Smiths Group plc v George Weiss [2002] ADR.L.R. 03/22

JUDGMENT : Mr Roger Kaye Q.C.(Sitting as a Deputy Judge of the CH.Div High Court) 22nd March 2002.

The Application :

1. I have before me an application by the defendants to expunge certain material from the claimants' expert witness's written report on the grounds that the objected material mentions or refers to privileged "without prejudice" material which arose in earlier mediation proceedings between the parties.

2. The Background :

3. The background is as follows. By a written agreement made on 31st October 1997 between the claimants and the defendants, the first claimant agreed to purchase the entire share capital of an English company called pneuPAC Limited ("pneuPAC") and the second claimant agreed to purchase the business and assets of pneuPAC Inc, a United States company.

4. By an action commenced on 20th October 2000 the claimants seek damages for breach of warranties in the purchase agreement or on grounds of misrepresentation. The claims as presently pleaded are mainly based on:
    1. The allegation that certain employment costs were materially understated in pneuPAC's audited accounts for the year ended 30th April 1997 ("the 1997 accounts") so much so as to mean that they did not give a true and fair view of the affairs of pneuPAC;
    2. Because there was a material deterioration and a loss in the sustainable operating profit for the first six months of the following accounting period to the 31st October 1997.

5. The main procedural steps in the litigation after the proceedings were begun as follows. Following commencement of the action the defendants served a request for further information under Part 18 of the Civil Procedure Rules on 14th November 2000, a defence on 17th November 2000, and a further request for information on 7th December 2000. The two requests were responded to on 13th and 21st December 2000 respectively. On 23rd May 2001, standard disclosure under CPR31.6 was ordered. Disclosure lists were exchanged on 27th July 2001. Witness statements were exchanged in November 2001 and expert reports in the following February. The trial is due to commence in the week beginning 15th April next with a time estimate of between three and four weeks.

6. The basis of the allegation that the employment costs were understated arises as follows. Certain of pneuPAC's staff were shared with the other two companies in the same group, namely K.V. Limited and Instruments and Movements Limited. The claimants alleged that the amount of the employment costs were not allocated properly between these three companies. What, for example, had to be determined was, (1) how much time did each employee work for each company in the group and, (2) was that time properly, i.e. truly and fairly, reflected in the accounts? The claimants say it was not. The defendants say it was.

7. Neither side has been able to locate a large number of documents relating to this aspect of the case for reasons which are disputed. There is also a dispute as to the significance of this lack of documentation. However, whether or not that lack of documentation is to be regarded as a serious deficiency, the claimants seek either to make good or at least to support the alleged under-statements in the 1997 accounts by reconstructing the position of each individual employee who worked in whole or part for pneuPAC in the year ended 30th April 1997, partly by documents, and partly by witness evidence. The defendants say this exercise is meaningless, but in order to attempt to meet the claim, which they say is groundless, the defendants have attempted to undertake the same exercise.

8. On 4th February 2002, experts' reports on each side dealing with this attempt at reconstruction were exchanged. The experts retained by either side, a Mr. Starkey of KPMG for the claimants and a Mr. Hall of Lee & Allen for the defendants, were retained at an early stage, initially to advise but later as expert witnesses for the intended trial of the action.

9. In April and May 2001, the parties attempted to settle their differences. They agreed to do this by mediation. They entered into a written agreement made on or about 20th April 2001 to submit to

mediation under the Arbitration and Commercial Initiative ("ACI scheme") which incorporated, with certain modifications, the ACI rules for alternative dispute resolution.

10. In particular, the agreement expressly incorporated rules 48.1 and 48.2 (with a gloss which is not relevant for present purposes) which expressly provide as follows:
"48.1 The ADR process is a bona fide attempt to resolve the disputes between the parties, and consequently the entire process is conducted on a without prejudice basis save for the purposes of enforcing any settlement agreement. All communications, documents and meetings shall be deemed private and confidential. No information arising from the process, including the fact that an ADR process is to take place or has taken place, shall be disclosed by the parties or the Neutral to any non-party."

Pausing there, the reference to "the Neutral" is, of course, to the mediator. Rule 48.2 provides as follows:
"No statement, document or other information whether oral or in writing made in or arising out of the process shall be discoverable or admissible in any other proceedings, whether in a court of law, in arbitration or otherwise howsoever save that any statement document or other information, which is otherwise discoverable or admissible shall not become non-admissible merely by virtue of its use in or in connection with the ADR process."

11. I shall return to this rule later. The meditation started on 24th April 2001. At the end of the first day the parties' respective solicitors met and agreed a manner of proceeding. This was reduced into a written note and signed by each side's solicitors. Their agreed procedure was expressed and expressly to be "part of the mediation process on a confidential and without prejudice basis". The procedure envisaged, among other things, that the parties' respective accountancy experts, Mr. Hall and Mr. Starkey would attend meetings with employees and former employees with a view to establishing the work done wholly or partially for pneuPAC during the year ended 30th April 1997 and the consequential effect of that investigation on the 1997 accounts and would report accordingly. The mediation was then to be reconvened before 18th May 2001. Much of the information they were to establish was obviously at the heart of the dispute between the parties. Pursuant to those arrangements the experts met and interviewed a number of individuals and agreed a programme of further interviews which was to take place and did take place on 15th May in two places. First, at Milton Keynes, and then at Luton with each expert attending at each place.

12. Manuscript notes were made of these meetings and interviews by each side's expert according to an agreed format filled in as each employee was interviewed. Those prepared by the defendants' expert were typed up and commented on by KPMG. There is a dispute as to whether copies of the interview notes made by KPMG were ever provided to the defendants or at least to the defendants' solicitors. At the meetings held on 15th May, the persons interviewed were apparently told informally before each interview that the interview was without prejudice and that the material would not be used in evidence.

13. Despite the fact that these interviews were clearly part of the mediation process, it was no doubt found by both sides to be very fruitful as a fact gathering exercise, somewhat surprisingly, Mr. Starkey stated in his witness statement on the present application that from May 2001 he worked on the assumption that the interview notes would form the basis for their expert opinions on the disputed employment costs. It seems reasonable to infer from the context of his witness statement that he was there meaning expert opinions for the purposes of the legal proceedings. This was surprising for at least two reasons. One, because the mediation proceedings were both contractually and by implication without prejudice to those legal proceedings and, two, because if the mediation had been successful (it was not) there would have been no necessity for expert opinions. As a result of this agreed procedure the experts duly reported, but the parties could not agree and mediation foundered and the parties turned their attention back to the legal proceedings.

14. The issue of disclosure in a general sense arose almost at once. Ironically it was the defendants who first took the view, and so indicated to the claimants' solicitors, that the documents produced, and the interview notes made, during the mediation process should be disclosed. The claimants' solicitors disagreed. They wrote on 26th July 2001 as follows: *"You have indicated that you consider that interview notes taken during the accounting exercise conducted by KPMG and Lee & Allen are discloseable in the*

proceedings. We consider that there is no question that all of the papers produced during the accounting exercise conducted by KPMG and Lee & Allen, including interview notes, were produced and exchanged on a without prejudice basis. The accounting exercise in question formed part of the mediation process. Accordingly, those documents should not be included in any disclosure statement ***at this stage****."*

And I emphasise the words "at this stage". They went on: *"We are considering with our clients whether they should in any event consent to the interview notes being disclosed in the proceedings and will revert to you on this issue in due course."*

And I emphasise those last words: "*and will revert to you on this issue in due course*".

15. On 27th July 2001, disclosure lists were exchanged. They were voluminous, but the defendants' disclosure statement was made in accordance with Practice Form N265 (See Civil Procedural Rules 31.10 and the notes thereto in the White Book). Neither the disclosure statement nor the list contained any statement asserting a right to withhold inspection. (See CPR31.19 and the Practice Direction Paragraphs 4.5 to 4.6 to which I will return).

16. In their covering letter of the same date enclosing the disclosure list the defendants' solicitors acknowledged the fax of 26th July. They went on: *"As regards the notes of the interviews conducted by KPMG and Lee & Allen, we do not understand why you contend that these are covered by the without prejudice imprimatur. These interviews were not part of the negotiation process. What those third parties said was in no sense related to any attempt to settle the proceedings. It was simply part of a factual investigation.*

"This is not the question that we consider justifies huge controversy, nor indeed does it arise at this moment since we can return to it at a much later stage." ...

"Accordingly in our disclosure lists there is a section dealing with these documents."

17. It was on this basis, the defendants' solicitor says in his witness statement, that the documents were listed. As it was put in the defendants' solicitors' witness statement, paragraph 17: *"On this basis the without prejudice material was listed in the defendants' disclosure statement. I did not consider this to be of great importance since the documents were common to both parties, and I have always understood the discovery under the old rules of the Supreme Court and disclosure under the Civil Procedure Rules was concerned only with those documents we did not object to producing or permitting the other side to inspect and did not in any way relate to whether such documents were admissible in evidence."*

18. Whether this view was and is justified is one to which I shall also return. The letter of 27th July 2001 also contained (at the end) an express disclaimer of any implication that might be read into documents included in the list in the following terms: *"To the extent that these lists contain items in respect of which privilege might have been claimed no general waiver of any kind is to be implied."*

19. The defendants' solicitors did indeed return to the issue of disclosure of the mediation material. First, in a letter dated 15th August, which said the following: *"We have reflected further on your letter of 26th July and our letter the following day. KPMG and Lee & Allen undertook this work before they were formally appointed as court experts. However, the primacy of the duty that they owe to the court and, in particular the requirement placed upon experts by the practice direction to CPR 35(PD1.2(2) requiring them to give details of any instructions or other material which they have relied on in making their report, makes it clear that without prejudice (or as we contend not) these earlier notes must be taken into account by them in preparing their report. Discussion beyond this seems academic. Yours faithfully."*

20. The practice direction referred to provides as follows. It is the Practice Direction to Part 35, paragraph 251.2(2) provides that: *"...an expert's reports must:*
"(2) give details of any literature or other material which the expert has relied on in making the report."

21. A similar statement was made in a later letter concerning exchange reports dated 24th August 2001. I shall not read the whole of this letter, but in a small paragraph on the second page of the letter to the claimants' solicitors the defendants' solicitors said this: *"At no little effort and expense your clients got their wish in the course of the abortive mediation. In their report the experts have to take into account the direct contact*

with the various witnesses they then made together. All the effort that has gone into this on both sides has resulted in little substantive progress beyond your client's original allegations."

22. On 31st August following in a long letter dealing primarily with a sequence of exchange of experts' reports and other matters, the claimants' solicitors wrote to the defendants' solicitors that they had disclosed every document on which they wished to rely.

23. The defendants' solicitors replied on 7th September that amongst other things said this about that passage: *"We note your assertion that you have already disclosed all relevant information which your experts intend to rely on and it is also noted that this assurance is given even before the further searches which your clients are undertaking are complete."*

24. The claimants' solicitors, in their letter of 31st August, had not, in fact, said that they had disclosed all relevant information upon which their experts intend to rely, but had simply said: "We have disclosed to you every document upon which our clients will rely" (my emphasis). None of the interview notes or other mediation material was, however, included in the claimants' disclosure list.

25. The next significant step taken in the proceedings was the service of a notice to admit facts by the claimants' solicitors in September 2001 in which they sought admissions about lists of those employees who had worked exclusively for pneuPAC.

26. The defendants did not apparently respond to this notice or did not respond as quickly as the claimants' solicitors might have liked because the claimants' solicitors sent a chasing letter on 26th September 2001 which contained the following paragraph: *"... you already know the identity of those employees in respect of whom there will be argument that an apportionment should be made and what order of apportionment our clients contend should be made. "*

27. This information is detailed in the experts' interview notes which you disclosed in the proceedings. Our client's position has not changed. What we are asking your clients to confirm is that they have not changed their position. At the time of the interviews your clients provided us with a list of employees: 'Headed disputed staff' whose costs your clients contended should be apportioned to I&M or KV and not charged in full to pneuPAC. The simple question you are being asked is has that list changed?"

28. In November some 40 witness statements were exchanged: 15 by the claimants, 25 by the defendants. None of these referred to the interview notes contained in the defendants' list but, one, that of the personal assistant to pneuPAC's finance director submitted on behalf of the claimants contained the following at paragraph 65 of the witness statement: *"I would estimate that in the 1997 financial year that I spent approximately 60% of my time on pneuPAC matters. I believe that that estimate is conservative and that it is likely that in fact I spent more rather than less of 60% of my time on pneuPAC matters. I have been shown a note of an interview conducted by KPMG and Lee & Allen with Barry Kentish [that is the finance director] in which he estimates that I spent 80% of my time on pneuPAC matters. A copy of the note appears at p.93."* [of the exhibit number]

29. The exhibit, it now seems, was a note made by KPMG of the interview with Mr. Kentish as part of the mediation interview process. It is common ground that the claimants' solicitors did nothing else, other than I have previously indicated, to indicate whether or not their earlier position that the mediation material was without prejudice had changed, until much later as we shall see. They did not, for example, as I have said, disclose the interview notes in their own disclosure list, nor did they serve a supplementary disclosure list referring to the KPMG interview notes, or indeed to any of the mediation material.

30. The claimants now submit, however, that in view of the listing of the interview notes in the defendants' disclosure list, and by referring to them as they did in their own letters, the defendants led the claimants to believe that they, the defendants, would be using that material. Relying on that, the claimants proceeded with their experts' reports and preparation of witness statements on the assumption that the mediation documents were, so to speak, out in the open. By January 2002 the defendants' solicitor, following a sight of the defendants' expert's report in draft, had further revisited the matter and came to

the conclusion that the mediation material was indeed without prejudice and so recorded his views in a letter to the claimants' solicitors of 18th January, shortly prior to the exchange of the experts' reports. The claimants' solicitors had by this time (they say for the reasons above mentioned) also shifted their position and replied on 21st January indicating for the first time unequivocally to the defendants that, owing to formal disclosure, the documents were now on the record and would be referred to by the claimants in the forthcoming proceedings.

31. Both sides therefore had entirely swapped places in their original stance. As I have said, experts' reports were exchanged on 4th February. That, for the defendants did not refer to the mediation material, that, for the claimants did. So the battle lines were and are drawn on the issue as to whether they should be included.

The respective arguments :

32. The respective arguments of both sides thus can be set out relatively briefly. The defendants' position is this. They submit that the interview notes were brought into existence as part of a clearly without prejudice process and are therefore inadmissible in evidence. They further submit that the duties of disclosure under CPR31 meant they had to list them, but that does not make them admissible in evidence at trial. Indeed, whilst their original position had been that the documents were admissible, they recognised that the claimants objected to that and, accordingly, they have prepared their case on the footing that they were not admissible.

33. Further, they submit that contrary to the indication given in the claimants' solicitors fax of 26th July 2001, at no time do the claimants unequivocally or clearly resile from their own original position that the notes were without prejudice and inadmissible, at least up until 21st January 2002. They themselves were led to believe at the outset that the claimants' position was that interview notes were inadmissible and acted accordingly. It is therefore not now too late to alter their original stance.

34. The claimants' current position on the other hand is that the mediation material was indeed without prejudice in origin, but that by listing the material in their disclosure letter and by referring to this material in the other letters I have mentioned up to their change of heart in January 2002, shortly before exchange of reports, they were led to believe that the defendants were going to or intended to use the mediation material as part of the trial and, accordingly, relying on that they prepared their own witness statements and reports accordingly, and the defendants must therefore be taken to have waived any objection they might otherwise have had to the use of such material.

35. As a subsidiary argument, the claimants submit that by listing the interview notes the defendants are in breach of the mediation agreement, and by in effect threatening to use that material at trial, which it is submitted is in substance how the correspondence is to be viewed, the defendants committed an anticipatory breach of such significance that this entitled the claimants to regard the mediation agreements as repudiated which they accepted and used the material 16 accordingly.

General Principle :

36. The legal principles applicable to this case are not really in dispute. The general principle has been relatively recently stated in the judgments of the Court of Appeal in **Somatra Limited v Sinclair Roche & Temperley** [2000] 1 W.L.R. p.2453 where Clarke L.J. said at p.2461, starting at paragraph 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 L.J., (with whom Simon Brown L.J. and Wilson J. agreed), in the course of a detailed analysis of this area of the law in **Unilever Plc v. The Proctor & Gamble Company** [2000] 1 W.L.R. 2436, 2448-2449 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 v. Tompkins Limited v. Greater London Council** [1989] A.C. 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 than litigate them to a finish. It is nowhere more clearly expressed than in the judgment of Oliver L.J. in ***Cutts v. Head*** *'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 that is 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 Companv v. Dravton Paperworks Limited, to 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."*

"After quoting that passage, Robert Walker L.J. said in the Unilever case:

> *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 negotiations should not be admissible in evidence if, despite the negotiations, a contested hearing ensues. (See also* ***Mullah v. Lindsev & Mortimer*** *to which Robert Walker L.J. made extensive reference)'*
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> *"The cases recognise that that rationale of the rule cannot be entirely based on contract because, of the decision of the House of Lords in* ***Rush & Tompkins Limited v. GLC*** *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.*
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> *"In so far as the rule is based on public policy, Lord Griffiths said this at p.1300 in the course of a consideration of the cases in which the courts have permitted reference to be made to the contents and without prejudice communication for various purposes:*
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> *'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 to 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'.*
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> *"In the* ***Unilever*** *case, Robert Walker L.J. gave eight examples of circumstances in which one or both parties have been permitted to put in evidence something said or written without prejudice."*

37. It is also common ground that that principle extends to the material collected during part of the mediation process in this case. In so far as the principle is based on admissions, it has long been recognised that the court may in an appropriate case permit a party to withdraw an admission made in error during the course of the proceedings and before trial if no injustice would result (See, for example, **Birds v. Birds Eye Wall's Limited** The Times, 24th July 1987. Court of Appeal and now CRP Rule 14.1(5)) So too where documents have been mistakenly produced. See **Great Atlantic Assurance Company v. Home Insurance Company** [1981] 1 W.L.R. 529 Court of Appeal at p.537 where Templeman L.J. (as he then was) and with whom Dunn L.J. agreed, said in a passage quoted in the **Somatra** case at p.2463: *"'In interlocutory proceedings and before trial, it is possible to allow a party who discloses a document or part of a document by mistake to correct the error in certain circumstances."*

38. Exceptions to the general principle. It is also clear from **Somatra** and the other authorities that the general principle is subject to exceptions. I have already referred to the examples given by Robert Walker L.J. in the **Unilever** case. But as I read the authorities, these are examples.

There may be others, for example, where one party has led another to believe the right to object was being waived. Indeed, one of the examples given in **Unilever** related to estoppel. The third example given in that case by Robert Walker L.J. at p.2444 was as follows:

"Even if there is no concluded compromise, a clear statement which is made by one party to negotiations and on which the other party is intended to act and does in fact act may be admissible as giving rise to an estoppel. That was the view of Neuberger J. in ***Hodgkinson & Corby Limited v. Wards Mobility Services Limited*** *[1997] F.S.R. 178-191, and his view on that point was not disapproved by this court on appeal." to be dissenting in any way from the broad proposition that where one party has clearly led another to believe by some statement or representation on which the other parties intended to act, that the representator's right to object to the use of a document in evidence on grounds of privilege was waived or withdrawn, and the other party does in fact act on I did not understand Mr. Joffe Q.C. for the defendants that representation, that may give rise to an estoppel from which the representor cannot resile if it would be unconscionable for him to do so. "*

The Test. :

39. Having regard therefore to the authorities cited to me, the real question here in my judgment is whether it would in the circumstances be fair and just to allow the claimants now to rely on mediation material. This was the test applied in **Somatra.** See p.2462, paragraph 27. The facts of that case were briefly that in 1994 the claimant settled an action in which it had been claiming substantial damages from a marine insurer. A dispute arose between the claimant and its solicitors over unpaid fees and the conduct of the litigation. A number of without prejudice meetings and communications took place which the claimant secretly recorded.

40. The claimant then commenced proceedings for breach of contract and negligence against the solicitors and the solicitors counterclaimed for unpaid fees. An ex parte application for a Mareva injunction was made, and at that application the solicitors relied on the contents of the without prejudice discussions in an attempt to expose the weaknesses of the claimants' claim. On an application by the claimant and the other defendants by counterclaim for an order that the solicitors disclosed all the documents relating to or arising from the discussion on the ground that the solicitors were no longer entitled to rely on the fact that they were without prejudice, the judge held that the contents of the discussions would still be inadmissible at trial and he refused the application.

41. On the claimants' appeal, the Court of Appeal allowing the appeal in part, held that a party to litigation was not entitled to rely upon the contents of without prejudice discussions with another party in order to advance its case at trial unless subsequent conduct by the other party entitled it so to do. But that where both as a matter of implied contract and public policy in support of its case on the merits of an action, a party deployed material which formed part without prejudice communications, the other party should be entitled to refer to the contents of the same communications at trial in order to advance its own case on the merits. Accordingly, the solicitors were not entitled at the trial to rely on the without prejudice nature of those discussions since they had themselves relied on those discussions to support the merits of their case when applying for their Mareva injunction. At p.2462 Clarke L.J. posed the test thus at paragraphs 26 and 27: *"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?"

42. In so far as the claimants in this case rely on estoppel as part of their argument, it really seems to me to come to the same thing. If there was a clear and unequivocal representation that the defendants were intending to use the mediation material, and it was one on which the defendants were intending to act and did act, would it now be unconscionable, would it now be unfair or unjust, for the claimants to resile from that.

Have the defendants lost their right to object?

43. I therefore now turn to consider whether indeed the defendants have lost their right to object. The starting point, in my judgment, is to recall that the interview notes came into being as part of a process that was plainly intended to be without prejudice at least on two grounds. First, because it was, as it is common ground, a bona fide attempt by both sides to settle their dispute. Second, because they expressly agreed in both the mediation agreement itself, in the rules they agreed to be bound by and in the further agreement of 24th April 2001, that the material brought into being as part of that process should be so regarded. That was plainly the effect of the opening words of the document in which they set out their agreed procedure by which they would investigate the employment costs, namely that the investigation will be done on a confidential and without prejudice basis.

44. This has important implications in my judgment. Mainly that the court should be slow, both for the reasons that that is what the parties agreed, as well as for the public policy reasons referred to in the **Somatra** case, to hold that the without prejudice status of the material brought into being in accordance with the agreed process has been lost except in clear and unequivocal circumstances. Moreover, although I do not rest my decision exclusively on this point, it is also worth remembering that the confidential and without prejudice nature of the employee interviews was apparently underlined by the informal assurances given to those interviewed prior to their interview.

45. It is next appropriate to consider the affect of the letters passing between the solicitors between July and September 2001 that I have mentioned, and the disclosure list. Separate issues concern the defendants' disclosure list to which I shall return in a moment. But the context in which that list was served is important. It is easy to approach the letters and construe the language in them a little as one approaches a lease or other written instrument, but that in my judgment would not be the right approach and, to be fair, neither side have in my view rightly sought to do that.

46. The correspondence must be approached fairly, standing back a little to see what in substance is being written or proposed by either side. Thus viewed, the letters to which I have already mentioned disclose fairly, in my judgment, the following. The claimants' stance as apparent from the fax of 26th July quoted above was that they were contending that the interview notes and the other mediation material was without prejudice, but that they would consider whether in any event the interview notes should be disclosed and would revert. The whole tenor of that fax was that this was an issue which could be resolved at a later stage. The defendants disagreed and thought they should be disclosed. The claimants submitted that the defendants' letters shows that they intended to use the material in evidence in their expert's report, and they made that, they submit, apparent, in particular, by their letters of 27th July, 15th August and 24th August. I disagree.

47. In my judgment, the defendants were maintaining that the interview notes <u>should</u> be disclosed and that it was something that the experts should list in their report as having relied on. They were not in my judgment saying that they <u>would</u> rely on them, nor were they threatening to do so. They were seeking in my view to persuade the claimants to change their view. They were, as Mr. Joffe submitted, carrying on the debate in the correspondence. The disclosure list sent with the letter of 17th July must be viewed in that context. The defendants felt that the notes should be disclosed in that list. It did not follow that they would be admissible in evidence. The claimants' position had been, and to all outward intents and purposes, was indeed that the notes could not be used in evidence. The defendants could not ignore that.

48. I then turn to the list itself in the context of the correspondence. The old rule prior to the introduction of the Civil Procedure Rules was that documents were to be discovered in accordance with the Rules of the Supreme Court, 0.24.

49. These required the party to list documents which advanced his own case or that of his opponents and which might damage is own case or that of his opponents or might lead to a train of enquiry having either of these two consequences. (See the well known case of **Compagnie Financiere et Commerciale Du Pacifigue v. Peruvian Guano Company** (1882) L.R. 11 Q.B.D. 55.

50. This was thought unsatisfactory and disproportionate in that it led to huge amounts of documents having to be disclosed at great cost to the parties and at some harm to the international competitiveness of the English legal system compared with the procedure adopted in many foreign countries. (See the Access to Justice Final Report, Chapter 12).

51. The recommendation therefore was to retain the discovery process in a more limited form. That process now called "disclosure" is to be found in the Civil Procedure Rules Part 31. Disclosure is made by a party stating that the document exists or has existed (See CPR 31.2). Where a document is disclosed the opposite party has a right of inspection unless the disclosing party has a right or duty to withhold inspection See CPR r.31.3. Standard disclosure as was ordered in this case requires a party to disclose only:

" (a) the documents on which he relies; and
(b) the documents which:
"(i) adversely affect his own case;
"(ii) adversely affect another party's case; or
"(iii) support another party's case; and
(c) The documents which he is required to disclose by a relevant practice direction."

Disclosure is generally made by a list in Practice Form N265. The procedure is set out CPR 31.10 which provides so far as relevant as follows:

"(1) The procedure for standard disclosure is as follows.
"(2) Each party must make and serve on every other party a list of documents in the relevant practice form.
"(3) The list must identify the documents in a convenient order and manner and as concisely as possible.
"(4) the list must indicate:
"(a) those documents in respect of which the party claims a right or duty to withhold inspection and
"(b)(i) those documents which are no longer in the parties control; and
"(ii) what has happened to those documents."

(Rule 31.19(3) and (4) require a statement in the list of documents relating to any documents inspection of which a person claims he has a right or duty to withhold.

"(5) The list must include a disclosure statement."

52. Rule 31.19(3) complements this and provides: *"A person who wishes to claim that he has a right or duty to withhold inspection of a document, or part of a document must state in writing*
(a) that he has such a right or duty; and
(b) the grounds on which he claims that right or duty."
"(4) The statement referred to in paragraph 3 must be made
(a) in the list in which the document is disclosed; or
(b) if there is no list, to the person wishing to inspect the document."

53. Under the old procedure, the practice was to make discovery by a list divided into two parts. Part 1 contained the documents to which there was no objection to inspection. Part 2 contained those to which inspection was objected. The inclusion of a document, however, in Part 1 did not mean it thereby became admissible in evidence. In **Sampson v. John Bodev Timber Limited**, unreported Court of Appeal, 11th May 1995, the Court of Appeal had to consider whether the inclusion of a letter objected to on grounds of privilege in Part 1 made it admissible in evidence. The Court of Appeal held it did not. Sir Thomas Bingham, the M.R. (as he then was) said this at p.7 of the transcript: *"Mr. Jackson then argued that even if the letter was prima facie inadmissible, it became admissible as a result of the defendant's inclusion of the letter in Part 1 of Schedule 1 of its list of documents as a letter which it did not object to producing. I do not accept this argument. In **Rabin v. Mendoza** Denning L.J. described as undoubted the proposition that production may be ordered of documents even though they may not be admissible in evidence. He did, however, hold that where documents had come into being under an express or tacit agreement that they should not be used to the prejudice of either party, an order for production will not be made. It may be observed that in the ordinary situation inter partes production is unlikely to be an issue since the other party*

*will already have either the original or a copy of relevant letters. In **Rush v. Tompkins** Lord Griffiths said but the right to discovery and production of documents does not depend upon the admissibility of the documents in evidence. (See **O'Rourke v. Derbyshire**) The Supreme Court Practice 1995 treats the without prejudice rule as relating to admissibility and not production. (See Para.24(5)(17)) It seems to me clear both on authority and in practice that the listing of letter in Part 1 of schedule 1 of the List of Documents irrespective of whether it could or should be more appropriately listed elsewhere does not have the effect of rendering the document admissible if it otherwise inadmissible."*

54. Lord Justice Evans said this about that issue at p.13: *"Although on examination the defendant's solicitors inclusion of the May 28ht letter in schedule 1, part 1 of their list was not inconsistent with the claim for privilege, this nevertheless in my judgment was a feature of the case which justified the barrister in obtaining the court's ruling."*

55. Lord Justice Aldous, also drawing the distinction between listing production and admissibility said this at p.19: *"True, the letter was included in Part 1 of schedule 1 of the defendant's list of documents and that notice was given in the list that it could be inspected, but that did not render it admissible in evidence, though it may have amounted to a waiver of privilege. I therefore believe that the judge rightly concluded that the letter was not admissible in evidence."*

56. The claimants submit that the new procedure under the Civil Procedure Rules has altered that position and now renders, in effect, the inclusion of a document in a list of standard disclosure admissible in evidence. I do not agree. It is plain that the rules contemplate that a document might be included to which objection could be made. True, it is that no statement of objection was included in the list, nor were the grounds of the objection stated clearly or at all in the letter of 27th July. But the letter of 27th July by the defendants to the claimants' solicitors which served the disclosure list contained the general reservation at the end and the correspondence made it plain in my judgment that the defendants felt the documents should be listed but it did not follow that they would be used in evidence. This was an issue which could be returned to, both they and the claimants had indicated, at a later stage. This was common ground. It, of course, had to be resolved at a later stage and, in any event, by the time of trial because the claimant's position, as understood by the defendants from the fax of 26th July, was that the claimants were saying the documents were without prejudice and therefore inadmissible and could not be used at the trial.

57. I see therefore nothing inconsistent in what the defendants did with the status of the documents being preserved as "without prejudice" at trial, and therefore inadmissible, if the parties could not in the meantime otherwise agree or the court ruled. Neither do I see the later letters of August or September as altering that position fairly read. The inclusion of the interview notes therefore in the disclosure list of the defendants in the context of these letters did not in my judgment amount to an alteration of the privileged status of the documents.

58. The claimants also argue as part of their subsidiary point that the defendants were in breach of the mediation agreement in disclosing the documents because this was forbidden by rule 48.2 of the incorporated rules which I have already read. Again, I disagree. These rules cannot have overruled the statutory process requiring each side to make proper and lawful disclosure of its documents. As I have said, listing the documents does not necessarily make them admissible. I do not therefore regard the listing as such a breach. Nor as I have I hope made plain that the letters of July to September fairly read in my judgment amount to a threat that the defendants would use them even though the letter of 15h August was copied to their expert. The letters, as I have said, were in my judgment advancing the debate by the defendants and seeking to persuade the claimants to change their mind. That being so, the letters did not, in my judgment, amount to an anticipatory breach of the mediation agreement by the defendants.

59. The position then, before the notice to admit, in summary, was that the parties had adopted different stances, the claimants against disclosure and the defendants in favour.

60. The claimants did not include any of the interview notes in their list. The defendants did as they thought, and rightly in my view namely that they had to. But that did not amount to a representation that they would be using the documents in evidence, or at least one not so clear and unequivocal as to amount to a representation that might give rise to an estoppel or waiver of a right to object. They were making a proposition to the claimants.

Do the subsequent events alter matters?

61. The claimants' service of a notice to admit facts in my judgment did not. It was not inconsistent with the stance that they had to obtain the evidence gained by the without prejudice process by other means, and therefore did nothing equally unequivocally to indicate to the defendants that they, the claimants, had changed their position. As to the witness statement, that is more finely balanced. The defendants' solicitor said this about the inclusion of the KPMG note in the witness statement: *"This was the first time I had seen the item exhibited. It was not sent to me by Lee & Allen. Hence it was not included among the documents listed in the defendants' disclosure statement. Mark Stevens of Lee & Allen confirms that this note was made by Emma Howell formerly Kalkin of KPMG. On receiving Miss Jones' witness statement and from what she said about this document in paragraph 65 of her witness statement it seemed to me that this was effectively a KPMG file note and a piece of unimportant hearsay which could be dealt with at trial. She did not even state who made the note. I also noted that this piece of paper sought to record a view that she spent 80% of her time on pneuPAC matters whereas her estimate was that she spent only 60% of her time in this way. It seemed to be at odds with her own evidence. All in all, I thought it was simply a piece of carelessness on the claimants' part."*

62. I should, of course, add that what the witness had exhibited was an interview note not of her own interview but of somebody else's interview and a note that had not been included in the defendants' disclosure list. The service of that witness statement, and indeed all the witness statements, were not served with any letter from the claimants stating in clear and unequivocal language that they had decided to change their earlier stance. In my judgment, in the context of some 15 witness statements from the claimants, one of which contained the small reference I have mentioned, does not amount to such clear evidence to show that the claimants had changed their view or themselves altered the position indicated in their earlier fax of 26th July 2001, or such that on that ground alone the defendants ought to be, as it were, condemned. This material has not been used in evidence and it is not too late to object to it.

63. In my judgment, therefore, the defendants did not by their conduct so clearly indicate that they would be using the material in evidence, as opposed to advancing the argument that they should be allowed to, as to amount to a representation that they would. In short, they cannot be fairly said to have led the claimants to that belief. Since I have also held that the defendants were not in breach of the mediation agreement, nor in anticipatory breach of it, that disposes of the claimants' subsidiary argument.

64. The contractual analysis does not quite end there. What it seems to me the defendants were in substance and effect saying is proposing or offering a variation of the mediation agreement, i.e that the interview notes should be used not would be used. But, as I hold, looking at events as a whole, that offer was never accepted before it was withdrawn or at least, if it was accepted, the acceptance of that offer was never clearly communicated to the defendants.

65. I do not overlook the effect that this judgment may have on the claimants. They will have to expunge the offending material and references from their expert evidence and witness statements. They will no doubt have to make further enquiries. Time is short. The fact finding exercise as part of the mediation process was no doubt useful, but usefulness does not make inadmissible evidence admissible.

66. The claimants are to some extent the authors of their own misfortune. Far from the defendants leading the claimants up the garden path, the claimants never came back after their fax of 26th July and told the defendants unequivocally: "*We have changed our mind in the belief that your disclosure was sufficient to render the material admissible*".

67. The defendants prepared their case on the faith that the claimants were objecting to the disclosure. What prompted the changes of heart on both sides is a matter of speculation, an arena into which I ought not

to wander and will not wander. I have not been taken through the mediation material beyond that to which I have mentioned, save that I have seen those parts of the experts' reports to which objection is taken. I cannot therefore evaluate in a meaningful way the damage or otherwise to either side, and nor do I think it useful, as I have said, to speculate upon it. It is sufficient to say that I recognise that the task of rebuilding the picture outside the mediation process may be difficult but it is not suggested that it is impossible. Time may concentrate the mind wonderfully.

Conclusion :

68. Accordingly and finally, standing back and looking at the matter as a whole, in my judgment the defendants are not estopped from resiling from their earlier position or, to be more accurate, earlier proposition or offer that the documents were discloseable and ought to be used in evidence. Nor was that offer ever accepted nor do I think that the justice of the case prevents them in all the circumstances from now objecting. I therefore propose to grant the defendants the order asked.