

Abstract: On a trial of a preliminary issue it fell to be determined whether an application by an applicant trustee in bankruptcy (B) under the [Insolvency Act 1986 s. 339](#) in relation to a sale of property by the first respondent's wife (R) to the second respondent (P) had been settled at a mediation involving the intervener (G). At the outset B and P had signed a written agreement which included a clause that a settlement reached would not be binding unless it was reduced to writing and signed by, or on behalf of, both parties. No settlement had been reached at the mediation although a draft consent order had been prepared by B. The discussions that took place during that day and the following day were disputed although G supported B's view that P had made a final offer that was to stay open until midday the following day and was to be paid within 28 days. P alleged that no offer had been made and that they had said that they would confirm the position the following day if they wished to make such an offer. The following day B had signed a letter accepting P's alleged offer and returned this to P before the apparent deadline that day. A trial was ordered to determine whether the proceedings were settled by those events. G submitted that nothing said or done in preparation for, at, or in consequence of the mediation, which was liable to disclose the nature of the negotiations, could be used outside the mediation process under the without prejudice rule, in the absence of a prima facie case or credible evidence of unambiguous impropriety by a party to the mediation. P submitted that no offer had been made at the mediation or, if such an offer had been made, that it was insufficiently complete or certain to constitute a valid offer and, in accordance with the clause requiring a written settlement, was subject to contract. B submitted that the clause requiring a written settlement was impliedly waived by P's offer having been open for acceptance until midday the following day, as to give effect to that clause would deprive that acceptance period of meaning.

Preliminary issue determined. (1) The without prejudice rule did not apply when the issue was whether without prejudice communications had resulted in a concluded settlement agreement, [Unilever Plc v Procter & Gamble Co \[2000\] 1 W.L.R. 2436 CA \(Civ Div\)](#) applied. The fact that the communications took place in the context of a mediation did not provide the communications with a special status exempting them from that exception to the without prejudice rule, [Reed Executive Plc v Reed Business Information Ltd \(Costs: Alternative Dispute Resolution\) \[2004\] EWCA Civ 887, \[2004\] 1 W.L.R. 3026](#) considered. (2) Whilst P might only have been considering putting forward the offer he had not made that clear to G or R and therefore P had objectively made an offer to settle the litigation within 28 days. The offer had been neither incomplete nor uncertain as the amount of and time for the payment and how interest on the money paid into court would be treated were provided for in the draft consent order. However, no provision had been made as to how the litigation was to be finally disposed of, particularly whether by Tomlin order or judgment. The consequences of those two options would differ and might be a matter of some importance to the parties. The absence of any provision as to the manner of disposal of the litigation made the offer incomplete. Moreover, the clause requiring that there be a written settlement meant that any agreement reached between the parties could not be complete until reduced to writing unless that clause was varied or waived or P was otherwise unable to rely on it. (3) The clause requiring a written settlement still applied as the acceptance period was relevant only to whether there had been any settlement at all. If there was no acceptance within the specified period, the offer would lapse. The clause would apply when an offer was accepted. Accordingly, the proceedings had not been settled.

High Court of Justice (Chancery Division)

14 March 2007

[2007] EWHC 625 (Ch)

[2008] F.S.R. 3

(Stuart Isaacs Q.C. sitting as a deputy judge of the High Court):

February 26 and 27 and March 14, 2007 ¹

Formalities; Mediation; Offer and acceptance; Settlement; Without prejudice communications

H1 Mediation— Contractual dispute— Evidence— Whether statements made in mediation admissible to establish concluded agreement— Whether within exception to “ without prejudice” rule— Clause in mediation agreement that no settlement reached in the mediation was legally binding until reduced to writing and signed— Alleged offer open for acceptance within time limit— Offer accepted within time limit— Whether valid offer of settlement made and accepted— Offer failing to deal with manner of effecting settlement— Whether terms for settlement complete— Offer accepted the day after the mediation— Whether alleged settlement reached “ in the mediation” — Whether mediation clause made offers subject to contract.

H2 CPR Pt 1.4(1), (2)(e), 26.4(1)

H3 In November 2004, Mrs Rice, who was at the time subject to an individual voluntary arrangement, exchanged contracts with the second respondent, Mrs Patel, to sell a property in Northampton for £250,000. Mrs Rice failed to notify the transaction to the supervisor of her IVA who, on learning of it, issued a bankruptcy petition. Mrs Rice was made bankrupt in January 2005 and the applicant was appointed as her trustee in bankruptcy. By an originating application dated February 22, 2005, the applicant issued proceedings under s. 339 of the Insolvency Act 1986 relating to transactions at an undervalue. In her defence, Mrs Patel alleged, inter alia, that the sale was not, or not at a significant, undervalue. The proceedings were set down for a three-day trial in the Northampton County Court beginning on February 21, 2006.

H4 Shortly before the trial, the applicant and Mrs Patel agreed to mediate the dispute. The parties signed a written agreement to mediate, cl.1.4 of which provided that “ Any settlement reached in the mediation will not be legally binding until it has been reduced to writing and signed by, or on behalf of, each of the Parties (‘ settlement agreement’)” .

H5 The mediation took place on February 16, 2006 at the offices of the applicant's solicitors. The mediator was Mr Stephen Walker. The participants included *62 Mr Stephen Evans, an experienced insolvency practitioner who represented the applicant, together with the applicant's solicitor and counsel and the second respondent and her husband, together with her solicitor and counsel. The mediation began at about 09.30 and went on late into the evening, lasting in all some 13 hours. By the end of the evening, Mr Evans had made an offer which was reduced to writing in the form of a draft consent order. This provided for payment within 14 days by Mrs. Patel to the applicant of £60,000 plus interest earned on the monies paid into court by her in full and final settlement of the claim. The Patel' s legal team then left the mediation. Mr Walker took a copy of the draft consent order, wrote words on the original to the effect that the offer was open for acceptance until midday the next day and gave the original to the Patels. The applicant' s case was that during the mediation Mrs Patel had made a final offer to pay £55,000 within 28 days, the offer to remain open for acceptance until 12 noon the next day. Mr Patel' s evidence was that he had told Mr Evans that he and his wife would consider making a payment of £55,000 within 28 days but would need to speak first the family and friends to know whether they could raise that amount before confirming the position by midday the next day if they wanted to make such an offer. Mr Evan' s evidence was that he understood that the Patels had made a final offer and this view was corroborated by a manuscript note made by the mediator.

H6 The next day, the applicant's solicitor faxed a typed up copy of the draft consent order but substituting £55,000 and 28 days for £60,000 and 14 days. In so doing, the applicant intended to accept the Patels' final offer. Shortly after this, Mr Patel telephoned the applicant's solicitor to say that he and his wife were not accepting the applicant' s offer and that they were proceeding to trial.

H7 The second respondent applied in the High Court for a declaration that there was no binding settlement agreement. This was refused on the basis that the matter would need to go to trial in the Northampton County Court. The applicant alleged that the proceedings had been settled when his solicitors accepted the alleged offer made by Mr Patel on his wife's behalf the previous evening. This was disputed by Mrs Patel, who also raised issues concerning the admissibility of the evidence relating to the alleged settlement.

H8 The question whether the proceedings had been settled came before the district judge in the Northampton County Court on February 21, 2006 as a preliminary issue. The judge enquired of the parties whether the mediator was able and willing to attend the hearing. The mediator attended in the afternoon and stated that, because of the circumstances of the alleged settlement, the ADR Group wished to intervene in the proceedings and make representations. A consent order was made permitting the ADR Group to intervene and transferring the proceedings to the High Court. This was the resumed hearing of the preliminary issue.

H9 The second respondent argued that there was a so-called mediation privilege, distinct from the without prejudice rule, under which, at least, a mediator could not be required to appear as a witness or give evidence or produce documents and under which the parties could not waive the mediator's entitlement not to give evidence of the contents of a mediation. The ADR Group submitted that nothing said or done in preparation for, at or in consequence of a mediation which was ***63** liable to disclose the nature of the negotiations could ever be used outside the mediation process, in the absence of a prima facie case or credible evidence of unambiguous impropriety by a party to the mediation. The second respondent and the ADR Group also submitted that cl.1.4 of the mediation agreement prevented the court from looking at events in the mediation to see whether there had been a concluded settlement because the provisions of that clause effectively removed the exception to the without prejudice rule where the issue was whether or not there had been a concluded agreement.

H10 In addition to her contention that no offer of settlement had been made by her, the second respondent contended that her offer, if made, was insufficiently complete or certain to constitute a valid offer because there was no provision as to the manner in which any settlement would be effected or as to what would happen to the interest on the money already paid into court. The applicant submitted that the offer was neither incomplete nor uncertain since Mrs Patel's offer was on the same terms as the draft consent order except as to the amount of and time for the payment.

H11 The second respondent also submitted that her offer, if made, had been made "in the mediation" and so was subject to cl.1.4 of the mediation agreement which in effect made her alleged offer subject to contract. The applicant argued that cl.1.4 had been impliedly waived by virtue of Mrs Patel's offer having been open for acceptance until midday the next day and that to give effect to cl.1.4 would deprive that acceptance period of any meaning. The applicant also submitted that the mediation had come to an end on the evening of February 16 with the consequence that the fax from the applicant's solicitors accepting Mrs Patel's offer was not "in the mediation" and so that was no "settlement reached in the mediation" within the meaning of cl.1.4 of the mediation agreement.

H12 **Held**, that the proceedings had not been settled on February 17, 2006:

H13 (1) There were two justifications for the without prejudice rule. The first was the underlying public policy that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that what transpired in the course of their settlement negotiations might be used against them in the litigation. The second lay in the express or implied agreement of the parties themselves that what transpired in their negotiations should not be admissible in evidence in the litigation if a settlement did not result. ([8], [9])

Rush & Tompkins Ltd v Greater London Council [1989] A.C. 1280, HL, Cutts v Head [1984] Ch 290, Ch D and Unilever Plc v The Procter & Gamble Co [2000] 1 W.L.R. 2436; [2000] F.S.R. 344, CA referred to.

H14 (2) The without prejudice rule did not prevent the admission into evidence of what one or both of the parties to litigation said or wrote when the issue was whether without prejudice communications had resulted in a concluded settlement agreement. This was for the understandable reason that without considering the communications in question it would be impossible to decide whether there was a concluded settlement agreement or not. Nor did it

apply where, even if there was no concluded settlement, a clear statement made by *64 one party to the negotiations and on which the other party was intended to and did in fact act might give rise to an estoppel. The public policy aspect of the without prejudice rule did not bite on either situation since the communications were not adduced in order to evidence an admission made by a party in a without prejudice communication but to ascertain whether there was or had to be taken to be a concluded settlement. ([10])

Tomlin v Standard Telephones and Cables Ltd [1969] 1 W.L.R. 1378, CA , Hodgkinson & Corby Ltd v Wards Mobility Services Ltd [1997] F.S.R. 178, Ch D and Muller v Linsley & Mortimer [1996] 1 P.N.L.R. 74, CA referred to .

H15 (3) There was no distinction between party-to-party negotiations and negotiations conducted within a mediation. Both were to be treated as subject to the without prejudice rule. Mediation was not a distinct type of without prejudice negotiation to which the exceptions to the without prejudice rule were inapplicable. ([15])

Reed Executive Plc v Reed Business Information Ltd (No 2) [2004] 1 W.L.R. 3026; [2005] F.S.R. 3, CA followed .

H16 (4) The issue in the present case was whether the without prejudice communications in question resulted in a concluded settlement. The admission of those communications in evidence was not prevented by the without prejudice rule since the situation was fairly and squarely within the recognised exception to the rule in respect of such communications. The fact that the communications took place in the context of a mediation— a form of assisted without prejudice negotiation— did not confer on them a status distinct from any other without prejudice communications such as to take them outside the scope of the exception or otherwise to render them inadmissible. ([21])

Reed Executive Plc v Reed Business Information Ltd (No.2) [2004] 1 W.L.R. 3026; [2005] F.S.R. 3, CA and Hall v Pertemps Group Ltd [2005] ADR L.R. 11/01 referred to .

H17 (5) The justification for the without prejudice rule in the present case was not founded on public policy but in the parties' agreement that what transpired in their negotiations should not be admissible in evidence in the litigation if a settlement did not result. The exception to the without prejudice rule where the issue was whether there was a concluded settlement operated just as much where the without prejudice rule was founded in the parties' agreement as it did where it was founded on public policy. Clause 1.4 of the mediation agreement did not have the effect of excluding that exception, either by its terms or impliedly. The absence of a written settlement signed by or on behalf of each of the parties did not necessarily mean that the parties might never have arrived at a concluded settlement as it was possible, for example, that the parties may have expressly or impliedly agreed to vary or waive those provisions or that a party might be estopped from relying on them or that a collateral contract had arisen which was not subject to cl.1.4. These were matters which a court was entitled to investigate and determine by way of exception to the without prejudice rule. ([25])

H18 (6) It was permissible and necessary for the court to consider the evidence relating to the issue whether there had been a concluded settlement. ([26])

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H19 (7) An offer was an expression of willingness to contract made with the actual or apparent intention that it was to become binding on the person making it as soon as it was accepted by the person to whom it is addressed. Under the objective test of agreement, an apparent intention to be bound could suffice, that is, the alleged offeror could be bound if his words or conduct were such as to induce a reasonable person to believe that he intended to be bound, even though in fact he had no such intention. ([49])

H20 (8) On the evidence, that whatever the Patels may have thought, objectively they had put forward an offer to Mr Evans to settle the litigation for a payment of £55,000 within 28 days. Mr Patel had failed to make it clear that he had only been considering putting forward the offer next morning after discussing it with family and friends. ([50])

H21 (9) Mrs Patel' s offer was on the same terms as the draft consent order except as to the amount of and time for the payment; and the draft consent order dealt with how the interest on the money paid into court would be treated. However, the draft consent order did not deal with how the litigation was to be finally disposed of, in particular whether by Mrs Patel consenting to judgment or by a Tomlin order. The manner in which litigation generally was to

be disposed of by a settlement agreement could be a matter of some importance to the parties to the litigation because the consequences of a judgment against Mrs Patel as opposed to a Tomlin order would differ. The absence of any provision as to the manner of disposal of the litigation made the offer incomplete. Its purported acceptance would not have given rise to a complete agreement. ([51])

H22 (10) Offers made during a mediation were commonly left on the table after the conclusion of the formal mediation hearing itself, in order to enable the parties to reflect and if necessary for the mediator to continue discussions with the parties individually. An acceptance, made after the conclusion of the mediation hearing, of such an offer was just as much made in the mediation as if it was made at the mediation itself. In the present case, had there been a valid offer and acceptance, it would have resulted in a “settlement reached in the mediation” within the meaning of cl.1.4 of the agreement to mediate. ([63])

H23 (11) The purpose of cl.1.4 of the mediation agreement was to prevent any settlement from being complete until reduced to writing and signed by or on behalf of each of the parties. Accordingly, the parties could not have intended any settlement to be legally binding until reduced to writing and signed by or on behalf of each of the parties. In the present case, this conclusion was reinforced by the fact that, at the start of the mediation, Mr Walker had expressly explained that there could be no concluded settlement until a written settlement agreement had been signed by all concerned. In those circumstances, Mr Patel’s words or conduct at the meeting were not such as to induce a reasonable person to believe that his wife intended to be bound by the offer made by him on her behalf. ([53])

H24 (12) The applicant’s submission that to give effect to cl.1.4 would deprive the acceptance period of any meaning was rejected. The acceptance period was relevant to whether there was a settlement at all. If there was no acceptance within the period, the offer would lapse (subject to any possible arguments as to *de minimis* and whether time was of the essence) and there would be no settlement on *66 which cl.1.4 could bite. If there was a valid acceptance within the period, there would then be a settlement on which cl.1.4 would bite. On either basis, there was nothing to justify the conclusion that the fact that Mrs Patel’s offer was open for acceptance until midday the next day meant that cl.1.4 had impliedly been waived or that to give effect to cl.1.4 would make the existence of the acceptance period otiose. ([56])

H25 (13) There was no basis for concluding that an offer, made in without prejudice negotiations, was in any way an open offer. Unless a party made plain its intention that a settlement offer was made on an open basis, it remained covered by the cloak of the without prejudice rule. ([57])

Sampson v John Boddy Timber Ltd (1995) C.A.T. 552, CA and Cheddar Valley Engineering Ltd v Chaddlewood Homes Ltd [1992] 1 W.L.R. 820 referred to .

H26 Cases referred to:

- Aird v Prime Meridian Ltd [2006] EWCA Civ 1866, CA
- Cheddar Valley Engineering Ltd v Chaddlewood Homes Ltd [1992] 1 W.L.R. 820
- Cutts v Head [1984] Ch 290; [1984] 2 W.L.R. 349
- D v National Society for the Prevention of Cruelty to Children [1978] A.C. 171; [1977] 2 W.L.R. 201, HL
- Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 576; [2004] 1 W.L.R. 3002, CA
- Hall v Pertemps Group Ltd [2005] ADR L.R. 11/01
- Hodgkinson & Corby Ltd v Wards Mobility Services Ltd [1997] F.S.R. 178, Ch D • McTaggart v McTaggart [1948] 2 All E.R. 754
- Muller v Linsley & Mortimer [1996] P.N.L.R. 74, CA
- Reed Executive plc v Reed Business Information Ltd (No.2) [2004] EWCA Civ 887; [2004] 1 W.L.R. 3026; [2005] F.S.R. 3, CA
- Rush & Tompkins Ltd v Greater London Council [1989] A.C. 1280; [1988] 3 W.L.R. 939, HL
- Sampson v John Boddy Timber Ltd (1995) C.A.T. 552, CA
- Savings and Investment Bank Ltd v Fincken [2003] EWCA Civ 1630; [2004] 1 W.L.R. 667, CA
- Tomlin v Standard Telephones and Cables Ltd [1969] 1 W.L.R. 1378, CA

- Unilever Plc v The Procter & Gamble Co [2000] 1 W.L.R. 2436; [2000] F.S.R. 344, CA
- Venture Investment Placement Ltd v Hall [2005] EWHC 1227

H27 Representation

- Iain Pester instructed by Collyer-Bristow appeared for the applicant.
- Duncan Macpherson instructed by Barnes & Partners appeared for the second respondent.
- Michel Kallipetis Q.C. instructed by Michael Lind appeared for the Intervener, ADR Group. *67

JUDGMENT

MR STUART ISAACS Q.C.:

Introduction

1 This case raises interesting and, to some extent, novel issues concerning the scope and application of the without prejudice rule and the exceptions to it in the context of a mediation, one of the most common means of alternative dispute resolution (ADR).

2 The background facts are not in dispute. On or about November 19, 2004, Mrs Jane Elizabeth Rice (Mrs Rice), who was at the time subject to an individual voluntary arrangement, exchanged contracts with the Second respondent (Mrs Patel) to sell a property in Northampton for £250,000. Mrs Rice failed to notify the transaction to the supervisor of her IVA who, on learning of it, issued a bankruptcy petition. Mrs Rice was made bankrupt on or about January 12, 2005 and the applicant was appointed as her trustee in bankruptcy. By an originating application dated February 22, 2005, the applicant issued proceedings under s. 339 of the Insolvency Act 1986 relating to transactions at an undervalue. In her Defence, Mrs Patel alleged that the sale was not, or not at a significant, undervalue. She also alleged that the transaction fell outside s.339 since it was made by Mrs Patel not with Mrs Rice but with the first respondent (Mr Rice). However, the applicant alleges that this is to overlook the fact that Mrs Rice's solicitors had the conduct of the sale of the property and Mrs Rice had effective control of the sale and the consideration to be paid by virtue of an order dated October 21, 2004 made in matrimonial proceedings. The proceedings were set down for a three day trial in the Northampton County Court beginning on February 21, 2006.

3 Shortly before the trial, the applicant and Mrs Patel agreed to mediate the dispute. Mr Rice took no part in the mediation but was available to agree any proposed settlement. He has taken no part in the present proceedings. On February 16, 2006, a mediation took place at the offices of the applicant's solicitors, Collyer-Bristow. At the outset, the parties signed a written agreement to mediate. The mediator was Mr Stephen Walker, of the solicitors' firm of Bray, Walker. The participants included Mr Stephen Evans, an experienced insolvency practitioner who represented the applicant, together with Ms Gillian Locke of Collyer-Bristow and counsel; and Mrs Patel and her husband, Mr Shreekant Patel (Mr Patel), together with her solicitor, Mr Serhat Sik of Barnes & Partners, and counsel. Mr Sik was at the time very newly qualified. The mediation began at about 09.30 and went on late into the evening, lasting in all some 13 hours. No settlement was reached at the mediation. 4 In the circumstances to which I shall have to refer in some detail later, the applicant alleges that the proceedings in the Northampton County Court between the parties were, however, settled the next morning when his solicitors accepted an alleged offer made by Mr Patel on his wife's behalf the previous evening. This is disputed as a matter of fact by Mrs Patel, who also raises issues concerning the admissibility of the evidence relating to the alleged settlement.

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5 On February 20, 2006, Mrs Patel applied to Pumfrey J. for a declaration that there was no binding settlement agreement. Pumfrey J. declined to make the order requested on the basis that the matter would need to go to trial in the Northampton County Court. The question whether the proceedings had been settled then came before District Judge McHale in the Northampton County Court on February 21, 2006 as a preliminary issue. In the course of the opening submissions on behalf of Mrs Patel, the district judge inquired of the parties whether Mr Walker was able and willing to attend the hearing. Mr Walker did attend court that afternoon but not to give evidence. Having spoken with ADR Group and because of the circumstances of the alleged settlement, he indicated to the court that ADR Group wished to intervene in the proceedings to make representations. On February 22, 2006, DJ McHale made a consent order whereby ADR Group was permitted to intervene and the proceedings were transferred to the High Court.

6 On June 15, 2006, Mr Registrar Rawson ordered the trial of a preliminary issue whether the Northampton County Court proceedings were settled on February 17, 2006. This is the trial of that preliminary issue.

7 At the outset of hearing before me, it was sensibly agreed by counsel for Mrs Patel and ADR Group that I should proceed to hear the evidence without prejudice to their submissions as to its admissibility. Evidence was therefore adduced on the applicant's behalf by Mr Evans and Ms Locke. On Mrs Patel's behalf, evidence was adduced by Mr Patel and Mr Sik and also by Mr John Esplen, the partner involved at Barnes & Partners, and Ms Amy Louise Morris, a secretary at that firm who had transcribed on February 22 and 23, 2007 a tape which included the contents of two telephone conversations which it is common ground took place between Mr Evans and Mr Patel on February 17, 2006. Mr Esplen had made no witness statement but, without demur from the applicant, was tendered for cross-examination at the hearing. Also, undisputed written evidence was given by Mr Phillip Howell-Richardson on behalf of ADR Group as to the status of communications made during a mediation and the commonplace nature amongst mediation bodies and mediators in their mediation agreements of provisions akin to those relied on by Mrs Patel in the present proceedings. Given that this evidence was adduced, counsel for Mrs Patel and ADR Group also sensibly agreed that, in the circumstances of this case, my judgment should deal with it even if I were then to accept their submissions as to its inadmissibility.

The without prejudice rule

8 A trio of cases, namely *Rush & Tompkins Ltd v Greater London Council* [1989] A.C. 1280 ; *Cutts v Head* [1984] Ch 290 and *Unilever plc v The Procter & Gamble Co* [2000] 1 W.L.R. 2436 , ² establishes that there are two justifications for the without prejudice rule. The first is the underlying public policy that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that what transpires in the ^{*69} course of their settlement negotiations may be used against them in the litigation. The second lies in the express or implied agreement of the parties themselves that what transpires in their negotiations should not be admissible in evidence in the litigation if a settlement does not result.

9 The rationale for the without prejudice rule was considered in detail by Hoffmann L.J. in *Muller v Linsley & Mortimer* [1996] 1 P.N.L.R. 74. After considering *Cutts v Head* and *Rush & Tompkins* , he expressed the view, at 79– 80, that the without prejudice rule (to which he also referred as a “ 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. Many of the alleged exceptions to the rule will be found on analysis to be cases in which the relevance of the communication lies not in the truth of any fact which it asserts or admits, but simply in the fact that it was made. Thus, when the issue is whether without prejudice letters have resulted in an agreed settlement, the correspondence is admissible because the relevance of the letters has nothing to do with the truth of any facts which the writers may have expressly or impliedly admitted. They are relevant because they contain the offer and acceptance forming a contract which has replaced the cause of action previously in dispute. ... Indeed, I think that the only case in which the rule has been held to preclude the use of without prejudice communications, otherwise than as admissions, is in the rule that an offer may not be used on the question of costs; a rule which ... has been held to rest purely upon convention and not upon public policy. ...”

10 In the light of the earlier authorities, in *Unilever* Robert Walker L.J. identified various situations where the without prejudice rule does not prevent the admission into evidence of what one or both of the parties to litigation said or wrote. Of these, two are of particular relevance in the present case. The first is when the issue is whether without prejudice communications have resulted in a concluded settlement agreement. This is for the understandable reason that without considering the communications in question it would be impossible to decide whether there was a concluded settlement agreement or not, see *Tomlin v Standard Telephones and Cables Ltd* [1969] 1 W.L.R. 1378 , 1382G per Danckwerts L.J. and 1386A per Sir Gordon Willmer. The second is where, even if there is no concluded

settlement, a clear statement made by one party to the negotiations and on which the other party is intended to and does in fact act may give rise to an estoppel, see *Hodgkinson and Corby Ltd v Wards Mobility Services Ltd* [1997] F.S.R. 178 , 191 per Neuberger J. On Hoffmann L.J.'s analysis in *Muller* , the public policy aspect of the without prejudice rule does not bite on either situation since the communications are not adduced in order to evidence an *70 admission made by a party in a without prejudice communication but to ascertain whether there was or must be taken to be a concluded settlement.

11 In *Unilever* , the main issue was the application of the without prejudice rule to an action for threats brought under s.70 of the Patents Act 1977. The plaintiff failed in its attempt to rely in support of its action on statements made at a without prejudice meeting between the parties and the action was struck out. The Court of Appeal based its conclusion not only on public policy but also, if necessary (which it did not consider it was), on the parties' agreement, on the basis that the circumstances of the meeting were such that each side was entitled to expect to be able to speak freely and their agreement to the meeting showed their common intention: per Robert Walker L.J. at 2449G– H. It is of note that *Unilever* was a case where the truth of the statements in question was in issue in the action and so the public policy aspect of the without prejudice rule was clearly in play.

Mediation and the without prejudice rule

12 There is also a clear public policy now reflected in the CPR to encourage mediation as a preferred means of dispute resolution to litigation. CPR r.1.4(1) obliges the court to further the overriding objective of enabling the court to deal with cases justly by actively managing cases. Rule 1.4(2)(e) defines “ active case management” as including “ encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure” . Rule 26.4(1) entitles a party, when filing the completed allocation questionnaire, to request that the proceedings be stayed while the parties try to settle the case by ADR. The encouragement of mediation by this court is also emphasised by Chapter 17 of the Chancery Guide 2005. These and other matters were referred to by the Court of Appeal in *Halsey v Milton Keynes General NHS Trust* [2004] 1 W.L.R. 3002 , at paras 4– 8, per Dyson L.J., giving the judgment of the court.

13 Mediation takes the form of assisted without prejudice negotiation. In *Aird v Prime Meridian Ltd* [2006] EWCA Civ 1866, the Court of Appeal recognised that “ with some exceptions not relevant to this appeal” , what goes on in the course of mediation is privileged, so that it cannot be referred to or relied on in subsequent court proceedings if the mediation is unsuccessful: see at [5] per May L.J., with whom the other members of the court agreed. The court rejected the claimants' submission that a joint experts' statement ordered under CPR r. 35.12 in the litigation between the parties and used in an unsuccessful mediation between them was a privileged document which could not thereafter be used in the resumed litigation.

14 In *Reed Executive Plc v Reed Business Information Ltd* [2004] 1 W.L.R. 3026 , ³ following a successful appeal by the defendant, the claimant sought to argue that it should be awarded a substantial part of its costs on the basis that the defendant had unreasonably refused ADR and, for that purpose, unsuccessfully sought disclosure *71 of the details of the without prejudice negotiations which had taken place between them.

15 The judgment of Jacob L.J., with whom Auld and Rix L.J.J. agreed, shows that no distinction is to be made between party-to-party negotiations and negotiations conducted within a mediation: both are to be treated as subject to the without prejudice rule. Jacob L.J.'s judgment also shows that he did not regard mediation as a distinct type of without prejudice negotiation to which the exceptions to the without prejudice rule listed by Robert Walker L.J. in *Unilever* were inapplicable. In arriving at its conclusion on the issue before it, the court in *Reed* observed that this list did not include an exception relating to the question of costs.

16 Referring to the requirement in CPR r.44.3(4) that the court should have regard to “ all the circumstances” , Jacob L.J. highlighted, at [17], the inherent difficulty that:

“ ‘ without prejudice’ negotiations, including offers and counter-offers, whether there should be an ADR, what form an ADR should take or what actually happens in an ADR (e.g. one side being recalcitrant) are all in principle relevant. Yet the ‘ without prejudice’ rule apparently makes them inadmissible on the question of costs.”

17 Jacob L.J. did not regard his conclusion that the court could not order disclosure of the

without prejudice negotiations against the wishes of the parties as in any way running counter to the policy of encouraging mediation since the reasonableness or otherwise of going to ADR was a matter which could be fairly and squarely debated between the parties and, under the Calderbank procedure, made available to the court when it came to considering the question of costs: [35].

18 In *Hall v Pertemps Group Ltd* [2005] ADR LR 11/01, Lewison J. also recognised that the conduct of a mediation was not in all circumstances “a no go area”: [14]. He observed that in most cases the kind of event that takes place in a mediation into which the courts will inquire would be quite irrelevant to the underlying dispute and that “the more relevant to the underlying dispute the events are the more likely they are to be covered by the without prejudice protection.” [14]. Lewison J. held that because the pleadings of both parties in a satellite action raised a factual issue on one discrete matter which took place in the course of an earlier mediation, the parties had waived the protection afforded by the without prejudice rule in relation to that matter alone. It is of some interest in the context of the present case that Lewison J.’s view seems to have been unaffected by whether or not the one-to-one conversation in question, which it was common ground had taken place outside any plenary session in the mediation itself, took place before or after the mediation itself had concluded.

19 Counsel for Mrs Patel argued for the existence of a so-called mediation privilege, distinct from the without prejudice rule, under which (at least) a mediator could not be required to appear as a witness or produce documents and under which the parties could not waive the mediator’s entitlement not to give evidence in respect of the contents of a mediation. He sought to build on *McTaggart v McTaggart* [1948] 2 All E.R. 754, where the evidence of a probation officer *72 who had been present at a without prejudice interview between a divorcing couple was admitted only because the wife had not objected to the husband giving evidence as to what transpired at the interview; and on *D v National Society for the Prevention of Cruelty to Children* [1978] A.C. 171, in which both Lord Hailsham and Lord Simon had considered that there was a distinct category of privilege in matrimonial cases extending to communications received in confidence with a view to matrimonial conciliation. (In *Unilever*, at 2445E–G, Robert Walker L.J. referred to the development of that distinct privilege.) Counsel for ADR Group also referred to a budding mediation privilege in this and other jurisdictions. In that context, he drew attention to Jacob L.J.’s observation in *Reed*, at [30], that the line between a third-party assisted ADR and party-to-party negotiations might be “fuzzy”. However, I do not myself find support in that particular observation for the existence of a distinct mediation privilege.

20 The possible existence and desirability of a distinct privilege attaching to the entire mediation process is also usefully discussed in *Brown & Marriott ADR: Principles and Practice*, 2nd edn (Sweet & Maxwell, 1999) at paras 22–079 to 22–097. Counsel for both ADR Group and Mrs Patel accepted, however, that this case could be decided under the existing without prejudice rule. In particular, this was because it was common ground between the parties that the court could not properly require Mr Walker to give evidence and, consistently with cl.7.4 of the agreement to mediate, neither party was intending to issue a witness summons against him. I agree that this case can be decided under the existing without prejudice rule. It may be in the future that the existence of a distinct mediation privilege will require to be considered by either the legislature or the courts but that is not something which arises for decision now.

21 The issue here is whether the without prejudice communications in question have resulted in a concluded settlement. In my judgment, in the circumstances referred to later, the admission of those communications in evidence is not prevented by the without prejudice rule since the situation is fairly and squarely within the recognised exception to the rule in respect of such communications listed by Robert Walker L.J. in *Unilever*. The fact that the communications took place in the context of a mediation—a form of assisted without prejudice negotiation—does not confer on them a status distinct from any other without prejudice communications such as to take them outside the scope of the exception or otherwise to render them inadmissible. This much is clear from *Reed* and *Hall v Pertemps Group Ltd*. No investigation of the underlying merits of the dispute is involved. Like Jacob L.J. in *Reed*, I do not regard this conclusion as running counter to the public policy which exists in favour of mediation. It would be an odd result if in any given case the court was prevented from determining the existence of a concluded settlement solely because the alleged settlement arose within the context of a mediation.

22 It follows that I also do not accept ADR Group’s submission that nothing said or done in preparation for, at or in consequence of the mediation which is liable to disclose the nature of

the negotiations can ever be used outside the mediation process, in the absence of a prima facie case or credible evidence of unambiguous *73 impropriety by a party to the mediation. As I have indicated, the exceptions to the without prejudice rule, even in the mediation context, go wider than this.

23 ADR Group, relying on passages in the judgment of Rix L.J. in *Savings & Investment Bank Ltd v Fincken* [2004] 1 W.L.R. 667, in particular [59], cautioned me against too readily opening up without prejudice negotiations to the scrutiny of the court. That case was concerned with the exception to the without prejudice rule listed by Robert Walker L.J. in *Unilever* where the exclusion of the evidence would act as a cloak for perjury, blackmail or other unambiguous impropriety. I accept that the exceptions to the without prejudice rule should be kept within close confines. However, that does not mean to say that where there is a recognised exception, all the material properly necessary to a determination of the issue at hand should not be considered by the court.

24 It was submitted by counsel for Mrs Patel and ADR Group that cl.1.4 of the agreement to mediate prevents the court from looking at events in the mediation to see whether there was a concluded settlement. Clause 1.4 provides that:

“ Any settlement reached in the mediation will not be legally binding until it has been reduced to writing and signed by, or on behalf of, each of the Parties (‘ settlement agreement’)” .

It was submitted that these provisions effectively remove the exception to the without prejudice rule where the issue is whether or not there had been a concluded settlement.

25 I disagree. The justification for the without prejudice rule in the present case is not founded on public policy but in the parties’ agreement that what transpires in their negotiations should not be admissible in evidence in the litigation if a settlement does not result. The exception to the without prejudice rule where the issue is whether there was a concluded settlement operates just as much where the without prejudice rule is founded in the parties’ agreement as it does where it is founded on public policy. In my judgment, the parties’ agreement expressed in cl.1.4 does not have the effect of excluding that exception, either by its terms or impliedly. The absence of a written settlement signed by or on behalf of each of the parties does not necessarily mean that the parties may never have arrived at a concluded settlement. For example, it is possible in any given case that the parties may have expressly or impliedly agreed to vary or waive those provisions or that a party may be estopped from relying on them or that a collateral contract has arisen which is not subject to cl.1.4, with the consequence that a concluded settlement was or must be treated as having been made. These are matters which a court is entitled to investigate and determine by way of exception to the without prejudice rule.

26 However, cl.1.4 remains relevant in the different context whether there was a concluded settlement, to which I shall refer later.

27 Both Mrs Patel and ADR Group also referred to the confidentiality provisions in cl.7 of the agreement to mediate. In particular cl.7 provides: *74

“ 7.1 The mediator and the Parties undertake to one another that, save as may be otherwise agreed in writing by the Parties or their respective solicitors, they will maintain confidentiality in respect of all statements and matters arising in the mediation ...

7.2 The parties recognise that the mediation is for the purpose of attempting to achieve a negotiated settlement and as such all information provided during the mediation is without prejudice and will be inadmissible in any litigation or arbitration of the dispute.

...

7.7 All documents, statements, information and other material produced prior to or during the course of the mediation, save to the extent [of] those documents disclosed already and in the domain of the litigation, whether in writing or orally, shall be held in confidence by the Parties and shall be used solely for the purposes of the mediation.”

28 Clause 7 is undoubtedly aimed at the promotion within the mediation of frank and open

discussion with a view to settlement. Its provisions bolster the without prejudice nature of what transpires in the mediation. In *Aird*, at [5], May L.J. observed that the parties had “reinforced” the without prejudice nature of the mediation by including a provision in the agreement to mediate whereby they would “keep confidential all information, whether oral or written or otherwise produced for or at the mediation”. He stated, however, that this statement could not be taken absolutely literally because it obviously did not apply to documents produced for other purposes, such as the antecedent pleadings in the litigation, which were needed for and produced at the mediation, but that the general intent of those provisions were clear and accorded with the without prejudice nature of mediation.

29 However, as counsel for Mrs Patel and ADR Group accepted, as a matter of practicality cl. 7 could not be invoked to prevent the court determining the issue whether or not there had been a concluded settlement. The confidentiality provisions in a mediation agreement were the basis upon which HH Judge Reid Q.C. granted an interlocutory injunction in *Venture Investment Placement Ltd v Hall* [2005] EWHC 1227 but that case was not concerned with the issue whether or there had been a concluded settlement.

The events of February 16/17, 2006

30 I therefore proceed on that basis that it is permissible and indeed necessary for the court to consider the evidence relating to the issue whether there was a concluded settlement in this case.

The mediation

31 It was common ground that, at the start of the mediation, Mr Evans, Mr Sik and Mr Walker signed the agreement to mediate. Mr Walker explained that there could be no concluded settlement until a written settlement agreement had been signed by all concerned. The mediation continued throughout the day. By *75 the end of the evening, Mr Evans had made an offer which had been reduced to writing in the form of a draft consent order prepared by the applicant's counsel. The draft consent order provided for the payment by Mrs Patel to the applicant within 14 days of £60,000 plus the interest earned on the monies paid into court by her, in full and final settlement of the applicant's claim; payment out to the applicant of the monies paid into court (included within the £60,000); and no order as to costs. Shortly afterwards, Mr Sik and Mrs Patel's counsel left the mediation. Mr Sik could not recall having seen the draft consent order but Mr Evans' recollection was that Mrs Patel's counsel had seen it. Mr Walker took a copy of the draft consent order, wrote words on the original to the effect that the offer was open for acceptance until midday the next day and gave the original to the Patels, who believed that they had an offer from the applicant which could have been accepted. Mr Patel told his wife's solicitors about the offer the next morning.

32 In his witness statement, Mr Evans gave evidence that Mrs Patel made a final offer during the mediation to pay £55,000 within 28 days but that he was not willing to accept that offer. Ms Locke's evidence was to the same effect. However, both Mr Evans and the Patels felt that a further discussion between themselves directly might lead to a settlement and so he and Mr Walker met with the Patels again in one of the meeting rooms. His statement continued:

“ 12. I asked Mr and Mrs Patel if there was any common ground between us and, if not, I asked if the offers from both sides remained open to 12.00 noon and they confirmed that they did. Both Mr and Mrs Patel agreed with this.

13. The Mediator then asked Mr and Mrs Patel if it would be helpful for him to write out Mr and Mrs Patel's offer for them. They agreed that it would and a copy of each of the offers was made and given to each party. ...

14. Both Mr and Mrs Patel and I then expressed our hopes that a deal could come from these offers and they were happy to consider the offers overnight.

15. At the end of the meeting, Mr and Mrs Patel both shook my hand

16. I asked the Mediator if I could give Mr Patel my business card with my telephone number on it, which he agreed I could. I handed my business card to Mr Patel, who agreed that he would phone me in the morning with any further thoughts that he had had overnight.”

33 Mr Walker's manuscript note of Mrs Patel's alleged offer referred to in para.13 of Mr Evans' statement states:

" Mr and Mrs Patel offer the same except the figure of £60,000 to £55,000 & the period is 28 not 14 days. This offer is open for acceptance until 12 noon on Friday 17 Feb'y 2006."

34 However, Mr Patel's evidence, in para.5 of his witness statement, is that at no stage during the discussions with Mr Evans did either he or his wife believe that they were putting forward any terms of settlement by which they could later be bound. Mr Patel expanded on this in his oral evidence. He was adamant that he never offered during the mediation to settle for a payment of £55,000 within 28 days. He remembered Mr Walker writing out something which Mr Walker *76 handed to Mr Evans but said he never saw what was handed over and that the first time he had seen Mr Walker's manuscript note was when he saw Mr Evans' statement. Mr Patel's evidence is that what he told Mr Evans was that he and his wife would consider making a payment of £55,000 within 28 days but would need to speak first with his family and friends to know whether that amount could be raised, before confirming the position by midday the next day if they wanted to make such an offer. The Patels shook hands with Mr Evans simply to say goodbye. Mr Evans gave them his business card so that they could call him once they had decided what to do.

35 Mr Sik's evidence, consistent with that of Mr Patel, was that when he left the mediation, Mrs Patel's position was that she wished to proceed to trial and that Mr Walker and Ms Locke had been so informed. Mr Sik confirmed those instructions with Mr Patel prior to leaving the mediation.

36 In the present case, there is—unusually—some evidence from Mr Walker himself (apart from his manuscript note referred to above), in the form of correspondence from him, to which it is accepted by counsel for Mrs Patel that I can have regard, albeit giving only such weight to it as I consider appropriate having regard to the fact that Mr Walker has not given oral evidence. In letters dated February 17, 2006 to Ms Locke and Mr Sik, Mr Walker recorded that offers were made by both Mr Evans and the Patels, in the terms indicated by Mr Evans. Mr Walker's letter to Mr Sik referred to a voicemail message left by Mr Walker on Mr Sik's mobile phone the previous evening. Mr Sik's evidence was that he did not recall having received any voicemail or Mr Walker's letter to him, although he accepted that he may have seen the letter later in the day on February 17. In a letter dated February 20, 2006 addressed to both firms of solicitors, Mr Walker set out his recollection of what transpired at the mediation. His letter supports the applicant's version of events.

The morning of February 17

37 I next turn to the events of February 17, 2006, the day after the mediation. By about 11.20, Mr Patel had not been back in contact with Mr Evans and Ms Locke was getting concerned in view of the midday deadline. Mr Evans called Mr Patel on his mobile phone at about 11.30. The call ended abruptly when Mr Patel's signal failed. According to Mr Evans, Mr Patel told him that he felt the same way as the previous evening and that his offer remained open until midday. Mr Patel's evidence was that he clearly told Mr Evans that there was no agreement and that the case was to proceed to trial.

38 Mr Evans' evidence was that he then called Ms Locke and instructed her to accept Mrs Patel's offer. At Ms Locke's request, he faxed her the draft consent order from the previous evening. Ms Locke's evidence was that this telephone conversation took place at about 11.40 and that following it she dictated a letter to her secretary accepting Mrs Patel's offer, attached a typed-up copy of the draft consent order but substituting £55,000 and 28 days for £60,000 and 14 days, signed the letter and personally faxed it to Mrs Patel's solicitors just before the *77 midday deadline. (It was previously disputed that the deadline had been met but this is no longer an issue in the case.)

39 Mr Evans' evidence was that at about 11.45, he then took a call from Mr Patel. This is the first of the two telephone conversations between them transcribed by Ms Morris. Mr Evans accepted in cross-examination that parts of the conversation showed that Mr Patel was not minded to accept Mr Evans' offer; that the Patels had decided to go to trial and that this was clear to Mr Evans at the time; and that there was no express reference to the offer made by Mr Patel on his wife's behalf of the previous evening. However, Mr Evans denied that this

meant that Mr Patel had withdrawn that offer. Mr Evans considered that “ Mr Patel was making it clear to me that this was his final offer and he was not going to budge from it” . Mr Evans accepted that he made no mention of his acceptance of Mrs Patel’ s offer and that it was crucially important for Mr Patel to have known of the acceptance of that offer. However, he denied that he had deliberately omitted to tell Mr Patel: he had wanted first to be sure that Ms Locke had received the draft consent order and had sent the acceptance of the offer on to Barnes & Partners.

40 After the conversation, Mr Evans called Ms Locke to confirm that, as was in fact the case, she had received the draft consent order which he had previously faxed over to her. In cross-examination, Mr Evans agreed that he did not mention to Ms Locke the telephone conversation which he had just had with Mr Patel. However, he denied that this was because he did not want her to know that Mrs Patel’ s offer had been withdrawn.

41 Mr Patel’ s evidence about the first transcribed telephone conversation between them, as with the earlier and later ones which he had with Mr Evans, was that in them he told Mr Evans that there was no agreement and that the case was to proceed to trial. He denied that in the first of the transcribed calls he had at any time been referring to any offer made by the Patels to Mr Evans or to its withdrawal, because there had been no such offer in the first place. He reiterated that the only offer on the table was that of Mr Evans.

The afternoon of February 17

42 Mr Patel said in his statement that at about 12.50 he contacted his wife’ s solicitors and told them that they should continue to prepare for trial. He then telephoned Mr Evans and, during this telephone conversation, Mr Evans became threatening and abusive towards him, an allegation which Mr Evans denied, although he agreed he was fed up with the whole situation.

43 Mr Evans agreed in cross-examination that, in the course of the conversation, Mr Patel was communicating to him that there had been some mistake, namely that he had been informed that Mr Evans had written to accept an offer from the Patels when the Patels’ instructions had been to proceed to trial. Mr Evans denied that, in the conversation, he was trying to force Mr Patel to do something which Mr Patel did not want to do, namely to acquiesce in the applicant’s acceptance of Mrs Patel’ s offer instead of proceeding to a trial. He also denied that he *78 had understood Mr Patel, in the earlier conversation, to have withdrawn that offer. 44 Mr Patel’ s evidence in cross-examination was that the “ problem” which he perceived was that Collyer-Bristow’ s letter had purported to accept an offer which had never been made.

45 In my judgment, in the 12.50 telephone conversation, Mr Patel was proceeding on the understanding that no offer had been made on Mrs Patel’ s behalf the previous evening. For his part, Mr Evans was proceeding on the basis that such an offer had been made. These completely conflicting beliefs explain why, as he admitted in cross-examination, Mr Evans was, “ fed up with the situation” since Mr Patel’ s statements in the conversation would have appeared to Mr Evans as Mr Patel reneging on the position as it stood at the end of the previous evening. In this conversation, Mr Evans was seeking by forceful and, in my judgment, inappropriate language to pressurise the Patels into not proceeding to a trial and instead into settling the litigation on the terms of the alleged offer made by the Patels which, on the applicant’s case, the applicant’s solicitors had accepted earlier in the day. However, I reject counsel for Mrs Patel’ s submission that Mr Evans was proceeding on the basis that he knew Mrs Patel had not made an offer. So far as Mr Evans believed, she had.

46 At about 16.00, Barnes & Partners wrote to Collyer-Bristow, in response to the faxes sent earlier in the day, disputing the existence of any concluded settlement. It was suggested by counsel for the applicant that the terms of that letter cast doubt on Mr Patel’ s evidence that no offer had been made by the Patels to Mr Evans since, if that had been the case, the letter would have spelled this out in the clearest of terms, which it did not do. I agree that Mrs Patel’ s case, as advanced before me, was not developed in detail in her solicitor’ s letter but in my judgment this does not weigh very heavily in the evaluation of Mr Patel’s evidence.

Was there a concluded settlement?

47 The issue whether there was a concluded settlement involves a consideration of three main questions: (1) was there a valid offer made by Mr Patel on behalf of his wife at the late evening meeting on February 16; (2) if so, was it withdrawn on the morning of February 17

prior to acceptance; and (3) if there was a valid offer which was not withdrawn, was it validly accepted by Collyer-Bristow's letter sent shortly before midday on February 17?

Offer

48 Counsel for Mrs Patel submitted that, on several grounds, there was no valid offer made on her behalf at the meeting which took place at the end of the evening on February 16. I should state at the outset that, in my judgment, this meeting formed part of the mediation. Mr Evans agreed in cross-examination that there was no discussion that evening about when the mediation had concluded and he fairly accepted that the meeting probably would have been part of it.

*79

49 An offer is an expression of willingness to contract made with the actual or apparent intention that it is to become binding on the person making it as soon as it is accepted by the person to whom it is addressed: Chitty on Contracts 29th edn (Sweet & Maxwell, 2004) Vol.1, para.2– 002. The same passage in Chitty states that under the objective test of agreement, an apparent intention to be bound may suffice, that is, the alleged offeror may be bound if his words or conduct are such as to induce a reasonable person to believe that he intends to be bound, even though in fact he has no such intention. Counsel for Mrs Patel submitted that Mrs Patel expressed no such willingness.

50 In terms of what actually took place at the meeting, I am satisfied on the evidence that, whatever the Patels may have thought, objectively they put forward an offer to Mr Evans to settle the litigation for a payment of £55,000 within 28 days. In this regard, I prefer Mr Evans' evidence to that of Mr Patel. I reject the submission that Mr Evans' evidence was untruthful. Mr Walker, an experienced mediator, clearly understood the Patels to have made such an offer, as his manuscript note and also his later correspondence with the solicitors show. I accept that evidence. In my judgment it is appropriate to give considerable weight to Mr Walker's correspondence: even though Mr Walker was not available to be cross-examined about it, he is independent of the parties and had no motive not to set out his recollection accurately, which in any event accords with his contemporaneous manuscript note. Mr Patel was not in my judgment an untruthful witness. I accept Mr Patels' evidence that he was only considering putting forward the offer the next morning, after discussing it with his family and friends. I also accept that this is what was in his mind at the time. However, I find that this was not made clear to Mr Walker or Mr Evans. In saying, in his evidence, that it was made clear, Mr Patel has, over the time since the meeting, mistakenly convinced himself to that effect. That Mr Patel believed that he had not made an offer on his wife's behalf is supported by that facts, as I find, that (1) he had earlier in the evening given Mr Sik instructions to proceed to trial; (2) when Mr Patel spoke to his wife's solicitors the next morning, he made mention only of Mr Evans' offer; and (3) as the transcript bears out, his 11.45 conversation the next day with Mr Evans proceeded, from Mr Patel's perspective, on the basis that no offer had been made on his wife's behalf at the meeting.

51 However, that is not the end of the matter. Counsel for Mrs Patel submitted that her offer, if made, was insufficiently complete or certain to constitute a valid offer because there was no provision as to the manner in which any settlement would be effected (she probably preferring a judgment to a Tomlin order) or as to what would happen to the interest on the money already paid into court. Counsel for the applicant submitted that the offer was neither incomplete nor uncertain since Mrs Patel's offer was on the same terms as the draft consent order except as to the amount of and time for the payment. The applicant's submission is correct to the extent that Mrs Patel's offer was on the same terms as the draft consent order except as to the amount of and time for the payment; and that the draft consent order dealt with how the interest on the money paid into court would be treated. However, the difficulty from the applicant's viewpoint about the draft consent order is that it does not deal with how the litigation is to be finally disposed *80 of, in particular whether by Mrs Patel consenting to judgment or by a Tomlin order. The manner in which litigation generally is to be disposed of by a settlement agreement may be a matter of some importance to the parties to the litigation. The consequences of a judgment against Mrs Patel as opposed to a Tomlin order would differ. In my judgment, the absence of any provision as to the manner of disposal of the litigation does make the offer incomplete. Its purported acceptance would not give rise to a complete agreement.

52 There is, in my judgment, a further important reason why Mrs Patel's offer, assuming it to have been accepted and accepted "in the mediation" within the meaning of cl.1.4 of the agreement to mediate (see further later), would not give rise to a complete agreement,

namely cl.1.4 itself. The effect of cl.1.4 is that any agreement reached between the parties in the mediation could not be complete until reduced to writing and signed by or on behalf of each of the parties (which included Mr Rice). The only relevant qualifications to this conclusion are if the provisions of cl.1.4 were varied or waived or Mrs Patel is otherwise unable to rely on them.

53 Counsel for Mrs Patel also submitted that the effect of cl.1.4 was that Mrs Patel' s offer, if made, was in effect subject to contract. Subject to the qualifications which I have just mentioned, I accept that submission. If the purpose of cl.1.4 was, as I have held, to prevent any settlement from being complete until reduced to writing and signed by or on behalf of each of the parties, the parties could not have intended any settlement to be legally binding until reduced to writing and signed by or on behalf of each of the parties. In the present case, this conclusion is reinforced by the undisputed facts that, at the start of the mediation, Mr Evans, Mr Sik and Mr Walker signed the agreement to mediate and Mr Walker expressly explained that there could be no concluded settlement until a written settlement agreement had been signed by all concerned. In those circumstances, I do not consider that Mr Patel' s words or conduct at the meeting were such as to induce a reasonable person to believe that his wife intended to be bound by the offer made by him on her behalf.

54 It therefore remains to determine whether the provisions of cl.1.4 were varied or waived or Mrs Patel is otherwise unable to rely on them. The applicant does not rely in the present case on any estoppel but he does seek to rely on an alleged collateral contract whereby both parties agreed to keep their respective offers open until midday on February 17.

55 In relation to the applicant' s arguments on variation and collateral contract, his counsel rightly accepted in his closing submissions that if, as I have held, there was no valid offer by Mrs Patel, these arguments did not run.

56 In relation to the waiver argument, counsel for the applicant submitted that cl.1.4 was impliedly waived by virtue of Mrs Patel' s offer having been open for acceptance until midday on February 17. He submitted that to give effect to cl.1.4 would deprive that acceptance period of any meaning. I reject that submission. The acceptance period is relevant to whether there was a settlement at all. If there was no acceptance within the period, the offer would lapse (subject to any possible arguments as to *de minimis* and whether time was of the essence) and there would be no settlement on which cl.1.4 could bite. If there was a valid *81 acceptance within the period, there would then be a settlement on which cl.1.4 would bite. On either basis, there is nothing to justify the conclusion that the fact that Mrs Patel' s offer was open for acceptance until midday on February 17 means that cl.1.4 was impliedly waived or that to give effect to cl.1.4 would make the existence of the acceptance period " just verbiage" , as counsel for the applicant submitted.

57 I should add that there is no basis in the evidence for concluding that the offer, made in without prejudice negotiations, was in any way an open offer. Unless a party makes plain its intention that a settlement offer is made on an open basis, it remains covered by the cloak of the without prejudice rule, see *Sampson v John Boddy Timber Ltd* (1995) CAT 552 per Sir Thomas Bingham M.R. and *Cheddar Valley Engineering Ltd v Chaddlewood Homes Ltd* [1992] 1 W.L.R. 820 (Mr Jules Sher Q.C., sitting as a deputy judge of the High Court).

58 These conclusions are sufficient to dispose of the preliminary issue in Mrs Patel' s favour. However, it is right that I should briefly express my conclusions on the other questions which arose.

Withdrawal

59 Counsel for Mrs Patel submitted that any offer by Mrs Patel was withdrawn during Mr Patel' s telephone conversation with Mr Evans at about 11.45 on February 17. Counsel for the applicant submitted that there was no withdrawal, and certainly no clearly communicated withdrawal, evident from the transcript of that conversation. (He also relied on the alleged collateral contract referred to above which meant that the offer could not be withdrawn but, for the reasons already indicated, this argument can no longer run.)

60 In the conversation, Mr Patel was proceeding on the understanding that no offer had been made on Mrs Patel' s behalf the previous evening. For his part, Mr Evans was proceeding on the basis that such an offer had been made. In my judgment, there is nothing sufficiently clear in the transcript of the conversation to justify the conclusion that any offer was withdrawn. I would therefore have decided this issue in the applicant' s favour. There

was, understandably from Mr Patel' s perspective, no express reference to any offer by Mrs Patel. In circumstances where Mr Patel was under the belief that there was no such offer, it cannot be concluded from his statements in the conversation that he was not minded to accept Mr Evans' offer and that his wife had decided to go to trial or from anything else in the conversation that any offer by his wife had been withdrawn.

Acceptance

61 For the reasons already indicated in relation to Mrs Patel' s offer, the purported acceptance of that offer would not have resulted in a concluded settlement. Any alleged agreement resulting from that offer and acceptance would have been incomplete and, by virtue of cl.1.4 of the agreement to mediate, the acceptance was in any event subject to contract.

***82**

62 In order to seek to get round the effect of cl.1.4, counsel for the applicant submitted that the mediation came to an end on the evening of February 16, with the consequence that Collyer-Bristow' s letter sent the next day which accepted Mrs Patel' s offer was not " in the mediation" and so there could be no " settlement reached in the mediation" within the meaning of cl.1.4. Although, on the conclusions which I have reached, the question does not arise for determination, it is one of some importance in the mediation world generally.

63 Offers made during a mediation are commonly left on the table after the conclusion of the formal mediation hearing itself, in order to enable the parties to reflect and if necessary for the mediator to continue discussions with the parties individually. In my judgment, an acceptance, made after the conclusion of the mediation hearing, of such an offer is just as much made in the mediation as if it was made at the hearing itself. In the present case, had there been a valid offer and acceptance, it would have resulted in a " settlement reached in the mediation" within the meaning of cl.1.4 of the agreement to mediate.

Conclusion

64 In the result, the preliminary issue must be answered in terms that the Northampton County Court proceedings in case no. 533 of 204 were not settled on February 17, 2006.

***83**

1. Paragraph numbers in this judgment are as assigned by the court.
2. [2000] F.S.R. 344.
3. [2005] F.S.R. 3.