BEFORE LORD JUSTICE WALLER and LORD JUSTICE CLARKE CA, on appeal from QBD Commercial Court. (Mr Justice Timothy Walker), 26th July 2000.

LORD JUSTICE CLARKE: ***Introduction.***

1. On the 29th May 1991 the ABT SUMMER sank. As a result her owner, ("**Somatra**"), which is the claimant in this action and the principal appellant on this appeal, made a substantial claim against its hull underwriters. The claim led to an action in the Commercial Court, which was settled in April 1994. The respondents ("Sinclairs") were acting as **Somatra**'s solicitors in connection with the claim and the action. **Somatra**'s case in this action is that when Sinclairs were acting as its solicitors they were negligent and thus in breach of duty and contract and that as a result it has suffered loss. The claim against underwriters was settled for some US$40 million, which was about 66 per cent of the full amount of the claim including interest. **Somatra**'s case is that but for Sinclairs' negligence it would or might have recovered 85 per cent of the claim. The claim against Sinclairs is of the order of US$10 million. Sinclairs counterclaim for their unpaid fees in the sum of £577,137.54 plus interest. Their claim is against both **Somatra** and the other two defendants to the counterclaim. They are also appellants, but need not be considered separately from **Somatra** in order to resolve the issues which arise on this appeal.

Meetings and Telephone Conversations.

2. Some time after the action was settled in April 1994 a dispute arose between **Somatra** and Sinclairs as to Sinclairs' unpaid fees, during which **Somatra** made a number of complaints about the way Sinclairs had represented it. It was agreed that the parties should meet in Jeddah in order to try to resolve the situation. Accordingly meetings took place in Jeddah over two days, the 24th and 25th September 1994. **Somatra** had by this time consulted Herbert Smith, but it was represented at the meetings, not by anyone from Herbert Smith, but by Mr Hisham Alireza and by Mr Tariq Mustafa. Sinclairs were represented by Mr Ben Leach, assisted by Mr Joachim Atkinson. Mr Leach, who was the managing partner of Sinclairs at the time, had played no part in the original action. The partner principally involved when Sinclairs were acting for **Somatra** had been Mr Harvey Williams. He had been assisted by Mr Atkinson, who was an assistant solicitor.

3. It is common ground that the meetings were without prejudice. As I understand it, that is on the basis that, although they were not expressed to be without prejudice, the nature of them was such that they should be so treated. For the same reasons, it is also common ground that two subsequent telephone conversations were also without prejudice. Those telephone conversations were between the same representatives of **Somatra** and Mr Leach. The first took place on the 8th October 1994 and the second at the end of October or the beginning of November 1994. As the judge said, the meetings and telephone calls covered a large number of matters which are in issue in this action and Mr Leach engaged on behalf of his partners in a full and uninhibited discussion of the conduct of the original action by Sinclairs.

4. Unknown to Mr Leach, **Somatra** covertly recorded the meetings with both audio and video equipment. It also covertly recorded the two telephone conversations. As a result there are now available transcripts of both the meetings and the telephone conversations, except for one period of about two hours during the course of one of the meetings. The judge inferred, in my view correctly, that it is in the highest degree unlikely that Mr Leach would have participated if he had known that the conversations were being recorded. The judge also described **Somatra**'s behaviour in making the recordings as unattractive. I see the force of that, but it is not to my mind relevant to the correct resolution of any of the issues in this appeal. It seems to me that either the contents of the conversations are admissible at the trial or they are not. If they are, no-one suggests that the court should not have the best evidence of what was said, namely the recordings.

The Issues.

5. **Somatra** wishes to adduce in evidence at the trial of this action the contents of the conversations (by which I mean what was said both at the meetings and in the telephone conversations) on the basis that Sinclairs are no longer entitled to rely upon the fact that they were without prejudice because of the

use which Sinclairs made of them on an ex parte application for a Mareva injunction. To that end **Somatra** listed the recordings in a supplemental list of documents. Sinclairs say that the contents remain inadmissible because the conversations were without prejudice and that nothing that has happened since entitles **Somatra** to rely upon them. The judge accepted Sinclairs' submissions and in effect declared that **Somatra** (and the other appellants) are not entitled to refer to the contents of the conversations. He also ordered them to serve an amended supplemental list deleting reference to the recordings. The principal issue on this appeal is whether the judge was right to hold that the contents of the conversations are inadmissible.

6. The judge gave permission to appeal because of the lack of authority on the issues raised, although he added that he had no doubt as to the correct result. I shall consider what may be called the without prejudice issue first, before turning to the second issue, which relates to the question whether certain documents relating to or arising from the meetings should be disclosed by Sinclairs. That question turns in part upon the way in which the first issue is resolved.

Without Prejudice. The Issue.

7. It is common ground that it follows from the fact that the conversations were without prejudice that **Somatra** cannot adduce in evidence any admission made in the course of them by or on behalf of Sinclairs unless subsequent conduct on Sinclairs' behalf entitles **Somatra** to do so. The conduct relied upon is reliance upon an affidavit in support of an ex parte application for a Mareva injunction made on the 16th October 1998. The application was granted by Colman J. The question is simply whether reliance upon that affidavit entitles **Somatra** to rely upon the contents of the conversations at the trial.

The Affidavit.

8. The affidavit was sworn on the 14th October 1998 by Mr Weir as a partner in Ince & Co, who were and are acting for Sinclairs. It was sworn in support of an application for a Mareva injunction to secure Sinclairs' claim for a total of about £824,000 in respect of unpaid fees, interest and costs. In paragraph 2 Mr Weir said that the facts and matters deposed to were either personally known to him or had been made known to him by Mr Leach, Mr Williams and Mr Atkinson, among others. The structure of the affidavit was as follows. Paragraphs 1 to 10 introduced the case and the parties; paragraphs 11 to 21 described Sinclairs' counterclaim for unpaid fees; paragraphs 22 to 29 discussed the allegations of breach of duty and paragraphs 26 to 37 set out the nature of the application and asserted the risk of dissipation of assets. The remaining paragraphs do not seem to me to be relevant.

9. **Somatra** relies upon two particular paragraphs in the affidavit. The first is paragraph 29.4, which must be considered in its context. As just stated, it is in the part of the affidavit which discussed the allegations of breach of duty against Sinclairs. In paragraph 26 Mr Weir asserted that there were a number of manifest weaknesses in those allegations. He then, in paragraphs 26 to 28, discussed three particular heads of loss alleged by **Somatra** namely loss on settlement, White & Case fees and bank claims. There followed paragraph 29, in which he said that in addition he would draw the court's attention to a number of what he described as general points. There were four such points. It is correctly conceded by Mr Mark Cran QC on behalf of Sinclairs that the first three of them were all aimed at exposing the weakness of **Somatra** 's case on breach of duty.

10. The fourth point was in these terms:

    I would draw to the Court's attention that there are some references in correspondence between the parties in the second half of 1994 and 1995 to Mr Leach having offered an apology on behalf of Mr Williams (see eg p 102 of AHWM 5). I am told by Mr Leach, and I believe, that it appeared to him, especially from the two meetings which he had with Mr Alireza and Mr Mustafa in Jeddah on 24th and 25th September 1994 that these two gentlemen harboured great personal hostility concerning Mr Williams, such that, so it seemed from what they said, there had been some sort of severe personality clash. In the circumstances, he formed the view that there might be room for a very limited apology from Mr Williams to ABTI, with a view to resolving matters between them. The idea was put to Mr Alireza and Mr Mustafa by Mr Leach, but the former misinterpreted it as an admission of fault, which it was not, nor was it ever intended to be.

Two faxes were exhibited to the affidavit. The first, which is at page 102 of AHWM 5 and was thus expressly referred to in the above paragraph, was a letter dated the 12th October 1994 from Mr Alireza to Mr Leach. It included the following:

"I recognize with gratitude your advice that HARVEY has agreed to accompany you to Jeddah to offer an apology in person. The recognition by you that both he and the firm have something to answer for and were lacking in their service to us as clients should bring us closer to resolving the issues.

Your personal attitude encourages me to attempt to reach an amicable solution in this matter.

The second fax was dated the 27th November 1995. It too was from Mr Alireza to Mr Leach, but with a copy to Herbert Smith. It was written both before the letter before action and before the writ was issued (which was on the 14th November 1996). It included the following:

During your Managing Partner, Mr Ben Leach's visit to Jeddah and in a subsequent telephone conversation, he had admitted that it appeared to him that his firm had made mistakes in handling the SUMMER case and that he was therefore prepared to travel down to Jeddah once again, with the Partner responsible Mr Harvey Williams, so as to allow the latter to apologize in person. Mr Leach had clearly stated that he would not want to take fees that his firm was not entitled to and did not deserve, and that he would want an amicable solution to the dispute.

We had carefully considered your request and informed you that we did not see the resolution of the dispute through a personal apology from your Mr Williams and that we had appointed Herbert Smith to fully investigate the matter, and define the basis for an amicable resolution of the dispute. We had subsequently informed you that Herbert Smith were of the opinion that there was a case to be answered by your firm and whether you would like to put the case against your firm to arbitration, as had been suggested by you during your visit to Jeddah. ....

.... We do not wish that the matter of your fees entitlement, if this is proven, now or at a later date, or the matter for which your Mr Williams had wanted to come to Jeddah to apologize for, should be left unresolved or subject to any delays. You will of course in due course hear from Herbert Smith on this matter and on the issues involved in respect of the injunction you now seek."

11. Mr Cran submits that Mr Weir included paragraph 29.4 only because he regarded it as his duty to do so in order to discharge the obligation to make full and frank disclosure of all relevant matters on an ex parte application of the kind which was being made. He submits that Mr Weir thought that the correspondence to which he referred was open correspondence, that both the letters which were exhibited asserted in effect that Mr Leach indicated at the meetings that Mr Williams was willing to apologise because he had something to apologise for in the handling of the case and that he therefore thought that he had a duty to refer to what was said at the meeting. However, there is unfortunately no evidence from Mr Weir as to what he in fact believed.

12. There is thus no evidence as to whether he thought that either the conversations or the correspondence were open or without prejudice. The only evidence on the point is contained in an affidavit which was not sworn by Mr Weir but by Mr Rutherford, who is (and was at the time Mr Weir swore his affidavit) the partner in Ince & Co in charge of the firm's professional indemnity team. The affidavit was Mr Rutherford's fourth affidavit. In it he made certain comments on the suggestion that the effect of reliance on Mr Weir's affidavit waived the without prejudice nature of the conversations. Those comments are not, however, said to be based on anything he had been told by Mr Weir. Indeed there is no suggestion in the affidavit that he had discussed the matter with Mr Weir.

13. In the course of his comments Mr Rutherford observed that there is no doctrine of waiver of the without prejudice nature of without prejudice discussions. However, more importantly, he asserted that the correspondence referred to in paragraph 29.4 and exhibited to Mr Weir's affidavit, namely the two letters from which I have quoted, were part of open correspondence and that if they had not been referred to in the affidavit, **Somatra** would have complained that they should have been. Mr Cran submits that they were indeed open correspondence and that reference had to be made to them. Alternatively he submits that, if they were not, Mr Weir thought that they were and made a mistake in referring to them.

14. In my judgment, it is not possible to say whether Mr Weir thought either that the conversations or the letters were open or that they were without prejudice because there is no evidence from him one way or the other. However, it does not seem to me to be likely that he thought that the conversations were without prejudice but that the letters were not. If he thought that the conversations were open, he probably also thought that the letters were open and that may indeed have been the reason why he referred to both. On the other hand, if he thought that the conversations were without prejudice, I do not see how he could have thought that the parts of the letters which I have quoted were open because, in my judgment, they were plainly part of the same process.

15. This can most clearly be seen from the letter of the 12th October 1994, which was only four days after the first of the two without prejudice telephone conversations which followed the meetings in Jeddah. The letter refers to `your advice', which is a reference back to what Mr Leach said during the without prejudice telephone conversation on the 8th October, just four days earlier. There can in my view be no doubt that that part of the letter was part of the exchanges which began at the meetings and continued in the telephone conversations. If the meetings and the telephone conversations were without prejudice (as it is common ground that they were), so too was the letter of the 12th October. Indeed, the contrary does not seem to me to be seriously arguable. There is more scope for debate about the letter of the 27th November 1995 because it was written more than a year later, but it nevertheless seems to me to be part of the same process and to be without prejudice for the same reasons.

16. In these circumstances I do not think that Sinclairs (or Ince & Co on their behalf) were under any duty to refer to the contents of the letters any more than they would have been under a duty to refer to what was said at the meetings or during the telephone conversations if the letters had not been written. In any event, in my judgment, even if Mr Weir thought that the letters were part of open correspondence and that he was under a duty to make some reference to the contents of the without prejudice meetings, I accept Mr Symons QC's submission on behalf of **Somatra** that he went much further than was necessary to discharge that duty.

17. In paragraph 29.4 Mr Weir did not simply refer to the contents of the correspondence without further comment, but to my mind put forward an account of part of the meetings in the context of his assertion that **Somatra** 's case on breach of duty was weak. He said that he had been told by Mr Leach that it appeared to him that Mr Alireza and Mr Mustafa harboured great personal hostility concerning Mr Williams, that it was for that reason that there might be room for a limited apology and that Mr Alireza and Mr Mustafa misinterpreted the suggestion as an admission of fault, "which it was not, nor was it ever intended to be". Mr Weir thus gave an account of the meeting which supported the argument that **Somatra** 's case was weak by asserting that the apology was only suggested because of personal animosity and not in connection with any admission of fault.

18. It is now conceded by Mr Cran that the contents of paragraph 29.4 are not entirely accurate and that in all these circumstances (and whether Mr Weir was mistaken or not) the way in which paragraph 29.4 was relied upon as part of the evidence in support of the application for a Mareva injunction entitled **Somatra** to introduce evidence of admissions at the meetings as part of any challenge which it might mount to the granting of the injunction. He made no such concession before the judge, but in my judgment it is both an important concession and one which is correctly made.

19. There are at least two reasons why, to my mind, the concession is correctly made. The first is that there is material in the transcripts which contradicts or appears to contradict the assertion that Mr Alireza and Mr Mustafa misinterpreted the suggestion that Sinclairs might apologise as an admission of fault. There is some such material in the transcript of the meetings, but I need refer only to the telephone conversation of the 8th October, in which Mr Leach is recorded as saying that Mr Williams would like to apologise personally "for some of the things which he acknowledges went wrong in the case", that "he agrees with my assessment and in some respects I'm sorry we perhaps didn't give our very best in this litigation", that it was not a case of a "token apology" and that "I think I've convinced him that he does have something to apologise for". I recognise that those are only very small extracts from wide ranging discussions about the case at the meetings and on the telephone and that the answer to the

question whether Sinclairs were in any way negligent would depend upon a close examination of all the facts in issue. However those quotations do show that the picture given in paragraph 29.4 of the affidavit is misleading or potentially misleading.

20. I have already mentioned the second reason, namely that Mr Weir went further than was necessary to discharge any duty to refer to the conversations in the light of the correspondence. The first reason is, however, by far the more important because it would be unjust to allow Sinclairs to rely upon the assertion in paragraph 29.4 that the proposed apology was not intended as an admission of fault and that the proposal had been misinterpreted at the meetings without allowing **Somatra** to adduce evidence to the contrary from the records of the conversations.

21. In the event **Somatra** did not apply for the injunction to be discharged, but provided security for Sinclairs' counterclaim. Mr Cran submits that in these circumstances, although **Somatra** would have been entitled to rely upon such admissions on such an application it is not entitled to do so at the trial of the action. I turn therefore to the relevant legal principles and their application to that question. There is scope for debate as to the true legal analysis, but I have reached the conclusion that, whatever the true analysis, whether it is contractual or expressed in terms of public policy, the answer is the same, namely that where a party deploys evidence of what was said on a without prejudice occasion in support of its case on the underlying merits on an application for a Mareva injunction, or, as it is now called a freezing order, that party loses the right it would otherwise have had to object to the admissibility of any admissions made in the course of the same without prejudice discussions.

Legal Principles and Application to Facts.

22. The underlying principle is not in dispute. It is that where discussions are held without prejudice, neither party is entitled to rely upon the contents of those discussions to prove an admission or admissions made by the other party in order to advance its case at the trial. It has recently been made clear by Robert Walker LJ (with whom Simon Brown LJ and Wilson J agreed), in the course of a detailed analysis of this area of the law in the unreported decision of this court in ***Unilever PLC v The Proctor and Gamble Company*** on the 29th October 1999 (at page 6), that, although the underlying basis of the rule is to exclude evidence of *admissions*, the concept of admissions must be given a wide meaning in this context so as in effect to include all matters disclosed or discussed in the without prejudice discussions concerned.

23. The reason for that approach can clearly be seen from what is now the classic statement of the relevant principle by Lord Griffiths in ***Rush & Tompkins v Greater London Council*** [1989] AC 1280 at 1299:
"The "without prejudice" rule is a rule governing the admissibility of evidence and is founded upon the public policy of encouraging litigants to settle their differences rather then litigate them to a finish. It is nowhere more clearly expressed than in the judgment of Oliver LJ in ***Cutts v Head*** *[1984] Ch 290, 306:*
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 so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They, should, as it was expressed by Clauson J in ***Scott Paper Co v Drayton Paper Works Ltd*** *(1927) 44 RPC 151, 156, be encouraged fully and frankly to put their cards on the table. ... 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.*
The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence. "

24. After quoting that passage, Robert Walker LJ said in the *Unilever* case (at page 4):
"This well-known passage recognises the rule as being based at least in part on public policy. Its other basis or foundation is in the express or implied agreement of the parties themselves that communications in the course of their negotiations should not be admissible in evidence if, despite the negotiations, a contested hearing ensues."

See also ***Muller v Lindsay***, which is another unreported decision of this court, dated the 30th November 1994, (to which Robert Walker LJ made extensive reference). The cases recognise that the rationale of the rule cannot be entirely based upon contract because, as the decision of the House of Lords in ***Rush v Tomkins*** shows, it may apply not only as between the parties to the negotiations but as between one of those parties and others. In that case it was held that an admission by A in without prejudice discussions with B was not admissible at the instance of C, which was another party to the litigation.

25. In so far as the rule is based on public policy, Lord Griffiths said this in the course of a consideration of the cases in which the courts have permitted reference to be made to the contents of without prejudice communications for various purposes (at p 1300):
"These cases show that the rule is not absolute and resort may be had to the "without prejudice" material for a variety of reasons when the justice of the case requires it. It is unnecessary to make any deep examination of these authorities to resolve the present appeal but they 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."

In the ***Unilever*** case (at pages 5 to 6) Robert Walker LJ gave eight examples of circumstances in which one or both parties have been permitted to put in evidence something said or written without prejudice. None of them is of direct relevance to the issue raised here.

26. The judge described **Somatra** 's submission as being that Sinclairs voluntarily chose to deploy without prejudice material before the court and were therefore taken to have waived for all purposes the "without prejudice privilege which would otherwise attach to the contents of the meetings and the telephone conversations". Mr Symons put the submission in much the same way before us, although it is accepted by both sides that the question is not the same as in the case of waiver of legal professional privilege. As I see it, the question can most accurately be posed as being whether Sinclairs lost their right to object to the admissibility of the contents of the without prejudice conversations at the trial by their reliance upon paragraphs 29.4 and/or 36(4) of the affidavit.

27. In so far as it is appropriate to have regard to the considerations of public policy underlying the rule, the answer seems to me to depend upon what justice requires. Would it be fair to permit Sinclairs to rely upon the contents of the conversations for the purposes of advancing their case on the merits in order to obtain a Mareva injunction without also permitting **Somatra** to rely upon the contents of the same conversations in order to resist Sinclairs' case on the merits at the trial? The authorities in my opinion help both to formulate and to answer that question, even though none of them resolves the precise point which we have to decide.

28. There is no doubt that if Sinclairs had deployed the material in paragraph 29.4 at a trial their right to rely upon the without prejudice nature of the conversations would have been lost. That is essentially for the same reason that Mr Cran correctly concedes that **Somatra** could have relied upon the contents of the conversations on an application to discharge the Mareva injunction. In ***Great Atlantic Insurance Co v Home Insurance Co*** [1981] 1 WLR 529 it was held that where part of a privileged document was read in the course of the opening of counsel for the plaintiff at a trial, privilege was waived for the whole of the document. Templeman LJ (with whom Dunn LJ agreed) said (at 537G):
"In interlocutory proceedings and before trial it is possible to allow a party to disclose a document or part of a document by mistake to correct an error in certain circumstances. ... But in my judgment the plaintiffs deliberately chose to read part of a document which dealt with one subject matter to the trial judge, and must disclose the whole. The deliberate introduction by the plaintiffs of part of the memorandum into the trial record as a result of a mistake made by the plaintiffs waives privilege with regard to the whole document. I can see no principle whereby the court could claim to exercise or could fairly and effectively exercise any discretion to put the clock back and undo what has been done."

29. In an earlier part of his judgment (at p 538) Templeman LJ approved this statement of principle by Mustill J in ***Nea Karteria Maritime Co Ltd v Atlantic and Great Lakes Steamship Corporation***, a decision made on the 11th December 1978 and only reported at [1981] Com LR 138 at 139:

"I believe that the principle underlying the rule of practice exemplified in ***Burnell v British Transport Commission*** *[1956] 1 QB 187 is that where a party is deploying in court material which would otherwise be privileged, the opposite party and the court must have an opportunity of satisfying themselves that what the party has chosen to release from privilege represents the whole of the material relevant to the issue in question. To allow an individual item to be plucked* out of context would be to risk injustice through its real weight or meaning being misunderstood."

30. I recognise that in those cases the court was considering waiver of privilege and not the use of without prejudice communications, but I do not think that the principle can be any different in such a case. Fairness requires that where a party deploys privileged or without prejudice material as part of its case at a trial the other party should be entitled, in the one case, to see the whole of the privileged document and, in the other case, to rely upon the other without prejudice material which came into existence as part of the same without prejudice process. The question here is whether the same is true where the without prejudice material is deployed, not at the trial, but at an interlocutory application.

31. The authorities show that the mere fact that without prejudice material is deployed on an interlocutory application does not entitle the other party to deploy it at the trial before a different trial judge. An example of such a case is ***Family Housing Association (Manchester) Ltd v Michael Hyde & Partners*** [1993] 1 WLR 354. In that case the plaintiffs filed evidence of the contents of without prejudice negotiations in order to resist an application by the defendants to strike the action out for want of prosecution. The question was whether they were entitled to rely on such evidence or whether they were precluded from doing by reason of the fact that the negotiations were without prejudice. It was held by this court that they were entitled to rely on it. Hirst LJ, with whom Mann and Balcombe LJJ agreed, recognised the public policy in favour of excluding such evidence but held that there was what he called (at page 363) a preponderant public policy in favour of admitting the evidence on applications of that kind. He expressed the view that to admit it would not infringe the public policy in favour of exclusion. He concluded in this way (at p 363):
"Consequently I am unable to see how exposure to the course of negotiations in this narrow context is in any way harmful to either side. If the application succeeds, the action will be at an end. If it fails, and the case proceeds to trial, the material will not be available to the trial judge and he will not be in any way embarrassed.
For the above reasons I accept Mr Bloom's submissions, which seem to me to have particular force in relation to reliance upon an alleged estoppel ... It seems to me to be manifest that a plaintiff must be entitled to rely for this purpose on any relevant statements in the without prejudice correspondence to demonstrate either conduct or an implied intimation by the defendant that he is willing for the case to proceed. "

32. Mr Cran submits that the same is true here. While justice requires that **Somatra** should be entitled to rely upon the contents of the without prejudice conversations at an application to set aside the Mareva injunction, the same is not true at a trial. **Somatra** did not in fact apply to vary or discharge the injunction, and, even if it had, the injunction would have been maintained, varied or discharged and, in each such event the material would not be available at the trial, which could and should take place before a different judge. I see the force of that submission, but I do not think that it is supported by the decision in the *Family Housing Association* case. Nor do I think that it represents the just result.

33. In the above passage Hirst LJ said that he accepted Mr Bloom's submissions. He had earlier summarised Mr Bloom's propositions as follows (at pp 361-2):
"Mr Bloom on behalf of the plaintiffs relied on the following basic propositions. (i) The admission in an application of this kind of the contents of without prejudice correspondence for the limited purpose of explaining the passage of time, and the conduct of the parties during negotiations, does not infringe the policy which lies behind the exclusion of such correspondence for other purposes and on other issues. ***The policy is only infringed if admissions etc are opened up on issues which will be before the trial judge***. (ii) Wider considerations of public policy require the disclosure of without prejudice correspondence in so far as it explains what has been going on between the parties, so far as such activity is relevant to the issues arising on an application to strike out, especially alleged inordinate and inexcusable delay. (iii) ***In so far as the exclusion is founded on agreement between the parties, such agreements should by implication be confined to the opening up of admissions and***

concessions on the merits of the issues likely to be raised at the trial, and should not extend to exclusion of material explaining delay and the conduct of the parties. (iv) Whilst public policy dictates that, in the majority of cases and in relation to the majority of issues, the details of without prejudice discussions cannot be disclosed, there is, in a residuum of cases, including the present, a stronger public policy which dictates disclosure. "

The emphasis in the above passage is mine. As I read Hirst LJ's judgment he accepted those submissions including the italicised portions.

34. He thus accepted the distinction between a case like that, where there was no infringement of the rule against the admissibility of the contents of without prejudice discussions and a case like this, where there is. The infringement in the present case is that Sinclairs opened up issues on the merits which will be the very questions to be determined by the trial judge. It seems to me that no party which has taken part in without prejudice discussions should be entitled use them to his advantage on the merits of the case in one context, but then assert a right to prevent its opponent from doing so on the merits at the trial.

35. The remaining case to which I should refer is ***Derby & Co Ltd v Weldon (No 10)*** [1991] 1 WLR 660, where Vinelott J considered the effect of deploying privileged material on an interlocutory application. He said (at pp 667-8):
"Mr Purle QC submitted that there is no general rule that when, adopting the word used by Mustill J in Nea Karteria ..., material has been `deployed' in court in an interlocutory application privilege that could otherwise be claimed in relation to that and associated material has been waived. In the instant case, he submitted, if the plaintiffs waived any privilege in the course of the application for the Mareva injunction they did so in discharge of their duty to make full disclosure and should not be taken to have waived privilege altogether; they can assert privilege at the trial. I reject that submission. There are, of course clearly contexts where a party who refers in interlocutory proceedings to the fact that he has obtained legal advice and who states the effect of that advice does not thereby waive privilege. ... In the instant, case the plaintiffs deployed Mr Baker's and Mr Di Donna's evidence in answer to the claims by Mr Comer and Mr Price as to the knowledge of the plaintiffs and the ambit of Network's retainer. Moreover those matters have been brought into issue by Mr Lyndford-Stanford."

Vinelott J held that privilege had been waived. It is true that Mr Lynford-Stanford was opening the case at the trial, but it seems to me that one of the bases of the decision was that the material had been deployed in a significant way on the application for the Mareva injunction. As I see it, the decision affords Mr Symons' argument at least some, if not decisive, support.

36. My conclusion as a matter of principle and policy is that where, in support of its case on the merits of an action, a party deploys material which would not be admissible because it forms part of without prejudice communications the other party is entitled to refer to the contents of those same communications in order to advance its own case on the merits. It does not seem to me to be just to allow the first party to obtain an advantage by relying on the without prejudice material in one part of the litigation, as here on an application for Mareva relief, where the merits are relevant, and to rely upon the without prejudice nature of the communications when the other party wished to rely upon, say, an admission made in the same without prejudice discussions at the trial, where the merits are of course also relevant.

37. The same conclusion is reached if the matter is viewed as one of implied contract between the parties. The implied contract has been variously stated in the cases. For example, in paragraph 24 above I quoted Robert Walker LJ's formulation as being an agreement that communications in the course of the parties' negotiations should not be admissible in evidence if, despite the negotiations a contested hearing ensues. Put another way, it can I think be said to be an agreement by each party not to rely upon anything said or written by the other party in the course of without prejudice communications in order to advance the first party's case on the merits.

38. As I see it, Mr Cran in effect concedes that there was a breach of whatever implied contract there was when Mr Weir relied upon the contents of the conversations in paragraph 29.4 of Mr Weir's affidavit. He submits, however, that in doing so, Sinclairs cannot be taken to have consented to **Somatra**

reliance upon Sinclairs' admissions in the conversations at the trial. I am unable to accept that submission. The position can perhaps be analysed in this way. The use of the without prejudice material which was made by or on behalf of Sinclairs in support of the application for a Mareva injunction was a repudiatory breach of the agreement that the material would not be admissible and/or that they would not rely upon it in order to advance their case on the merits. In accordance with ordinary contractual principles **Somatra** was entitled to affirm the contract and hold Sinclairs to its terms or to accept the repudiatory breach as bringing the contract to an end leaving it free to adduce the contents of the conversations in evidence. **Somatra** either has or is entitled to take the latter course and to put the contents (or such parts as are relevant to the issues on the merits) before the judge at the trial.

39. As I see it, however, the matter cannot be analysed in wholly contractual terms because of the element of public policy recognised in the cases. The essential point in a case like the present case is, in my judgment, that it would be unjust to allow one party to deploy the material for its benefit on the merits in one part of the litigation without allowing the other to do so too in another. For example, if there is an application to discharge a Mareva injunction the court may have to reach preliminary conclusions on the merits. Thus it is accepted here that an application to discharge the injunction would be likely to have involved at least some consideration of the admissions offered during the conversations in order to examine whether the assertions in paragraph 29.4 of the affidavit were sustainable. In these circumstances I do not see how it could be just thereafter to exclude the same evidence when the merits came to be considered in detail at a trial. Moreover, that seems to me to be so, even if no application is made to discharge the injunction. Any advantage gained by the applicants is gained when the affidavit is relied upon in the first place. They should not be allowed to seek that advantage on the merits by infringing the without prejudice status of the conversations without **Somatra** being allowed to rely upon the same without prejudice material to its advantage on the merits at the trial, without requiring it first to apply to discharge the injunction.

40. In all the circumstances, I have reached a different conclusion from the judge. I would hold that the contents of the conversations are admissible at the trial because Sinclairs relied upon them in paragraph 29.4 of Mr Weir's affidavit. I should add in this regard that (subject to any discrete point that may arise at the trial) I do not think that it is possible to limit the admissibility to some of the contents of the conversations. In these circumstances it is not necessary to give any separate consideration to paragraph 36(4). I would allow the appeal on the main point.

Privilege.

41. This point was not considered by the judge. By a respondents' notice Sinclairs claim privilege for all documents in their possession, custody and power relating to or arising from the meetings and telephone conversations. They make the claim under two heads, which I shall consider in turn, namely legal professional privilege and litigation privilege.

Legal Professional Privilege.

42. In Mr Rutherford's third affidavit he says that there are in existence certain documents in the above categories, namely written communications and records of oral communications between Mr Leach and other partners of Sinclairs. In paragraph 25 of his affidavit he says that he has reviewed those documents and that they are protected by legal professional privilege as follows:

    All were confidential communications which formed part of a continuum of communications aimed at keeping Mr Leach and other partners informed so that Mr Leach could advise and act on behalf of the firm as required. Mr Leach was throughout exercising professional skill and judgment as a Solicitor, on behalf of his firm. He was effectively acting as "*in-house counsel*" to SRT.

43. Against that, Mr Symons submits that the contemporary documents from 1994 show that Mr Leach was acting as managing partner dealing with a disgruntled client who was querying the size of the firm's bill and raising issues as to the way in which Sinclairs had acted. Mr Leach was not advising Sinclairs as to its rights against **Somatra** and the other ABT companies. Reliance is placed upon part of what Mr Leach said at the meetings. It is submitted that if Sinclairs were a firm of accountants Mr

Leach's role as managing partner would have been the same, but there would have been no question of a claim for privilege.

44. I was at one time attracted by Mr Symons' submissions on this point. A consideration of the recordings shows that Mr Leach was in important respects acting as Sinclairs' managing partner and in that capacity trying to settle **Somatra** 's claim against them. However, I do not think that the analogy with the position of the managing partner of a firm of accountants is apt because, as Mr Cran points out, Mr Leach is in fact a lawyer and thus in a position to give legal advice to the partnership. Mr Rutherford has deposed to having considered the relevant documents and to the fact that Mr Leach was throughout exercising professional skill and judgment as a solicitor on behalf of Sinclairs. If that evidence is accepted, even if Mr Leach was at the same time acting as managing partner, Sinclairs are I think entitled to claim privilege for the classes of document referred to by Mr Rutherford. On balance, I have reached the conclusion that it would not be appropriate to go behind Mr Rutherford's affidavit and that his evidence should be accepted. In these circumstances, not without hesitation, I would uphold the claim for privilege on this ground.

Litigation Privilege.

45. So far as I am aware, the conclusion just reached makes it unnecessary to consider this head of privilege separately.

Waiver of Privilege.

46. There is a suggestion in **Somatra** 's skeleton argument that there has been a waiver of the right to privilege, but the point was not pursued in argument and I say no more about it.

Conclusion.

47. For the reasons which I have given I would allow the appeal and hold that Sinclairs are not entitled to rely upon the without prejudice nature of the conversations at the trial because they themselves relied upon them in support of their application for a Mareva injunction. On the other hand, I would uphold Sinclairs' claim for privilege for the documents referred to in paragraphs 42 and 43 above.

Lord Justice Waller:

48. I agree. On the main point argued on the appeal, the question whether the contents of "without prejudice" meetings and conversations may now be referred to, I would just add one point by way of emphasis.

49. Where a mareva or freezing injunction is being sought, the merits of the underlying dispute will be relevant. If that injunction is obtained, a cross-undertaking in damages will invariably be required. That is a factor which to my mind makes it clear beyond per-adventure that it would be unjust to allow a party to deploy without prejudice material to support the merits of his case in order to obtain such an injunction, but be entitled to prevent the other party deploying part of the same material to attempt to defeat the case on the merits at a trial. A party who is attempting to defeat a case at trial is also seeking to demonstrate thereby that the injunction granted on an interlocutory basis should not have been granted in the first place and will be seeking an order for an enquiry as to damage which flows from the undertaking given to the court.

50. I agree with my lord that the material in paragraph 29.4 of the affidavit of Mr Weir was being deployed on the merits in order to assist in the obtaining of the mareva or freezing injunction. Once that conclusion is reached I agree with my lord that it will be unjust if **Somatra** are not entitled to deploy part of that same material at the trial.

Order:

1. Appeal allowed in part; dismissed in part; respondent to pay 80% of the claimant's (appellant's) costs of the appeal, such costs to be paid within 28 days.
2. The respondent to pay 70% of the costs of the application;
3. There to be an interim award of £27, 500
4. Application for permission to appeal to the House of Lords refused.