No admission

An admission of debt under the Limitation Act 1980 is not protected by the without prejudice rule after a recent House of Lords' decision, says **Ed Sautter**

- *Bradford & Bingley plc v Rashid*
- admission of debt or without prejudice communication?

In *Bradford & Bingley plc v Rashid* [2006] UKHL 37, [2006] All ER (D) 145 (Jul) Bradford & Bingley (B&B) granted a £50,300 mortgage to Mohammed Rashid. Payments under the mortgage fell into arrears, the last payment being made on 3 January 1991. A possession order was obtained and the property sold on 2 October 1991, realising a shortfall of £15,583. In June 1994 Rashid was notified of the debt, but nothing substantive transpired until B&B wrote in 2001 requesting an offer of repayment.

When no offer was forthcoming, B&B instructed its solicitors to write seeking proposals for repayment. On 26 September 2001 an advice centre, acting for Rashid, responded:

"Please find attached Mr Rashid's financial statement, which clearly indicates that at present he is not in a position to repay the outstanding balance, owed to you…"

On 2 October 2001 B&B's solicitors responded:

"Should your client be in a position to raise a lump sum payment in full and final settlement, our client is willing to consider writing off a substantial amount of the debt."

On 4 October 2001 the advice centre replied Rashid was willing to pay about £500 towards the outstanding amount as a final settlement.

When, in June 2003, B&B resorted to proceedings to claim the outstanding money it was met with a limitation defence on the basis that the 12-year period prescribed by the Limitation Act 1980 (LA 1980), s 20(1) for recovering the principal mortgage debt began on 3 January 1991—the date of Rashid's last payment—and had accordingly expired. B&B then sought to rely on LA 1980, s 29(5) which provides that "where any right of action has accrued to recover…any debt or any other liquidated pecuniary claim…and the person liable…for the claim acknowledges the claim…the right shall be treated as having accrued on and not before the date of the acknowledgment…"

The two questions for the House of Lords were whether the relevant correspondence constituted an acknowledgement for the purposes of LA 1980, s 29(5) and, if it did, whether it was prevented from being relied on because of the without prejudice rule.

The courts below found the relevant letters inadmissible as a result of the without prejudice rule, and failed to reach any conclusion about whether either or both the letters, (of 26 September 2001 and 4 October 2001) were an acknowledgement of the debt.

However, the House of Lords found that the two letters did constitute acknowledgement of the debt. Rashid tried to argue that references in the correspondence to "the outstanding balance, owed to you" and to "the outstanding amount" did not acknowledge what sum was outstanding and that, in the absence of an admission of a definite amount, there was no acknowledgement within LA 1980, s 29(5), questioning the reasoning in *Dungate v Dungate* [1965] 3 All ER 818, [1965] 1 WLR 1477. This argument was unsuccessful: Lord Brown found *Dungate v Dungate* was rightly decided, and that acknowledgments were not limited to admissions of debts where quantum and liability were indisputable.

The Law Lords concluded the correspondence was not protected. There were, however, differences in approach. The majority of the Law Lords observed that the correspondence was not expressed to be without prejudice and therefore, to determine whether it was protected, it was necessary to decide whether the surrounding circumstances made it clear that the parties sought to compromise a dispute. There was no dispute about liability on the face of the correspondence. As Lord Brown said:

"…the without prejudice rule has no application to apparently open communications…designed only to discuss the repayment of an admitted liability rather than to negotiate and compromise a disputed liability."

Lord Hoffmann argued the exclusion of the without prejudice rule's effect could be justified because the use of acknowledgements for the purposes of LA 1980 was not as evidence of the truth of anything asserted, which, he said, was the rationale behind most of the exceptions to the without prejudice rule.

Lord Hope, by reference to a number of Scottish cases, said a court could identify and extract admissions from correspondence that was otherwise written as part of a negotiation designed to compromise a dispute. This was regarded by the other Law Lords, however, as not reflecting the English law approach. Lord Brown observed that a suggestion that clear and unequivocal admissions, even if made in the course of without prejudice communications, are admissible in evidence, did not represent the law.

While this decision is encouraging to those who need to rely on an acknowledgement of debt to overcome limitation difficulties, the limits of the decision should be recognised. In *Bradford & Bingley v Rashid* the relevant communications from the debtor were not expressly stated to be without prejudice. Lord Brown quoted Lord Justice Rix in *Savings and Investment Bank Ltd v Fincken* [2003] EWCA Civ 1630, [2004] 1 All ER 1125, where he observed that the admitting party loses the relevant protection only where he abuses the privilege, and that it was not an abuse to tell the truth, even where the truth was contrary to one's case.

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Summary

- Acknowledgements for the purposes of the Limitation Act 1980, s 29(5) are not confined to admissions of debts where quantum and liability are indisputable.
- The without prejudice rule has no application to apparently open communications designed only to discuss the repayment of an admitted liability rather than to negotiate and compromise a disputed liability.
- It is only in exceptional circumstances—where the without prejudice rule is being abused, such as in cases of unambiguous impropriety—that admissions made in the course of without prejudice communications are admissible.