

> "If the proper basis of the rule is privilege, is there any logical theory under which the court can, by methods akin to chemistry, analyze a compromise conversation so as to precipitate one element of it as an offer of settlement and the other as an independent statement of fact? Would not the layman entering into a compromise negotiation be shocked if he were informed that certain sentences of his conversation could be used against him and other sentences could not?"

See J E Tracy, "Evidence – Admissibility of Statements of Fact made during Negotiation for Compromise" (1935-1936) 34 Michigan Law Review 524, 529. In *Bradford & Bingley plc v Rashid* [2006] 1 WLR 2066, 2071, para 13, Lord Hoffmann argued along essentially similar lines that the approach in the Scottish decisions should not be followed in England. At the hearing of the present appeal Mr Wilson QC did not rely on the Scottish decisions and so it is unnecessary to come to any concluded view on the point. I accordingly go no further than to say that the approach in the Scottish cases appears to be inconsistent with the general approached endorsed by this House in *Rush & Tompkins v Greater London Council* [1989] AC 1280.

40. In much the same way as with admissions of "independent facts", it would be technically possible to say that the exclusion rule should not apply to statements in correspondence or negotiations which were to be treated not as admissions but as "acknowledgments" for the purposes of section 29(2)(a) of the Limitation Act 1980 ("the 1980 Act"). Lord Hoffmann developed an argument to that effect in the Court of Appeal in *Muller v Linsley & Mortimer* [1996] PNLR 74 and later in *Bradford & Bingley plc v Rashid* [2006] 1 WLR 2066, 2072-2073, paras 16-18. No other member of the House adopted his reasoning on that occasion. My noble and learned friend, Lord Walker of Gestingthorpe, now elaborates his concerns about the viability, in this context, of a distinction between admissions and acknowledgments.

41. The present case illustrates some of the difficulties in applying such a distinction, especially to something like the offer to purchase which no-one at the time would ever have had occasion to see as either an acknowledgment or an admission. In *Bradford & Bingley plc v Rashid* [2006] 1 WLR 2066, 2072, para 16, Lord Hoffmann argued that, when a statement is used as an acknowledgment for the purposes of section 29(5) of the 1980 Act, it is not used as evidence of anything: it is not evidence of acknowledgment but the acknowledgment itself. He went on to say that, if the action proceeded, however, it might also be evidence of an indebtedness at trial.

42. In the present case, it is agreed that, but for the without prejudice point, the offer to purchase would constitute an acknowledgment of the appellant's title for purposes of section 29(2)(a) of the 1980 Act. And, in one way, Mr Crampin QC was right to say that this was because, by making the offer, the Bosserts were impliedly admitting that Mr and Mrs Ofulue owned the house. So, he said, evidence of the offer should be excluded as being evidence of an admission made in the course of negotiations to settle the earlier action. But it is an unusual kind of admission since, if the present action went ahead, it would not actually assist the claimants in establishing title to the house: the Bosserts' extrajudicial view on that matter would count for nothing. So, even without the privilege relating to without prejudice correspondence, evidence of the admission would presumably be excluded as being irrelevant.

43. Despite the difficulties, I would be prepared to assume that the law could make the distinction favoured by Lord Hoffmann. But should it do so? His argument, that it should, really depended on his view that the main purpose of the privilege is "to prevent the use of anything said in negotiations as evidence of anything expressly or impliedly admitted...": *Bradford & Bingley plc v Rashid* [2006] 1 WLR 2066, 2072, para 16. While that may well be the commonest application of the rule in practice, its rationale appears to be wider: it is that parties and their representatives who are trying to settle a dispute should be able to negotiate openly, without having to worry that what they say may be used against them subsequently, whether in their current dispute or in some different situation. If that is right, then there is no obvious justification for drawing a line between admissions and acknowledgments. In the words of Robert Walker LJ in *Unilever plc v The Procter & Gamble Co* [2000] 1 WLR 2436, 2448H-2449C, the modern cases

> "show that the protection of admissions against interest is the most important practical effect of the rule. But to dissect out identifiable admissions and withhold protection from the rest of without prejudice communications (except for a special reason) would not only create huge practical difficulties but would be contrary to the underlying objective of giving protection to the parties, in the words of Lord Griffiths in the *Rush & Tompkins* case [1989] AC 1280, 1300: 'to speak freely about all issues in the litigation both factual and legal when seeking compromise and, for the purpose of establishing a basis of compromise, admitting certain facts.' Parties cannot speak freely at a without prejudice meeting if they must constantly monitor every sentence, with lawyers or patent agents sitting at their shoulders as minders."

In my respectful view, these considerations justify the application of the rule so as to exclude reference to the offer to purchase in the present case. There is nothing to suggest that the appellant and her husband failed to press ahead with their original action or delayed in starting the present action because they understood that, by making the offer, the Bosserts had been acknowledging their title. Indeed there is nothing to suggest that, having been promptly rejected, the offer entered into their consideration at all. In these circumstances I do not consider that the justice of the case requires an exception to be made to the privilege.

44. For these reasons, and in agreement with the majority of your Lordships, I conclude that the appellant should not be allowed to rely on the offer in the letter of 14 January 1992 as an acknowledgment of title for the purposes of section 29(2)(a) of the Limitation Act 1980.

LORD WALKER OF GESTINGTHORPE

My Lords,

45. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Neuberger of Abbotsbury, and I gratefully adopt his summary of the facts and issues. On the first issue (whether the admission in the defence in the first action was not merely an acknowledgment, but also a continuing acknowledgment) I am in full

agreement with Lord Neuberger and have nothing to add. I am also in agreement with Lord Neuberger, and with my noble and learned friend Lord Hope of Craighead, on the second issue (the without prejudice letter of 14 January 1992). But it is to my mind a troublesome point and I wish to add a few observations of my own on this issue.

46. When a party to litigation seeks to adduce in evidence the other party's letters written (expressly or impliedly) without prejudice, he generally wishes to rely on admissions which the other party has made against his interest. In the leading case in this House, *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280, 1299-1300, Lord Griffiths approved Oliver LJ's statement of the principle (in *Cutts v Head* [1984] Ch 290, 306) as concerned with excluding admissions, and Lord Griffiths himself (with the concurrence of the rest of the House) also stated the principle in terms of admissions.

47. In *Muller v Linsley & Mortimer* [1996] PNLR 74, 79, Hoffmann LJ referred to those passages and commented:

> "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."

48. Lord Hoffmann took forward this line of reasoning in *Bradford & Bingley Plc v Rashid* [2006] 1 WLR 2066, para 16:

> "The solution which I would therefore favour, and which I think is in accordance with principle, is that the without prejudice rule, so far as it is based upon general public policy and not upon some agreement of the parties, does not apply at all to the use of a statement as an

> acknowledgment for the purposes of section 29(5). That, I would infer, is what everyone thought in *Spencer v Hemmerde* [1922] 2 AC 507. It is in accordance with principle because the main purpose of the rule is to prevent the use of anything said in negotiations as evidence of anything expressly or impliedly admitted: that certain things happened, that a party concerned thought he had a weak case and so forth. But when a statement is used as an acknowledgment for the purposes of section 29(5), it is not being used as *evidence* of anything. The statement is not evidence of an acknowledgment. It *is* the acknowledgment. It may, if admissible for that purpose, also be evidence of an indebtedness when it comes to deciding this question at the trial, but for the purposes of section 29(5) it is not being used as such. All that an acknowledgment does under section 29(5) is to allow the creditor to proceed with his case. It lifts the procedural bar on bringing the action. Questions of evidence to prove the debt will arise later."

49. In *Rashid* the House allowed an appeal against the Court of Appeal's exclusion of certain letters (not expressly written without prejudice) which (if admitted) amounted to an acknowledgment within section 29(5) of the Limitation Act 1980. The House's reasons differed, but the majority considered that the letters were merely seeking indulgence in respect of an admitted liability, and were not aimed at the compromise of any dispute. In my respectful opinion that was also the case with the debtor's letters in *Spencer v Hemmerde* [1922] 2 AC 507, which is why no issue of without prejudice was raised at any stage in that litigation. In this appeal, by contrast, your Lordships cannot avoid the issue of whether a written statement, expressly made without prejudice, can be admissible as an acknowledgment within section 29(2) of the Limitation Act 1980, even though it is or may be inadmissible as an admission against interest.

50. In *Rashid* [2006] 1 WLR 2066 I felt considerable difficulty about this proposition (para 42), as did Lord Hope (para 35) and Lord Brown of Eaton-under-Heywood (paras 66-68). Lord Mance (para 93) reserved his opinion. Having given the matter further thought, I still feel the same difficulty.

51. To my mind there is no great difference between the natural meaning of "admission" and the natural meaning of "acknowledgment".

The former expression naturally conveys the sense of accepting the truth of something which is or may be detrimental to the interest of the person making the communication, whereas the latter expression is (in this context) concerned with recognising the rights or status of the party addressed. But if the two parties are debtor and creditor, or tenant and landlord, that may be a distinction without much of a difference. By one and the same form of words the debtor (or tenant) may admit his disadvantaged or inferior position and acknowledge the superiority of the position of his creditor (or landlord).

52. Lord Hoffmann observed (in para 16 of his opinion in *Rashid*, quoted above) that an acknowledgment is not *evidence* of anything; it simply *is* an acknowledgment (his emphasis). That is no doubt correct. But equally an admission can, it seems to me, be made in a way that is not evidence of anything; it is simply an admission (for instance a litigant might write, either in an open or in a without prejudice letter, "I do not dispute your version of our oral agreement"). The truth of an admitted fact is often presumed rather than proved.

53. The clearest case of the without prejudice rule being inapplicable because of the fact, rather than the content of a communication is *In re Daintrey; Ex p Holt* [1893] 2 QB 116. The sending of the without prejudice letter was an act of bankruptcy, and its character could not be altered simply by affixing a without prejudice label to it.

54. An acknowledgment under section 29 of the Limitation Act 1980 does not seem to be a close parallel to an act of bankruptcy. The two situations might be equated if there were strong policy reasons for doing so. But in *In re Daintrey* the creditor was liable to be prejudiced whether or not he accepted the offer made to him, as Vaughan Williams J noted. In the present case, by contrast, Mr and Mrs Ofulue's difficulty arose out of their own failure to press on with their claim for possession. There is no reason to suppose that they consciously recognised the letter of 14 January 1992 as an acknowledgment of their title for the purposes of the Limitation Act 1980, and held their hands in reliance on it. Ms Bossert's abrupt switch from claiming to be a tenant to claiming to be a squatter may be unattractive, but it did not amount to "unambiguous impropriety" (and Mr Wilson QC for the appellant did not contend otherwise, relying instead on a wider and looser principle of what the justice of the case required).

55. I would add that so far as the without prejudice rule depends on the agreement of the parties, as well as on policy considerations, there is nothing in the Limitation Act 1980 to outlaw an agreement varying its effect. Standstill agreements are common, though they operate to suspend the running of time. Similarly there is no reason why the parties should not, by agreeing to engage in without prejudice negotiations, keep time running despite something that would otherwise count as an acknowledgment.

56. There is very little authority on whether an acknowledgment can be given in without prejudice correspondence. Apart from the recent dicta in *Rashid*, counsel's researches have found one 19th-century English dictum against that proposition (Mellish LJ in *In re River Steamer Co* (1871) LR Ch. App 822, 831-832, dating from a time when the requirements for an acknowledgment were more onerous) and two conflicting Canadian dicta on "confirmation" of a cause of action in without prejudice correspondence (Lambert JA in *Belanger v Gilbert* [1984] 6 WWR 474, 476 and Taggart JA in *Farrell v Tisdale* (1987) 16 BCLR (2d) 230, 241-242). Your Lordships have to decide this appeal as a matter of principle.

57. As a matter of principle I would not restrict the without prejudice rule unless justice clearly demands it. In England the rule has developed vigorously (more vigorously, probably, than in other common law jurisdictions, and more vigorously than some overseas scholars, notably J H Wigmore, approved: see Wigmore, Evidence in Trials at Common Law, 1972 edition, vol. 4, pp34 -36). The distinction formerly drawn between conditional and unconditional assertions has largely disappeared. Sir John Romilly MR was particularly firm in disapproving of attempts to cut down the scope of the rule: see *Jones v Foxall* (1852) 15 Beav 388, 396 and *Hoghton v Hoghton* (1852) 15 Beav 278, 321. The Court of Appeal in *Walker v Wilsher* (1889) 23 QBD 335 was also strongly in favour of upholding the width of the rule: see Lord Esher MR at pp 336-337, Lindley LJ at pp337-338 and Bowen LJ at p339, all quoted by Oliver LJ in *Cutts v Head* [1984] Ch 290, 302-304.

58. Finally there is the important speech of Lord Griffiths in *Rush & Tompkins* [1989] AC 1280. He noted at p1300 that the rule is not absolute, and that there are exceptions when the justice of the case requires it. He mentioned *In re Daintrey* [1893] 2 QB 116 as a notable exception, and continued:

> "There is also authority for the proposition that the admission of an 'independent fact' in no way connected with the merits of the cause is admissible even if made in the course of negotiations for a settlement."

It is unnecessary to consider that exception here, since the letter of 14 January 1992 was undoubtedly connected with the possession proceedings that the parties were trying to settle. Then Lord Griffiths referred to *Waldridge v Kennison* (1794) 1 Esp 142 and continued:

> "I regard this as an exceptional case and it should not be allowed to whittle down the protection given to the parties to speak freely about all issues in the litigation both factual and legal when seeking compromise and, for the purpose of establishing a basis of compromise, admitting certain facts. If the compromise fails the admission of the facts made for the purpose of the compromise should not be held against the maker of the admission and should therefore not be received in evidence."

59. In my opinion the recognition of an exception for an acknowledgment under section 29 of the Limitation Act 1980 would whittle down the protection given to the parties to speak freely. For these reasons, as well as for the reasons given by Lord Hope, Lord Rodger and Lord Neuberger, I would dismiss this appeal.

LORD NEUBERGER OF ABBOTSBURY

My Lords,

60. The principal issue on this appeal concerns the extent to which it is permissible for one party to rely on a statement made by another party in "without prejudice" correspondence written with a view to settling earlier proceedings between the same parties. The particular statement in this case is said to constitute an acknowledgment of title which stopped time running against the claimant under the provisions of the Limitation Act 1980. There is a secondary issue, namely whether an admission of the claimant's title in a Defence in the earlier proceedings operated as a continuing acknowledgment for the purpose of the 1980 Act.

The factual history

61. Mr and Mrs Ofulue purchased 61 Coborn Road, Bow London E3 ("the property") in 1976, and were registered at H.M. Land Registry as the proprietors of the freehold on 26 August 1976. Thereafter, they went to Nigeria, and let the property to tenants. In 1981 Mr Bossert and his daughter were permitted to occupy the property by one of those tenants, Ms Osborne. Thereafter, there were meetings and discussions between the parties, but, on 15 June 1989, the Ofulues began possession proceedings against the Bosserts in the High Court.

62. In their Statement of Claim, the Ofulues asserted that they were "the owners and entitled to possession of the property", and that the Bosserts were trespassers. In their Defence and Counterclaim ("the Defence"), served on 18 July 1990, the Bosserts admitted the Ofulues' title, but denied their right to possession, on two alternative grounds. First, they said that they had taken an assignment of Ms Osborne's tenancy. Additionally, they claimed that they had carried out substantial work to the property on the understanding that they would be granted a 14-year lease. Accordingly, the Bosserts contended either that they had a protected tenancy, or that they were entitled to a 14-year lease, of the property. They counterclaimed a declaration as to "extent and nature of" their interest in the property. The Ofulues served a Reply and Defence to Counterclaim in December 1990, and the proceedings were transferred to the Shoreditch County Court in February 1991. Thereafter, during 1991, further and better particulars of the case of each of the parties were provided, and lists of documents were exchanged.

63. Meanwhile, in a letter dated 12 August 1991, headed "WITHOUT PREJUDICE", the Bosserts, through their solicitors, wrote to the Ofulues' solicitors, referring to earlier correspondence, stating that the Bosserts were prepared to buy the property for £20,000. This offer was rejected, and further correspondence ensued. In a letter of 14 January 1992 ("the Letter"), with the same heading, the Bosserts' solicitors stated that the Ofulues would "at the most . . . be entitled to six years arrears of rent", and they then set out their assessment of the value of the property, and of the work carried out to it. The Letter concluded with this sentence, "In these circumstances, our client would be willing to make an offer of £35,000 to your client for the purchase of the property". This offer was promptly rejected by the Ofulues' solicitors

64. Nothing then happened in relation to those proceedings for nearly ten years. In the mean time, on 8 August 1996, Mr Bossert died, and on 26 April 2000, the proceedings were automatically stayed under the provisions of the Civil Procedure Rules. On 1 February 2002, the Ofulues applied to lift the automatic stay. That application was opposed by Ms Bossert, and on 16 April 2002, District Judge Lightman refused the application, and, consequently, struck out the proceedings.

65. On 30 September 2003, the Ofulues issued fresh proceedings in the Bow County Court for possession of the property against Ms Bossert; statements of case were exchanged in the normal way. Although other points were ventilated in her Defence and Counterclaim, Ms Bossert's only relevant contention for present purposes was her claim that she had obtained title to the freehold of the property by adverse possession. This was claimed on the basis that any claim that she and her father had had any legal or equitable interest in the property was abandoned, and that she (together with her father until August 1996) had been in uninterrupted possession, as trespassers, for more than twelve years before the instant proceedings for possession had been initiated. Although other arguments were raised in the Reply, the only relevant answer to this contention was that Ms Bossert had acknowledged their title during that twelve year period in the Defence in the earlier proceedings, and/or in the Letter of 14 January 1992.

The relevant law of adverse possession

66. Section 15(1) of the Limitation Act 1980 provides that "[n]o action shall be brought … to recover any land after the expiration of twelve years from the date on which the right of action accrued …". Schedule 1, which is incorporated by section 15(6), provides, through paras 1 and 8, that time runs under section 15(1) so long as someone is in possession "adverse" to the owner of the paper title. Section 17(1) states that, where section 15 applies in a case in which the title is registered at the Land Registry, "the title of [the registered proprietor] shall be extinguished". (The effect of section 15 has been very considerably emasculated in relation to registered land by the Land Registration Act 2002, but the provisions of that Act only came into force in 2004, and do not apply to cases such as this, where the twelve years had already expired by the time the 2002 Act came into force).

67. The concept of adverse possession was considered and explained by your Lordships' House in *JA Pye (Oxford) Ltd v Graham* [2003] 1

AC 419. The effect of the reasoning in that decision on the facts of this case is that, subject to the effect of the earlier proceedings and the correspondence in 1991 and 1992, Ms Bossert was indeed in adverse possession of the property for more than 12 years, namely from some time before June 1989, when the earlier proceedings were started, until 30 September 2003, when the instant proceedings were started. In particular, the fact that the Bosserts may have believed that they were in possession as tenants, in law or equity, of the Ofulues does not prevent their possession having been "adverse". The decision in *Pye v Graham* [2003] 1 AC 419 made it clear that (provided that there is no other reason to defeat the claim) all that is normally required to make good a claim that section 15 applies is an intention to possess coupled with actual physical possession.

68. Subsequent to the decision of this House in *Pye v Graham* [2003] 1 AC 419, proceedings were brought in the European Court of Human Rights challenging the compatibility of section 15 of the 1980 Act with article 1 of the first protocol to the European Convention on Human Rights ("article 1"), at least in relation to registered land. Although that challenge succeeded before a Chamber of the former Fourth Section of the Court, the decision was reversed by the Grand Chamber - see *JA Pye (Oxford) Ltd v United Kingdom* (2005) 43 EHRR 43and (2007) 46 EHRR 1083. In brief, the Grand Chamber decided that, although article 1 was engaged, the legislation was within the margin of appreciation afforded to the United Kingdom government.

69. Section 29(2)(a) of the 1980 Act provides that "[i]f the person in possession of the land … acknowledges the title of the person to whom the right of action has accrued … the right shall be treated as having accrued on and not before the date of the acknowledgment". However, section 29(7) states that, once the right to claim possession has been barred by section 15(1), it cannot be subsequently revived by an acknowledgment. Section 30 of the 1980 Act says that "[t]o be effective . . . an acknowledgment must be in writing and signed by the person making it", and it is made clear by subsection (2) that an effective acknowledgment can be made by an authorised agent.

70. The effect of abortive proceedings for possession on the running of time under section 15 was considered by the Court of Appeal in *Markfield Investments Ltd v Evans* [2001] 1 WLR 1321. In that case, the paper title owners had brought a claim for possession against the occupier of the land, and those proceedings were dismissed for want of prosecution. They then brought a fresh claim, and the occupier

contended that the claim was barred under section 15. The plaintiff paper title owners argued that time did not run under section 15 while the first set of proceedings was on foot. That argument was rejected, in my view rightly. As Simon Brown LJ said at [2001] 1 WLR 1321, para 21, "there is no question of the issue of a writ 'stopping time from running'" against the plaintiffs, although, of course, it would have had that effect if it had led to a judgment which expressly or impliedly confirmed their title. In that case, unlike this case, there was no basis for arguing that the defendant had acknowledged the title of the paper title owners in the first set of proceedings.

The course of the instant proceedings

71. The instant proceedings came before His Honour Judge Levy QC in October 2005. He accepted Ms Bossert's contention that she had been in adverse possession of the property for the requisite period, and rejected the Ofulues' contention that the running of time had been interrupted by any acknowledgment as they contended. The Ofulues appealed this decision to the Court of Appeal – [2008] EWCA Civ 7, [2008] 3 WLR 1253. In a carefully reasoned judgment (with which May LJ and Sir Martin Nourse agreed), Arden LJ explained why, in her view, the appeal should be dismissed. This appeal to your Lordships' House is brought by Mrs Ofulue alone.

72. The Court of Appeal decided the following points:

(a) The Grand Chamber in *Pye v UK* 46 EHRR 1083 should be followed, so that, subject to section 29, the adverse possession claim was established.

(b) The admission of title in the Defence in the first proceedings did not constitute an acknowledgement for the purposes of section 29.

(c) If that admission was an acknowledgment, it did not continue beyond the date of the Defence, so it was more than twelve years before the instant claim was brought.

(d) The Letter could not be relied on as an acknowledgment, because it was written without prejudice with a view to settling the earlier proceedings.

(e) If the Letter could be relied on, it would have been an effective acknowledgment, as it was sent less than twelve years before the instant proceedings were brought.

73. The only issues in play on this appeal are points (c) and (d), where the Court of Appeal's conclusions are challenged by Mrs Ofulue. There is no challenge on behalf of Mrs Ofulue to the Court of Appeal's decision on point (a), and it is conceded on behalf of Ms Bossert that the Court of Appeal was wrong on point (b) and right on point (e). Those concessions are, in my view, realistic and correct. Before turning to the two issues which have to be resolved, I should nonetheless consider the latter two issues, not least because I disagree with the Court of Appeal on point (b)

Two issues no longer in dispute

74. The Court of Appeal concluded that the admission in the Defence in the first proceedings did not amount to an acknowledgment within section 29, because it was only an acknowledgment of the Ofulues' title to the freehold, and not an admission of their right to immediate possession. So far as that conclusion involved interpreting the Defence in the earlier proceedings, it was plainly correct. But the conclusion that section 29 requires an acknowledgment of a right to immediate possession, as opposed to an acknowledgment of title, is, in my judgment, wrong for two separate reasons, which may be shortly stated.

75. First, the conclusion reached by the Court if Appeal is inconsistent with the wording of section 29(2), which refers in clear terms to acknowledging "the title" of the person whose claim is said to be time-barred. Secondly, in any event, the concept of "possession" is more subtle than the reasoning of the Court of Appeal appears to have assumed. The effect of the Defence in the earlier proceedings was to acknowledge the Ofulues' right to possession, albeit subject to the Bosserts' rights as tenants (in law or equity). This analysis also accords with common sense. The current dispute is whether the Ofulues effectively lost the freehold interest in the property to Ms Bossert, so it would be strange if a plain acknowledgment by Ms Bossert of their ownership of that very interest was not a sufficient acknowledgment for the purposes of section 29. It would also be strange if the Bosserts' contention that they held, or were entitled to the grant of, an interest in premises from the Ofulues did not operate as an acknowledgment by them of the Ofueles' title.

76. On the other hand, I agree with the Court of Appeal on the issue of whether the offer to purchase the freehold of the Property, as contained in the Letter, was an acknowledgment sufficient to satisfy

section 29, subject to the fact that it formed part of without prejudice negotiations. While any statement has to be construed by reference to its context, an offer to purchase an interest, even if made expressly "subject to contract", will, at least in the absence of special facts, amount to an acknowledgment of the offeree's title to that interest. The decision is *Edgington v Clark* [1964] 1 QB 367 was, in my view, correct on this point. I should add that it is a little difficult to reconcile the Court of Appeal's correct decision on this point with their view as to the effect of the admission of title in the Defence in the earlier proceedings.

77. As a result of this discussion, it follows that (a) the admission of title in the Defence and (b) the offer in the Letter were both capable of amounting to acknowledgments for the purpose of section 29. However, (a) the Defence was served more than twelve years before the instant proceedings were brought, and (b) the Letter was part of "without prejudice" correspondence. Hence, Mrs Ofulue's arguments that (a) the admission in the Defence operated as a continuing acknowledgment, and (b) the Letter can be relied on despite it having been sent "without prejudice". I turn to those two arguments.

The admission of title in the Defence as a continuing acknowledgment

78. Mr Richard Wilson QC, on behalf of Mrs Ofulue, contended that the admission in the Defence constituted an effective acknowledgment which prevented time running for the period up to the time the proceedings in which it was served were dismissed. The principal basis for this contention was that, by maintaining her case in the Defence from the date it was served until the first proceedings were dismissed in 2002, Ms Bossert was affirming her acknowledgment of the Ofulues' title to the property for the purpose of section 29(2).

79. I can see no reason why a statement in a pleading or statement of case, or in any other court document, cannot amount to an acknowledgment for the purposes of section 29. Accordingly, the admission in the Defence in this case, as I see it, operated as such as an acknowledgment of the Ofulues' title as at 18 July 1990, the date on which it was served. Indeed, although the point was in issue below, the contrary was not argued by Mr Peter Crampin QC, for Ms Bossert.

80. However, in my opinion, the argument that the admission continued to operate as such an acknowledgment beyond 18 July 1990

was rightly rejected by the Court of Appeal. It is inconsistent both with the language of the relevant provisions, and with the policy, of the 1980 Act. Conceptually and as a matter of language, I accept that an "acknowledgment" could cover a continuing state of affairs. However, particularly where it has to be embodied in a signed document, the more natural meaning of the word would suggest that it arises as at the date of the document – most naturally the date on which the document is provided to the person to whom the acknowledgment is made. The requirement in section 30(1) that an acknowledgment must be in writing and signed was no doubt intended to minimise the room for argument as to whether and when it was made.

81. The effect of section 15 of the 1980 Act is that a formal record, such as a conveyance or entry on the register, which appears to establish the paper title owner's title against the world, cannot be relied on after twelve years of adverse possession have passed. In those circumstances, it would seem very odd if an informal written acknowledgment could be relied on under section 29 of the same Act, where the adverse possession has thereafter continued for a longer period. If Mr Wilson's argument were correct, an offer to purchase, which remained open for acceptance, because it was not time-limited and not rejected, would presumably continue to operate as an acknowledgment for a potentially indefinite period. That appears surprising, inconvenient, and inconsistent with the purpose of the 1980 Act. Further, it seems clear that an act which could be said to refer to the future, namely a payment of rent in advance, will only stop time running up to the date it actually occurs – see para 5(2) of Schedule 1 to the 1980 Act.

82. The only authority cited in support of the proposition that the Defence operated as a continuing acknowledgment was an Irish case, *Johnston v Smith* [1896] 2 IR 82. On analysis, it seems to me that that case does not assist at all. It is true that O'Brien J (in his rather intemperate judgment) decided that an originating notice of motion issued in 1881 operated as an acknowledgment for limitation purposes in 1883. However, that decision was based on the fact that it was in 1883 that the notice was amended by the court and "used" by the person claiming adverse possession ([1896] 2 IR 82, 90), and not on the notion that, so long as the proceedings in question were on foot, an admission of title in the notice operated as a continuing acknowledgment. Further, Holmes and Gibson JJ (who concurred in the result for other reasons given by O'Brien J) expressly left the point open (see [1896] 2 IR 82, 91 and 92 respectively). Particularly as O'Brien J said that he "had some difficulty" with the point ([1896] 2 IR, 82, 90), and did not appear to think that the notice operated as some sort of continuing

acknowledgment, it seems to me that, if anything, the decision is positively unhelpful to Mrs Ofulue's case.

83. Mr Wilson had an alternative argument, namely that the Defence was relied on by Ms Bossert in 2002, at the hearing of the Ofulues' application to lift the automatic stay on the earlier proceedings. That argument, which was quite rightly advanced briefly, has no merit. It seems to me that, before an acknowledgment in a Defence, or other statement of case, could be treated as renewed for the purposes of section 29, it would normally be necessary for the defendant, or other relevant party, to write and sign something which affirmed or repeated the acknowledgment. This would usually involve an act such as amending and re-serving the Defence, or other statement of case, or confirming its contents in a signed affidavit or witness statement.

84. While it would be wrong to attempt to set out an exhaustive test as to what can or cannot constitute a sufficient affirmation of a previous acknowledgement in a Defence to amount to a fresh acknowledgment, it appears to me that it would, at least normally, require a fresh written and signed document (including an amended Defence) or, quite possibly, an act such as re-service of the original Defence. On any view, merely taking steps in the action, even though it can be said that such steps affirm the defendant's reliance on the contents of her Defence, will not do for the purposes of section 29, particularly as section 30 requires any acknowledgment to be in writing and signed Many, indeed most, steps taken by a defendant in an action can be said to be taken pursuant to her Defence; yet they often will not be in writing, let alone signed, and even those that are will not normally amount to acknowledgments for the purposes of section 29. On any view, opposing the lifting of the stay and seeking a consequent dismissal of the claim cannot conceivably operate as a written affirmation of any acknowledgment in the Defence.

The without prejudice rule

85. In order to defeat the claim for adverse possession, therefore, Mrs Ofulue needs to establish that she is entitled to rely on the offer in the Letter, notwithstanding that it was written expressly "without prejudice", with a view to settling the earlier proceedings. The normal rule is, of course, that statements made in negotiations entered into between parties to litigation with a view to settling that litigation are inadmissible and therefore cannot be given in evidence. In *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280, 1299, Lord

Griffiths explained that the rule was "founded upon the public policy of encouraging litigants to settle their differences rather than litigate them to a finish". As stated by Robert Walker LJ in *Unilever plc v The Procter & Gamble Co* [2000] 1 WLR 2436, 2442~~C~~-D, the rule also rests on "the express or implied agreement of the parties themselves that communications in the course of their negotiations should not be admissible in evidence".

86. As Robert Walker LJ went on to point out at [2001] 1 WLR 2436, 2444C, "there are numerous occasions on which … the without prejudice rule does not prevent the admission into evidence of what one or both of the parties said or wrote". At [2001] 1 WLR 2436, 2444D-2445G, he then set out and explained eight of "the most important instances". Apart from agreement (e.g. where the negotiations are "without prejudice, save as to costs"), the principal occasions he identified were where the negotiations are said to have resulted in a contract, an estoppel, or a misrepresentation, or where they are said to include an impropriety or an explanation for delay. It is common ground that none of those instances is of direct assistance in this case.

87. In the present case, it is indisputable that the Letter was written with a view to settling the earlier proceedings, and that the Ofulues can have been in no doubt but that the without prejudice rule was intended to apply to it. Nor is there any question of Ms Bossert's reliance on the rule amounting to some sort of abuse. Further, the fact that the rule is being invoked in relation to negotiations involving earlier proceedings involves no new extension of the rule: see both the facts and the reasoning in *Rush & Tompkins* [1989] AC 1280, the observations in *Unilever* [2000] 1 WLR 2436, and the reasoning in *Muller v Linsley & Mortimer* [1996] ~~1~~ PNLR 74. I have had the benefit of reading in draft the opinion of my noble and learned friend Lord Hope of Craighead, who considers this aspect more fully. In my view, it is strongly arguable that the principles which govern the admissibility in subsequent proceedings, of a statement made in without prejudice negotiations to settle earlier proceedings, should be the same as those which would govern its admissibility in the earlier proceedings. Indeed, I find it hard to see how the contrary could even be argued in a case such as this, where the two sets of proceedings involve the same parties and very closely connected issues, namely, in each case, whether the Bosserts had any interest in, or right to possession of, the property.

88. Nonetheless, it is said by Mr Wilson that the implied acceptance of the Ofulues' title to the property contained in the offer to purchase in the last sentence of the Letter can be invoked as an acknowledgment

under section 29, essentially for four reasons. First, the admission of title did not go to any issue in the earlier proceedings: indeed, the Ofulues' title was not merely undisputed; it was specifically admitted in the Defence. Secondly, the admission of title is sought to be invoked as a fact, rather than for the truth of its contents. Thirdly, an acknowledgment which satisfies the requirements of section 29 is an exception to the normal without prejudice rule. Fourthly, the Bosserts' conduct entitles Mrs Ofulue to override the rule. The first three arguments overlap to some extent, but each of the four arguments is most conveniently considered separately.

89. Before considering these arguments, it is worth quoting a passage from Robert Walker LJ's invaluable judgment in *Unilever* [2000] 1 WLR 2436, which, in my opinion, makes a point which should always be borne in mind by any judge considering a contention that a statement made in without prejudice negotiations should be exempted from the rule. After considering a number of authorities, Robert Walker LJ said at pp 2448H-2449B that the cases which he had been considering:

> "make clear that the without prejudice rule is founded partly in public policy and partly in the agreement of the parties. They show that the protection of admissions against interest is the most important practical effect of the rule. But to dissect out identifiable admissions and withhold protection from the rest of without prejudice communications (except for a special reason) would not only create huge practical difficulties but would be contrary to the underlying objective of giving protection to the parties … to speak freely about all issues in the litigation … . Parties cannot speak freely at a without prejudice meeting if they must constantly monitor every sentence, with lawyers … sitting at their shoulders as minders".

This approach is entirely consistent with the approach of your Lordships' House in *Rush & Tompkins* [1989] AC 1280, and with that of the courts in the nineteenth century, mentioned by my noble and learned friend Lord Walker of Gestingthorpe in para 57of his opinion, which I have had the benefit of seeing in draft.

The Ofulues' title was not in issue in the earlier proceedings

90. The fact that the Ofulues' freehold title to the property was not directly in dispute in the earlier proceedings is not, in my judgment, a good ground for admitting the without prejudice offer to purchase into evidence. I reach that conclusion for two reasons; one is rather specific to this case, while the other is more general. The first reason is that the only sentence in the Letter on which the Ofulues seek to rely must, as I see it, be covered by the without prejudice rule on any view. That sentence, after all, is the one which contains the actual offer to settle the earlier proceedings. It appears to me that, even if an admission of title in the Letter could be admissible because it went to a point which was not in issue in the earlier proceedings, a sentence which implies or contains such an admission could not be admissible if that sentence contains the offer to settle those proceedings. After all, there can be nothing in a without prejudice letter or conversation which is more clearly within the scope of the rule than the actual sentence containing the offer to settle the proceedings in question.

91. Quite apart from this, it appears to me that, save perhaps where it is wholly unconnected with the issues between the parties to the proceedings, a statement in without prejudice negotiations should not be admissible in evidence, other than in exceptional circumstances such as those mentioned in *Unilever* [2000] 1 WLR 2436, 2444D-2445G. It is not only that the offer contained in the relevant sentence of the Letter was connected with the issue between the parties in the earlier proceedings. It is also that the title to the property was in issue in the earlier proceedings in the sense that the Ofueles claimed the unencumbered freehold, whereas the Bosserts were contending that the freehold was subject to their legal or equitable interest. Bearing in mind the point made in the passage quoted above from Robert Walker LJ [2000] 1 WLR 2436, 2448-2449, it seems to me that it would set an unfortunate precedent if your Lordships held that an admission of the claimants' title in a without prejudice letter was sufficiently remote from the issues in a possession action relating to the same land as to be outside the rule.

92. I leave open the question of whether, and if so to what extent, a statement made in without prejudice negotiations would be admissible if it was "in no way connected" with the issues in the case the subject of the negotiations. That point was mentioned by Lord Griffiths in *Rush & Tompkins* [1989] AC 1280, 1300, where he referred to *Waldridge v Kennison* (1794) 1 Esp 142, in which a without prejudice letter was

admitted solely as evidence of the writer's handwriting. That was a factor wholly extraneous to the contents of the letter, and Lord Griffiths described it as "an exceptional case [which] should not be allowed to whittle down the protection given to the parties to speak freely about all issues in the litigation both factual and legal when seeking compromise and, for the purpose of establishing a basis of compromise, admitting certain facts".

93. I note also that in *obiter* observations, Lord Hope suggested in *Bradford & Bingley plc v Rashid* [2006] UKHL 37, [2006] 1 WLR 2066, para 25, that "[a]n admission which was made in plain terms is admissible, if it falls outside the area of the offer to compromise". There is no reason to think that this amounts to a different approach from that adopted by Lord Griffiths in *Rush & Tompkins* [1989] AC 1280 when discussing *Waldridge* (1794) 1 Esp 142. In any event, it is unnecessary to consider the precise ambit of "the area of the offer to compromise" on the facts of this case. Even if one gives the rule a relatively circumscribed effect, the offer in the Letter fell within "the area of . . . compromise", as I have explained.

The offer is relied on as such, and not for the truth of what was said

94. I turn to the argument that the offer in the Letter is admissible because it is being relied on to establish that an admission was made as a matter of fact, as opposed to the truth of the admission. In other words, it is said that the offer is admissible as evidence that the Bosserts acknowledged the Ofulues' title to the property, although it would not be admissible as evidence of the fact that the Ofulues were the owners of the property. Some apparent support for this contention may be found in the judgment of Hoffmann LJ in *Muller* [1996] PNLR 74, 79C-D. Having stated 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)", he then said that "the public policy aspect of the rule is not … 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".

95. Despite the very great respect I have for any view expressed by Lord Hoffmann, and the intellectual attraction of the distinction which he draws, I am inclined to think that it is a distinction which is too subtle to apply in practice; I consider that its application would often risk falling foul of the problem identified by Robert Walker LJ in the

passage quoted above. In any event, the observation appears to be limited to the public policy reason for the rule, and says nothing about the contractual reason, which plainly applies here. Over and above this, even if the distinction is valid in principle, in any event, I do not consider that it would assist Mrs Ofulue in the present context: the distinction between an acknowledgment and an admission is not one which can be satisfactorily drawn, in my opinion, at least in the context of identifying exceptions to the without prejudice rule.

96. It is true that in *Rashid* [2006] 1 WLR 2066, paras 16-18, Lord Hoffmann applied this distinction to an acknowledgment under section 29(5) of the 1980 Act, which for present purposes is in the same terms as section 29(2), and concluded that an acknowledgment which would satisfy section 29 was admissible, even if it was made in without prejudice correspondence. But none of the other opinions in *Rashid* [2006] 1 WLR 2066 were based on this reasoning: the other four members of committee based their conclusion on the fact that the correspondence in which the acknowledgment was made was neither expressly nor impliedly without prejudice. However, Lord Walker of Gestingthorpe expressed doubt about Hoffmann LJ's distinction at [2006] 1 WLR 2066, paras 41-42, and Lord Hope agreed with those doubts at para 35, as did Lord Mance at para 93. And at [2006] 1 WLR 2066, para 67, Lord Brown of Eaton-under-Heywood said that, in contrast with *Muller* [1996] PNLR 74, "[i]n acknowledgment cases … the statements *are* sought to be adduced in evidence as admissions". Consequently, he concluded that the principle expressed by Hoffmann LJ did not apply to an acknowledgment for the purposes of section 29.

97. I share Lord Walker's difficulty, as expressed in *Rashid* [2006] 1 WLR 2066, para 42, as expanded in paras 51and 52 of his opinion in this case, in distinguishing between an admission and an acknowledgment. To invoke a statement in without prejudice negotiations as an acknowledgment seems to me to be as inconsistent with the protection afforded to such negotiations, and the policy behind it, as invoking such a statement as an admission of the truth of what is stated. As for *In re Daintrey; Ex p Holt* [1893] 2 QB 116, I also agree with Lord Walker's analysis. Vaughan Williams J said at [1893] 2 QB 116, 120 that a person could not invoke the rule in relation to "a document which, from its character, may prejudice the person to whom it is addressed if he should reject the offer", a principle which plainly does not apply to the Letter.

98. Since preparing this opinion, I have had the privilege of reading in draft the characteristically trenchant opinion of my noble and learned friend Lord Scott of Foscote, in which he comes to a different conclusion. I entirely agree with my noble and learned friend, Lord Rodger of Earlsferry, whose opinion I have had the benefit of reading in draft, that it is open to your Lordships to create further exceptions to the rule, and in particular the sort of admission identified by Lord Hoffmann in *Rashid* [2006] 1 WLR 2066, para 13 and by Lord Scott in this case. However, I also agree with him, and indeed with Lord Hope and Lord Walker, that it would be inappropriate to do so, for reasons of legal and practical certainty. To uphold such an exception in this case would run counter to the thrust of the approach of Lord Griffiths in *Rush & Tompkins* [1989] AC 1280 and of Robert Walker LJ in *Unilever* [2000] 1 WLR 2436, and would severely risk hampering the freedom parties should feel when entering into settlement negotiations.

99. I do not consider that the nineteenth century cases Lord Scott cites in para 22 really bear on the issue your Lordships have to decide. They emphasise the need for the rule, so as to ensure that parties to negotiations feel free and uninhibited in their settlement discussions, and there is no reason to think that they embody a different approach to the nineteenth century cases cited by Lord Walker in para 57. The same is true of the more recent decision in *Cutts v Head* [1984] Ch 290, which was, of course, relied on in *Rush & Tompkins* [1989] AC 1280 and *Unilever* [2000] 1 WLR 2436. As for the more modern cases cited in para 33 by Lord Scott, *McDowell v Hirschfield Lipson & Rumney* [1992] 2 FLR 126 can be explained by the fact that privilege was waived, in *Norwich Union Life Insurance Society v Tony Waller Ltd* (1984) 270 EG 42 the "without prejudice" heading to the letter concerned was inappropriate so the rule did not apply, and *Hodgkinson & Corby Ltd v Wards Mobility Services Ltd* [1997] FSR 178 involved the well established exception of estoppel, as explained in *Unilever* [2000] 1 WLR 2436, 2444E-F.

Does public policy justify an acknowledgment overriding the rule?

100. The third ground upon which it was contended that the offer in the Letter could be admitted was that the public policy embodied in section 29 effectively trumped the public policy of not admitting in evidence what was said in without prejudice negotiations. This argument derives some support from what Lord Hoffmann said towards the end of para 18 in *Rashid* [2006] 1 WLR 2066. It was argued that it also derived support from what Lord Hope said in that case at [2006]1 WLR 2066,

paras 34-35, but, as I read those paragraphs, they were primarily directed to a case where, in without prejudice correspondence, statements were made by the defendant to induce the claimant not to issue proceedings, as a result of which the claimant desisted from issuing his claim; (this is also, I think, the effect of what Lord Mance meant at [2006] 1 WLR 2066, para 93). In agreement with Lord Hope, it seems to me that such statements could be relied on by the claimant in such a case as founding an estoppel – one of the exceptions identified in *Unilever* [2000] 1 WLR 2436, 2444E-F.

101. Apart from this, the argument that there is a special exception to the without prejudice rule for acknowledgments for the purpose of section 29 derives no support from any of the other opinions expressed in this House in *Rashid* [2006] 1 WLR 2066. For my part at any rate, I do not accept that the argument is justified. I do not consider that there is any significant public policy element in the acknowledgment provisions of the 1980 Act, save in so far as it can be said that any statutory provision carries with it an element of public policy. As Lord Brown (with whom Lord Walker agreed – see [2006] 1 WLR 2066, para 43) said in *Rashid* [2006] 1 WLR 2066, para 75, "the policy underlying the without prejudice rule seems to me to outweigh the countervailing policy reason for lengthening the period" of limitation through a written acknowledgment.

102. It may well be that the decision in In re *Daintrey; Ex p Holt* [1893] 2 QB 116 can be distinguished from the present case on this ground as well. An acknowledgment under section 29 operates only as between the parties to and by whom the acknowledgment is made (and their privies), whereas a person's act of bankruptcy has an impact on all the creditors and potential creditors of that person. Although not mentioned in the judgment of Vaughan Williams J, it appears to me that there is therefore a pretty strong case for saying that the public interest in ensuring that an act of bankruptcy can be referred to and acted on as such, should outweigh the public interest in the without prejudice rule being observed.

The alleged misconduct

103. Finally, Mr Wilson submitted that Mrs Ofulue was entitled to refer to the acknowledgment in the Letter because the justice of the case required it. I accept that the without prejudice rule cannot be invoked "as a cloak for perjury, blackmail or other 'unambiguous impropriety'"

(see *Unilever* [2000] 1 WLR 2436, 2444F). However, any reliance on that principle in this case is in my view misconceived. There has been no impropriety on the part of Ms Bossert, either generally or in claiming the benefit of the rule. Further, there is plainly no warrant for overriding the rule simply because many people might think that, in relying on the rule, Ms Bossert is taking an unattractive point, or that, by changing her stance in the two sets of proceedings, she has acted unattractively.

Conclusion

104. For these reasons, I would dismiss this appeal, and uphold the determination of Judge Levy QC, to the effect that the Ofulues' title to the property was barred by the time of the issue of the instant proceedings, and that the proprietorship register of the property should be amended to show Ms Bossert as the registered proprietor.