CA on appeal Ch.Div (Mr Justice Patten) before Rix LJ, Carnwath LJ. 14th November 2003.

JUDGMENT : Lord Justice Rix:

1. This appeal arises from an application to amend particulars of claim shortly before trial. The application came forward in exceptional circumstances in that, in the court below, it was primarily based on an admission said to be made by the defendant at a without prejudice meeting. The judge, Patten J, found that the admission fell within a recognised exception to the doctrine of without prejudice privilege known as the "*unambiguous impropriety*" exception, a phrase coined by Hoffmann LJ in ***Forster v. Friedland*** (CA, 10 November 1992, transcript No 1052 of 1992, unreported) and adopted in later cases such as ***Unilever plc v. The Procter & Gamble Co*** [2000] 1 WLR 2436 at 2444G. On that basis the judge exercised his discretion to allow the subject matter of the admission, as well as another closely related matter, to be pleaded by way of amendment. The trial date was accordingly lost, but the judge felt that there was a real doubt as to whether it could have been achieved in any event. Curiously, however, the reference to the admission itself was dropped from the proposed amendment by the claimant, and the judge adopted that concession in the order he made.
2. In this court, however, the successful claimant, while maintaining the basis on which the judge acted below, has put in the forefront of its submissions a new basis for the amendments, namely that irrespective of the admission made at the without prejudice meeting there is a plain case to be made on publicly available documents in support of those amendments. The judge's order should therefore be maintained in the discretion of this court even if he were in error in finding the unambiguous impropriety exception to have been made good.
3. It follows that there are three issues for this court:
   (1) Was the judge correct to find that the admission in question had fallen within the unambiguous impropriety exception and thus had lost the protection of the without prejudice rule?
   (2) If he was correct, could his exercise of discretion be faulted?
   (3) If he was not correct, is there a new basis upon which this court should nevertheless exercise its own discretion to allow the same or similar amendments?

The background to the litigation

4. The litigation between the parties arose out of the compromise of a debt owed by Mr Kenneth Fincken, the defendant and here the appellant, to the Savings & Investment Bank Limited ("SIB"), the claimant and here the respondent. On 15 September 1982 SIB, an Isle of Man company, had gone into liquidation. Mr Michael Jordan, a partner of Cork Gully and now a consultant with PricewaterhouseCoopers ("PwC"), and Mr Timothy Beer, a then partner of Peat Marwick McLintock & Co and now a consultant with KPMG, were appointed joint liquidators by the Isle of Man court. Mr Fincken owed SIB a large sum of money. On 23 February 1988 SIB brought proceedings against Mr Fincken to recover that debt.
5. On 13 October 1988 SIB and Mr Fincken entered into a deed of settlement (the "first deed"). Mr Fincken thereby acknowledged the existence of various debts and agreed to deliver by 30 November 1988 a bill of exchange in the sum of over £19 million. He also agreed that he would pay £250,000 to SIB within the year, ie by 13 October 1989, in which case SIB would return the bill of exchange to him unnegotiated and unpresented. Mr Fincken delivered the bill of exchange on approximately 18 November 1988 but paid only £50,000 of the £250,000 promised. SIB's obligation to return the bill therefore did not materialise.
6. On 25 July 1990 the parties entered into a further deed of settlement (the "second deed") under which Mr Fincken agreed to deliver five bills of exchange, each in the sum of over £19 million, and at the same time to pay £50,000 at six monthly intervals down to April 1992, plus a further £20,000 on the last of those dates. On due performance the respective bill would be returned unnegotiated and unpresented. Mr Fincken made no payments in either April or October 1990, whereupon SIB presented the bill of exchange payable on 18 October 1990, which was dishonoured. A bankruptcy petition against Mr Fincken was dismissed for technical reasons.
7. On 9 December 1991 Mr Fincken swore an affidavit of means (the "affidavit") exhibiting a statement of personal assets, liabilities and business interests as of that date. He disclosed his residence at Field

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House in Chalfont St Giles and two shotguns valued at £2500, otherwise no other assets or investments of any kind. Among the scheduled liabilities were the mortgage arrangements on Field House and a loan to him from Guinness Mahon for £250,000. Among the disclosed business interests was his directorship in two companies: Westminster Property Holdings plc ("WPH") and Pyrok Group plc ("Pyrok"). His interest in WPH brought him an income of £25,000 per annum. That affidavit is at the root of the current litigation between the parties, for SIB says that Mr Fincken there misrepresented his assets and did so fraudulently. Prior to the amendment allowed by Patten J below the only non-disclosures pleaded were in respect of Field House Barn, a barn adjoining Field House which the liquidators say is worth at least £25,000, and a further shotgun, which the liquidators say is worth at least £7,500. The amendments allowed by the judge relate to holdings in the ordinary and preference shares of WPH (47,500 ordinary and 250,000 preference shares, the "shares"), which the liquidators say were worth £228,785, and a director's loan by Mr Fincken to WPH in the sum of £291,480, which the liquidators say was recoverable in full (the "loan").

8. On 13 December 1991, a few days after the making of that affidavit, Mr Fincken was interviewed by the liquidators about his means. A resume of that interview exists in the form of a letter written by Mr Richard Coleman to Messrs DJ Freeman, SIB's solicitors. Mr Coleman is a director of PwC in its forensic services department and has been assisting the liquidators, in their duties. Paragraph 11 of the letter reads as follows:

   "11. We asked Fincken about his directorship of Westminster Property Holdings plc. He had disclosed a salary from this company of £25,000 a year. We asked if he had any interest in the shares. He said he had none, directly or indirectly. He told us that the shares registered in the name of Hallam Financial Services were in fact held for a Mr Nathan Lee."

9. There is a dispute between the parties as to whether that interview and thus that letter is itself covered by without prejudice privilege. Before us the dispute was left as a matter of submission and counter-submission. The only evidence we have is Mr Coleman's second witness statement of 31 January 2003, made for the purpose of the hearing before Patten J, which states that it was a without prejudice meeting.

10. The reference to Hallam Financial Services (Hallam Financial Planning Services Limited or "Hallam") was to a nominee company administered by WPH's auditors. WPH's annual return dated 30 September 1990 showed Hallam as WPH's secretary and Hallam's director as N Springer. WPH's auditors were Alexander Springer & Company. The same annual return showed Hallam (whose address was the same as that of the auditors) as registered owner of 49,998 of the 50,000 issued ordinary £1 shares in WPH.

11. On 6 May 1992 SIB and Mr Fincken entered into a third deed of settlement (the "third deed"). In it Mr Fincken warranted that he had made full disclosure of all assets worldwide beneficially owned by him or in which he had an interest and which were worth £5,000 or more. The third deed discharged Mr Fincken from any further liability, in full and final settlement of all claims, subject to a term which permitted SIB to claim any asset worth £5000 or more, or its value, in the event of non-disclosure. SIB agreed to drop its pursuit of Mr Fincken's bankruptcy. In effect the liquidators accepted that there was nothing more to be got out of Mr Fincken.

The litigation

12. These proceedings were commenced by the issue of a writ on 1 May 1998. Its validity was extended twice. On 16 April 1999 the writ was re-issued on amendment. At that time its claims of non-disclosure encompassed cash in Swiss bank accounts, shares in a company called Bradenham Holdings Ltd, interests in 18 properties (including Field House Barn), shooting rights and offshore trusts. On the same day SIB obtained an ex parte freezing order against Mr Fincken in the sum of about £12 million. The amended writ was served on Mr Fincken on 19 April 1999. On 4 June 1999 a statement of claim was served on Mr Fincken, but the non-disclosure claim relating to properties was at that time limited to four properties (including the barn). Mr Fincken applied to strike out the claims. His application was heard on 30 July 1999 by Wright J and substantially failed. On the same day SIB applied successfully for leave to amend to seek rescission of the third deed on the ground of

misrepresentation. On 25 October 1999 SIB served voluntary further particulars relating to seven undisclosed shotguns. On 28/29 October 1999 the court of appeal heard Mr Fincken's appeal from the orders of Wright J and struck out all the claims except that in respect of the barn. It also discharged the freezing order and refused to hear SIB's application for leave to re-amend in respect of the shotguns.

13. The application to re-amend was renewed before the master who on 18 August 2000 allowed the proposed amendment only in relation to one shotgun. Mr Fincken also had an application for summary judgment on the rescission claim on the ground that the third deed had been affirmed: on 16 October 2000 the master dismissed this application. On 22 February 2001 an appeal by Mr Fincken was allowed by Lightman J on the ground that the amended claim was a "new claim" and statute barred; the judge also held in Mr Fincken's favour that SIB had affirmed the third deed. SIB appealed to this court, which on 6 November 2001 held that the re-amendment in respect of the shotgun was not statute barred, and that the issue of affirmation should go to trial. Thus the issues for trial had been defined with the assistance of a re-amended statement of claim and two visits to this court. The only items of non-disclosure related to the barn and the shotgun. As to the former, Mr Fincken pleaded inter alia that disclosure had been made, in that the barn was part of his residence at Field House. As to the latter, Mr Fincken pleaded that it belonged not to him but to his son, for whom it had been bought as a gift.

14. On 16 May 2002 there were directions for trial, and a trial window commencing on 17 March 2003 was obtained.

15. On 9 December 2002 DJ Freeman wrote to Mr Fincken's solicitors asking for an exchange of lists of documents. They were to write repeatedly over the next few weeks, pressing for disclosure and for proposals for a revised time-table to deal with the exchange of witness statements and the agreement of single experts to deal with the valuation of the barn and the shotgun. The original directions had been allowed to fall into abeyance.

16. In the meantime there were movements towards settlement, and in particular the without prejudice meeting on 13 December 2002 which has given rise to this third interlocutory visit to this court.

The without prejudice meeting of 13 December 2002

17. The meeting was attended by Mr Fincken, Mr Jordan and Mr Coleman. Mr Coleman wrote up a note of it, dated the same day. There is no evidence about the meeting from Mr Fincken.

18. The note begins by referring expressly to the agreement that it was to be without prejudice. I will refer to relevant parts of the note: *"This was agreed to be a without prejudice meeting to see if a settlement was possible…*

"We pointed out that there were still many uncertainties about Fincken's assets and only he would ever know the true position. We referred to the accounts of Westminster Property Holdings plc, in which he appeared to have no shareholding. He told us that this company was at one time jointly owned by him and Nathan Lee. Subsequently it appeared to be owned by Hallam Financial Planning Services Limited. Fincken explained that they were his auditors. He said that the WPH shares were held by Hallam as his nominee. WPH had acquired Pyrok and he had borrowed £250,000 from Guinness Mahon, secured on his home at Field House. He had a long dispute with Guinness Mahon which was settled last year. Pyrok went bust and dragged down WPH which went into compulsory liquidation with about a £1 million deficiency. At the time he was shown as being owed some £200,000 by WPH.

"Fincken stressed that in 1992 he really had nothing. His home was charged to the hilt…He subsequently sold the house, repaid A&L and part of the charge to Guinness Mahon and had lived in rented accommodation ever since…

"We referred to Fincken's past lack of openness about his financial affairs – for example the shareholding in WPH being in the name of his auditors' nominee company. We pointed to the £300,000 share capital shown in the accounts, of which £250,000 was in preference shares injected in about 1990. Fincken said that he had never had that much money and that he thought that the apparent injection was in fact a debt for equity swap. He confirmed that he owned the shares…"

The application to amend in respect of the WPH shares and loan

19. On 3 February 2003 SIB applied to amend (to re-re-amend) its statement of claim to rely on non-disclosures by Mr Fincken of interests in the shares and the loan. The essence of the draft amendment was contained in new paragraphs 19.16 to 19.38 of the statement of claim. As for the shares, namely 47,500 ordinary shares and 250,000 preference shares held in the name of Hallam as of September 1991, the draft made reference to the meeting of 13 December 1991 in paragraph 19.26 and to the meeting of 13 December 2002 in paragraph 19.27, the latter as follows: *"on 13 December 2002 Mr Jordan had another meeting with Mr Fincken at the offices of PricewaterhouseCoopers at Plumtree Court, London EC4A 4HT. In the course of this meeting Mr Fincken told Mr Jordan that all the Hallam shares were held by Hallam as his nominee, and later in the meeting he again confirmed that he was the owner of all the Hallam shares".*

20. At paragraph 19.30 the draft amendment invited the court to infer in the circumstances set out above *that "Mr Fincken had lied on 13 December 1991 in denying that he had any interest in the Hallam ordinary and preference shares…alternatively was obliged to disclose the same to SIB on 9 December 1991 and/or 6 May 1992 but he failed to do so."*

21. As for the loan, paragraphs 19.31/38 of the draft pleaded various annual WPH reports from which it was to be inferred that by 1 April 1992 Mr Fincken had lent WPH £291,480 by way of director's loan and had been repaid £100,810 of that by 31 March 1993; and that Mr Fincken had deliberately sought to conceal this asset from SIB. It was not suggested that Mr Fincken had admitted to such an asset in his meeting of 13 December 2002.

22. This application and draft were supported by the second witness statement of Mr Coleman in which he referred to both the meetings of 13 December 1991 and that of 13 December 2002 as without prejudice meetings but said that he had been advised that he was entitled to refer to the contents of those meetings under the unambiguous impropriety exception. He defined the unambiguous impropriety as twofold, viz a lie in Mr Fincken's affidavit of means that he held no interest in shares and another lie in the meeting of 13 December 1991 that the beneficial interest in Hallam shares was held by Mr Nathan Lee. Mr Coleman continued: *"SIB says that Mr Fincken cannot exclude the evidence obtained at the said without-prejudice meetings because that would be acting as a cloak to his lies."*

23. As for the loan, Mr Coleman said: *"When Mr Fincken made his admission about the ownership of the WPH shares Mr Jordan and I looked more carefully at the WPH accounts, as a result of which I made enquiries and received the said letter from Mr Franklin dated 20 December 2002 which by his paragraph (c)…now for the first time reveals the true picture."*

24. The reference to the letter dated 20 December 2002 from Mr Franklin was to a letter from a colleague of the liquidator of WPH, a Mr Eliades of the firm of Panos Eliades Franklin & Co. That letter is addressed to Mr Coleman and refers to "*your letter of 9th December*", ie to a letter from Mr Coleman dated prior to the without prejudice meeting of 13 December 2002. I do not therefore wholly understand Mr Coleman's comment that his enquiries of Mr Franklin were engendered by Mr Fincken's admission at the meeting. Mr Coleman's letter of 9 December 2002 is not before the court. Paragraph (c) of Mr Franklin's letter confirmed that a director's loan in the sum of £291,480 shown in WPH's accounts as at 31 March 1992 was a loan from Mr Fincken. That is the figure pleaded by SIB.

25. WPH had gone into liquidation in 1994. A report to creditors made by Cork Gully following a meeting of 23 June 1994 reports that Pyrok had been placed into administrative receivership in April 1994. The statutory information annexed showed a Mr R Williams as a creditor for £209,640, as to which the report commented: *"It was also learned that Mr K J Fincken had personally guaranteed the accounts of Nubbh Limited and Mr R Williams, a creditor for some £209,640."*

26. The statutory information also showed Mr Fincken as a creditor of WPH in the sum of £190,670.

27. The Cork Gully report was annexed to Mr Coleman's witness statement in support of SIB's application to amend. Mr Coleman does not say exactly when the liquidators acquired this report.

The hearing and judgment below

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28. SIB's application came before Patten J on 19 February 2003. A partial transcript of the argument before him is available to this court. His first reaction was to express concern at the thought of losing the trial date ("*Well, this is hopeless, I am not going to allow this to happen*"), but Mr Ashton, junior counsel for SIB, submitted that an early trial was not possible. This submission was regarded by the judge as an alteration of the position outlined in counsel's skeleton which "*regretted that the occasion of SIB's proposed amendment will have the inevitable effect of postponing the trial date of 17.03.03*".

29. Patten J discussed with Mr Ashton the theory that an impropriety might only arise if at trial Mr Fincken sought to give sworn evidence that he did not own the shares. Mr Ashton's response was that he was willing to delete from the draft amendment the specific allegation in para 19.27 referring to Mr Fincken's admission at the meeting of 13 December 2002. On that basis, the judge considered at the close of Mr Ashton's application that the issue of law concerning the pleading of the contents of a without prejudice meeting could be avoided, and was indeed premature and not susceptible of determination in advance of trial. Mr Francis, who appeared before Patten J for Mr Fincken, then submitted that, even though the judge indeed could not decide the point against Mr Fincken at that time, he could decide the point in his favour, on the basis that the unambiguous impropriety exception only arose if the without prejudice occasion was itself then and there abused. Mr Francis sought on that ground to defeat the proposed amendments altogether, since the only suggested basis for the allegation that Mr Fincken owned the shares was his own alleged admission.

30. In the event, in his extemporaneous judgment (reported at [2003] 3 All ER 1091) Patten J did decide the point of law as to the width of the unambiguous impropriety exception *against* Mr Fincken. Among other authorities which he considered he referred to Robert Walker LJ's dictum from ***Unilever v. Procter & Gamble*** at 2444G that – *"Apart from any concluded contract or estoppel one party may be allowed to give evidence of what the other said or wrote in without prejudice negotiations if the exclusion of the evidence would act as a cloak for perjury, blackmail or 'unambiguous impropriety'"*

and concluded: *"It seems to me that the exception identified by Robert Walker LJ can extend, in appropriate cases, not only to instances where the without prejudice occasion is abused by the making of threats but also to cases where there is an equally unambiguous admission of facts which is intended to be followed by an equally unambiguous denial of those facts by the same party. Circumstances of that kind amount to an abuse and the exclusion of such evidence by virtue of the rule would act as a cloak for perjury."*

31. In the circumstances the judge regarded Mr Ashton's offer to delete the controversial reference to the admission at the meeting as being unnecessary. He had concluded that the admission could be given in evidence at trial and thus could be referred to in a pleading. He therefore did not have to decide, and did not decide, the issue which would have arisen if the pleading omitted any reference to the admission, namely whether in that case there was anything to substantiate the plea of ownership by Mr Fincken of the shares.

32. In the light of his decision in principle concerning the admissibility of the admission, the judge was able therefore to proceed directly to the question of discretion, which he defined as *"the more general objection to these amendments, namely, that they are late and cause undue prejudice, particularly in relation to the possible vacation of the trial date"*. In this connection he referred to what Peter Gibson LJ, speaking of the new CPR regime, had said in ***Cobbold v. The London Borough of Greenwich*** (CA, 9 August 1999 unreported, see *Civil Procedure* 2003 at 17.3.5*): "Amendments in general ought to be allowed so that the real dispute between the parties can be adjudicated upon, provided that any prejudice to the other party or parties caused by the amendment can be compensated for in costs and the public interest in the administration of justice is not significantly harmed."*

33. The judge considered that questions of costs would work themselves out and that the two serious factors were the possible effects on the trial date and on Mr Fincken. As to the former, he said that although the directions for trial had not been complied with, this was *"mainly because the parties have very sensibly been engaged in discussions designed, although in the event unsuccessfully, to compromise these proceedings"*. He concluded that – *"although I think the true position is that both parties have approached the court today on the footing that they could be ready by 17 March on the basis of the existing pleading, there must be a real doubt as to whether that is in fact achievable."*

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34. As to Mr Fincken, the judge recognised that litigation over a 14 year period must necessarily have been a strain, but nevertheless considered that as the amendments went to the established issue of misrepresentation and rescission the need to do justice between the parties on that issue outweighed other considerations. He therefore gave leave for the amendments, but, somewhat curiously given the logic of his judgment, gave his ultimate decision in these terms: *"In those circumstances, with the proposed alteration and substitution of paragraph 19.27, suggested by Mr Ashton, I will give permission to reamend."*

35. In the result, therefore, the issue of principle on which the exercise of his discretion was founded was not used in support of an amendment which referred to an admission as to the ownership of the shares; and the issue which would have arisen if leave to refer to the admission in the pleadings had been refused was never reached.

36. It also follows from the structure of the judgment that if the issue of principle was wrongly decided, then the judge's exercise of his discretion is invalidated. It was common ground in this court that that was so.

37. I turn to the three issues highlighted in para 3 above. Issue one: Did the admission fall within the *"unambiguous impropriety" exception to the privilege of without prejudice communications?*

38. On behalf of SIB Ms Elizabeth Gloster QC sought to support the judge's ruling on this issue, but it was no longer in the forefront of her case. She submitted that, if properly unambiguous, an admission could be referred to in circumstances where it proved the lie to a previous sworn statement, viz Mr Fincken's 1991 affidavit of means. This was especially so in the absence of any evidence in rebuttal from Mr Fincken in the application. She accepted that the admission was not in itself inconsistent with his response to the previous case of dishonesty directly raised against him in these proceedings, since, subject to permission to bring non-disclosure of the shares into the litigation, he had here not been called on to state his position with regard to the shares. Nevertheless, the public policy which protected without prejudice negotiations did not or should not extend to cover what would be a fundamentally dishonest approach to his earlier affidavit and thus to the conduct of his defence. The exception recognised in the authorities should not be tightly constrained, but was wide and flexible. In the tension between the public interest in the protection of without prejudice negotiations and the separate public interest in the honest and due administration of justice, the former should give way to the latter. Otherwise the privilege is used as a cloak for perjury.

39. On behalf of Mr Fincken, on the other hand, Mr Francis Tregear QC submitted that the key to the understanding of the exception was that the occasion of the without prejudice discussions needed itself to be an abuse of the privilege generally afforded to such discussions. Examples of such abuse found in the authorities were the issuing of threats to persevere in admittedly dishonest litigation, threats described in terms of blackmail. If, however, a mere admission were enough, then the exception would not merely erode but overwhelm the rule. This would remain the case even if the vice of the admission were not so much the possibility of future perjury at trial but rather inconsistency of the admission with some past affidavit or statement of truth. Such a wide exception to the rule in favour of the privilege of without prejudice admissions would make claims of dishonesty incapable of being settled by negotiation: but the problem would extend beyond such claims, for even an admission of negligence would become exposed where the defendant had made a previous affidavit or statement of truth denying negligence.

40. The authorities concerning the unambiguous impropriety exception to the privilege of without prejudice communications have been recently set out in the judgment of Peter Gibson LJ in ***Berry Trade Ltd v. Moussavi*** [2003] EWCA Civ 715 (22 May 2003, unreported). I am indebted to that account in what follows.

41. In ***Cutts v. Head*** [1984] Ch 290 the underlying public policy was described by Oliver LJ as follows (at 306): *"It is that parties should be encouraged as far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations…may be used to their prejudice in the course of the proceedings. They should…be encouraged fully*

and frankly to put their cards on the table…The public policy justification, in truth, essentially rests with 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."

42. That statement of principle was subsequently approved by the House of Lords in ***Rush & Tompkins v. Greater London Council*** [1989] AC 1280 at 1299.

43. In ***Hawick Jersey Limited v. Caplan*** (unreported, 26 February 1988) Mr Anthony May QC (as he then was) ruled that the exception applied to secret tape recordings admitted as being accurate, the effect of which was that the claimants had brought a dishonest case against the defendant for a £10,000 debt which they knew did not exist and were doing so in order to "***blackmail***" the defendant into a settlement of other differences. Mr May adopted a test that privilege did not extend to cloak a prima facie case that the communications in question were in furtherance of what could reasonably and in good faith be charged as a crime or fraud. Mr May referred to two Canadian cases, ***Underwood v. Cox*** [1912] 4 DLR 66 and *Greenwood v. Fitts* [1961] 29 DLR (2d) 260, in which threats made in without prejudice meetings were held to be unprotected by privilege.

44. In ***Rush & Tompkins Ltd v. Greater London Council*** [1989] AC 1280 the issue was whether admittedly privileged without prejudice communications had to be disclosed to third parties within the same litigation. The decision was that they were protected from disclosure and from being admitted into evidence. Although the case was not concerned with the unambiguous impropriety exception, the rationale of the decision is relevant to the importance and breadth of the public policy concerned. Lord Griffiths said (at 1305A/B): *"I have come to the conclusion that the wiser course is to protect "without prejudice" communications between parties to litigation from production to other parties in the same litigation. In multi-party litigation it is not an infrequent experience that one party takes up an unreasonably intransigent attitude that makes it extremely difficult to settle with him. In such circumstances it would, I think, place a serious fetter on negotiations between other parties if they knew that everything that passed between them would ultimately have to be revealed to the one obdurate litigant. What would in fact happen would be that nothing would be put on paper but this is in itself a recipe for disaster in difficult negotiations which are far better spelt out with precision in writing…In my view the general public policy that applies to protect genuine negotiations from being admissible in evidence should also be extended to protect those negotiations from being discoverable to third parties."*

45. Lord Griffiths also reviewed in passing the exceptions to the rule (at 1300C). He said*: "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."*

Among such cases he mentioned "a threat if an offer is not accepted: see ***Kitcat v. Sharp*** (1882) 48 L.T. 64."

46. ***Forster v. Friedland*** (10 November 1992, unreported) was the first of a series of cases in this court which discussed the exception, but held that it did not apply. The defendant admitted that he considered himself honour bound by an agreement, but said that if it came to litigation he would deny any legal obligation. On the facts, this was held to be "*very far from blackmail*". On the law, Hoffmann LJ described ***Greenwood v. Fitt*** and ***Hawick Jersey v. Caplan*** as examples of cases which show that a party cannot use the without prejudice rule "*as a cloak for blackmail*". He pointed out that in the former case the defendant had said that unless the claim against him was withdrawn, he would give perjured evidence and would bribe other witnesses to perjure themselves. Having reviewed these cases, he said*: "These are clear cases of improper threats, but the value of the without prejudice rule would be seriously impaired if its protection could be removed from anything less than unambiguous impropriety. The rule is designed to encourage parties to express themselves freely and without inhibition. I think it is quite wrong for the tape recorded words of a layman, who has used colourful or even exaggerated language, to be picked over in order to support an argument that he intends to raise defences which he does not really believe to be true."*

47. ***Fazil-Alizadeh v. Nikbin*** (CA, 19 March 1993, unreported) was the second of the series of cases in this court. Again there were secret tape recordings of without prejudice meetings: the litigation was as to who owned the beneficial interest in a house. Two matters were sought to be put in evidence, the first

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an admission of payment of £10,000 as a deposit for the purchase of a flat in the house by the plaintiff – who claimed to be entitled to the beneficial interest in the whole house irrespective of such a purchase; the second was the alleged revelation of forgery of the terms of a previous settlement agreement. The alleged vice of the first admission was that the claimant continued to deny such payment on his pleadings. The alleged vice of the second admission was the continued cover-up of a past crime. As to the first, this court held that even if the admission was established, it could not be held against him "**despite his continued denial of such payment on the pleadings".** As to the second, it held that the test of unambiguity had not been met. But Simon Brown LJ continued: *"I add only this. There are in my judgment powerful policy reasons for admitting in evidence as exceptions to the without prejudice rule only the very clearest cases. Unless this highly beneficial rule is most scrupulously and jealously protected, it will all too readily become eroded. Not least requiring of rigorous scrutiny will be claims for admissibility of evidence advanced by those (such as the first defendant here) who have procured their evidence by clandestine methods and who are likely to have participated in discussions with half a mind at least to their litigious rather than settlement advantages. That distorted approach to negotiation to my mind is itself to be discouraged, militating, as inevitably it must, against the prospects of successful settlement."*

48. In ***Unilever v. Procter & Gamble*** Robert Walker LJ reviewed the scope of the privilege in a wide-ranging judgment. Patten J himself quoted the passage (see para 30 above) in which Robert Walker LJ stated (at 2444G) that the rule could not be used "*as a cloak for perjury, blackmail or other 'unambiguous impropriety'."* After referring among other authorities to ***Forster v. Friedland, Hawick Jersey v. Caplan*** and ***Fazil-Alizadeh v. Nikbin***, Robert Walker LJ said (*ibid*) that *"this court has…warned that the exception should be applied only in the clearest cases of abuse of a privileged occasion."*

He concluded (at 2448/9) that: *"[The modern authorities] show that the protection of admissions against interest is the most important practical effect of the rule. But to dissect out identifiable admissions and withhold protection from the rest of without prejudice communications (except for a special reason) would not only create huge practical difficulties but would be contrary to the underlying objective of giving protection to the parties, in the words of Lord Griffiths in the* ***Rush & Tompkins*** *case [1989] A.C. 1280, 1300: "to speak freely about all issues in the litigation both factual and legal when seeking compromise and, for the purpose of establishing a basis of compromise, admitting certain facts." Parties cannot speak freely at a without prejudice meeting if they must constantly monitor every sentence, with lawyers and patent agents sitting at their shoulders as minders.*

"Lord Griffiths in the ***Rush & Tompkins*** *case noted, at 1300C, and more recent cases illustrate, that even in situations to which the without prejudice rule undoubtedly applies, the veil imposed by public policy may have to be pulled aside, even so as to disclose admissions, in cases where the protection afforded by the rule has been unequivocally abused."*

No exception to the rule was found to have been justified in that case.

49. ***Merrill Lynch Pierce Fenner & Smith v. Raffa*** (11 May 2000, unreported) was a case relied on by the judge below. Mr Raffa was an ex-employee of Merrill Lynch who was charged in the litigation with the fraudulent transfer and theft of securities to the value of $58 million. Over the course of a number of discussions Mr Raffa made admissions of involvement in the fraud, though he raised the question of collaborators. HH Judge Jack QC, sitting as a high court judge, held that there were no improper threats in the nature of blackmail. That basis for disapplying the privilege was thus not open to the court. Nevertheless, Judge Jack considered that it would be open to Merrill Lynch to rely on admissions made on the without prejudice occasions if the defendant were to advance a defence (which he had not yet filed) which denied his involvement in the fraud. Judge Jack said – "*The ground for disapplying the cloak of without prejudice would be that it would otherwise be being used to protect a fundamentally dishonest defence…In his summary of the law in Unilever Robert Walker LJ expressly refers [to] the situation where the exclusion of the evidence would be a cloak for perjury. That situation will arise here if Mr Raffa made the admissions and seeks to defend the case on the basis that he was not involved in the fraud."*

The judge did not refer to any evidence on behalf of Mr Raffa, who was in prison in Egypt.

50. ***Berry Trade Ltd v. Moussavi*** is the most recent in this line of cases, and the fourth authority of this court where the exception was not applied to displace the general rule of privilege. The issue arose in

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the course of an application by Berry Trade for summary judgment on a counterclaim brought by a Mr Ghadimi, another defendant to the action. The claim arose out of oil trading. Berry Trade complained that Mr Moussavi and Mr Ghadimi had misappropriated its oil. Mr Ghadimi's defence and counterclaim alleged that Berry Trade had agreed with him a fee of $9 per tonne to supervise the transport of Berry Trade's oil through Iran. There were lengthy meetings to discuss a settlement. Berry Trade alleged that in the course of these discussions Mr Ghadimi had made certain admissions which demonstrated that his defence and counterclaim were dishonest and that the unambiguous impropriety exception applied where privilege was being used as a cloak for dishonesty. There were witness statements on this issue from both sides. In his witness statement Mr Ghadimi disputed Berry Trade's evidence about the discussions. David Steel J concluded that there was no evidence at all for the $9 per tonne agreement pleaded by Mr Ghadimi, and that this was a central and uncomplicated issue in the case; but that only the content of the negotiations themselves would readily reveal that the pleaded case must be false. In the circumstances the test adopted was that "there was a serious and substantial risk that the exclusion of the evidence of this part of the negotiations would act as a cloak for perjury" and on that basis the exception to the privilege was allowed. Further witness statements were admitted by this court on appeal.

51. Peter Gibson LJ's review of previous authority concluded with *Merrill Lynch* and the present case, as to which he said (at paras 46/47):

*"46. We do not see that either the Merrill Lynch case or the Savings & Investment Bank case provides much assistance in the determination of the present case because of their different circumstances. In the Merrill Lynch case on the only evidence before the court the defendant admitted in the without prejudice discussions his involvement in fraud. In the **Savings & Investment Bank** case again there appears to have been no challenge to the evidence that the relevant simple admission of fact was made by the defendant. Further, Patten J had distinguished the circumstances of his case from those of other cases, by saying (in para 39) that the concerns of Lord Griffiths in **Rush & Tomkins**, of Hoffmann LJ in **Forster** and of Robert Walker LJ in **Unilever** were:*

"largely concerned with ensuring that what may be complicated without prejudice negotiations should not subsequently be scrutinised with a view to constructing admissions which when made, and particularly in the context in which they were made, were never intended to be and were not in truth unequivocal and unambiguous admissions of liability."

*"47. We will come back shortly to the circumstances of the alleged admission in the present case. [Counsel] criticised the decisions in both cases as eroding the protection afforded to admissions made in without prejudice negotiations. It may be doubted whether Robert Walker LJ's reference to "a cloak for perjury" was intended to cover such admissions rather than the threatened perjury in a case like **Greenwood v. Fitt.** However it is unnecessary for us to decide in this case the correctness of the decisions in **Merrill Lynch** and **Savings & Investment Bank** in view of their different circumstances."*

52. And so the issue raised by ***Merrill Lynch*** and the present case falls for decision on this appeal and was not expressly covered in ***Berry Trade v. Moussavi***. Nevertheless this court's conclusions in that case need to be recalled. Peter Gibson LJ said (at paras 48 and 53):

"48. We start with the judge's self-direction that the court, when considering whether statements made in without prejudice discussions may be admitted in evidence, applies the test of whether there is a serious and substantial risk of perjury. [Counsel] does not suggest that that test has been applied before and we can see nothing in the authorities to support it. On the contrary, it seems to us to weaken significantly the requirement of unambiguous impropriety and of the need for a very clear case of abuse of a privileged occasion…

"53. In our case this is simply not the sort of case where the court should be prepared to admit the evidence of without prejudice statements as falling within the exception from the without prejudice rule for unambiguous impropriety. The situation here is precisely what Robert Walker LJ referred to in Unilever (at p 2444A) when he talked of without prejudice communications which "consist not of letters or other written documents but of wide-ranging unscripted discussions during a meeting which may have lasted several hours." It seems to us quite wrong to select from many hours of without prejudice discussions what are said

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> *to be an admission here and an admission there in order to mount a claim that by his subsequent statements on oath the alleged maker of the admissions committed perjury. These were not even discussions at which, through tape-recording or the keeping of a detailed note, what was said and the context in which it was said could not be doubted. If the without prejudice rule can be breached in this case, we do not see why it cannot be breached in any case where an admission, inconsistent with some pleading or sworn assertion, is alleged to have been made. No litigant could be advised to enter into without prejudice discussions without a lawyer at his elbow or a prepared script approved by his lawyer. To allow such admissions in evidence flies in the face of the public policy justification for the without prejudice rule."*

53. It seems to me that there is nothing in these authorities, with the exception of ***Merrill Lynch***, to support the judgment below. All four authorities in this court, while allowing the existence of an exceptional rule to cover cases of unambiguous impropriety, have stressed the importance of the public interest which has created the general rule of privilege and have cautioned against the too ready application of the exception. It is true that in each of those four cases the court was assisted in its proper appreciation of the alleged admissions either by evidence from the party claiming privilege (as in ***Fazil-Alizadeh*, *Unilever*** and ***Berry Trade***) or by full recordings and transcripts of the discussions (as in ***Forster*)** or even by both. Only in ***Merrill Lynch*** and in this case have the defendants submitted no evidence on the issue, so that the evidence against them has gone unchallenged. It was on this very point that in ***Berry Trade*** Peter Gibson LJ was able to say that these two cases concerned different circumstances which made it unnecessary for him to rule on the correctness of the decisions to be found in them. It may also be that Peter Gibson LJ was told that Patten J had himself given permission to appeal from his judgment in this case, and this too might have made him cautious in its treatment.

54. It also follows from the absence of evidence in this case that Mr Tregear has not been in a position to challenge the judge's finding that the admission about the shares was unambiguous. So indeed it appears to be, although the discussions are only recorded in a brief note written by Mr Coleman for internal consumption, and the note goes on to say that "**Fincken stressed that in 1992 he really had nothing.**" That may possibly raise an issue whether Mr Fincken considered the WPH shares to be valueless. Since other material which SIB has placed before the court shows that WPH was a private company which had lent Pyrok £250,000, that as at 31 March 1992 this loan was greater than WPH's net asset value of £228,785, and that the failure of Pyrok had by 1994 dragged WPH itself into liquidation, the value of the shares even as of December 1991 may be uncertain. Ms Gloster is able to say, nevertheless, that in its accounts as at 31 March 1992, signed by Mr Fincken himself as director on 14 September 1992, the loan to Pyrok is shown as an asset in its full value of £250,000. In the circumstances, it is probably correct to regard the admitted ownership of the shares as unambiguous, because unchallenged, and to regard the value of the shares as at any rate of prima facie materiality, while bearing in mind that the admission goes to ownership and not to value. Value is significant because, although the affidavit of means did not itself contain a cut-off for materiality, the subsequent third deed's warranty did, in the sum of £5,000, and the point has already been taken in Mr Fincken's defence, in relation to the barn and the shot-gun, that the parties only intended the affidavit to list "all assets of significant realisable value".

55. There is therefore a potential issue as to whether the shares ought to have been disclosed, even if owned by Mr Fincken. Nevertheless, Mr Fincken has said nothing to indicate in one way or another his position with regard to value, and I would therefore consider that the court ought to treat the possibility of such an issue as being low in the scale of things, even if it cannot be ignored altogether.

56. These considerations throw into relief the fact that SIB's evidence has gone unchallenged. How important is that factor in the present context? In my judgment, the courts ought to treat it with considerable caution, for otherwise there is a danger of the exception to the rule displacing the rule by a process of begging the question. If the exception applies, then Mr Fincken is obliged to explain himself or face the consequences, for his admission is in the public domain. The absence of challenge may therefore be critical. If, however, the exception does not apply, then the admission is not in the public domain, the court ought not to know about it, and the absence of challenge is irrelevant. Moreover, there may be many reasons why someone in Mr Fincken's position may at the stage of SIB's

application be cautious about responding to an issue (his ownership of the shares) which was not yet even part of the litigation. He is accused of perjury, but not on any formal charge and not on a matter even formally in issue. I can see that the absence of challenge may enable an applicant to establish more easily that an alleged admission is unequivocal. That, however, is not the same thing as an unequivocal or unambiguous impropriety. I would therefore be reluctant to find in the circumstances that an absence of challenge is a critical factor taking this case outside the philosophy of the jurisprudence expressed in the leading authorities cited above.

57. In my judgment that philosophy is antagonistic to treating an admission in without prejudice negotiations as tantamount to an impropriety unless the privilege is itself abused. That, it seems to me, is what Robert Walker LJ meant in ***Unilever*** when he repeatedly spoke in terms of the abuse of a privileged occasion, or of the abuse of the protection of the rule of privilege: see at 2444G, 2448A and 2449B. That is why Hoffmann LJ in *Forster* emphasised that it was the use of the privileged occasion to make a threat in the nature of blackmail that was, if unequivocally proved, unacceptable under the label of an unambiguous impropriety. And that is why Peter Gibson LJ in ***Berry Trade*** suggested, without having to decide, that talk of "*a cloak for perjury*" was itself intended to refer to a blackmailing threat of perjury, as in ***Greenwood v. Fitt,*** rather than to an admission in itself. It is not the mere inconsistency between an admission and a pleaded case or a stated position, with the mere possibility that such a case or position, if persisted in, may lead to perjury, that loses the admitting party the protection of the privilege (see the first holding in ***Fazil-Alizadeh***, described in para 47 above). It is the fact that the privilege is itself abused that does so. It is not an abuse of the privilege to tell the truth, even where the truth is contrary to one's case. That, after all, is what the without prejudice rule is all about, to encourage parties to speak frankly to one another in aid of reaching a settlement: and the public interest in that rule is very great and not to be sacrificed save in truly exceptional and needy circumstances.

58. It may be said, as indeed Ms Gloster has powerfully argued, that even if the mere possibility of future perjury does not suffice to destroy the privilege, the admission which demonstrates that perjury has been committed in the past, by reference to an existing affidavit, is or should be different and that no authority suggests otherwise. In this way she seeks to support the judge's decision, which was premised on the prospect of future perjury, as was the decision in ***Merrill Lynch***, by the different route of the impropriety of past perjury. There is indeed a substantial case to be made that the courts should not pass by such proof of perjury with indifference. There is a clear public interest in the discouragement of perjury. Nevertheless, on balance I do not think that the courts should adopt such a position. If they did, the very serious and criminal charge of perjury would fall to be debated, without the protection which should be available to the accused party, on an interlocutory outing (as here) or even at trial, with the potential of derailing the trial by the exposure of without prejudice material to the trial judge. Essentially the same problem would arise in connection with statements of truth, which now apply under the CPR to all particulars of claim or defence: although they cannot give rise to the offence of perjury, they can give rise to the only relatively less serious matter of contempt of court.

59. Further considerations point in my judgment in the same direction. A litigant understands in general that he may make admissions for the purpose of settling litigation under the protection of privilege if the negotiations fail. He may go into such a meeting without legal advisors, indeed very often such meetings have better prospects of success if the principals to the dispute meet alone. If the case against him is one of fraud or dishonesty, or if he has made an incautious affidavit in the past whatever be the nature of the case against him, he moves into a situation of peril at the point at which he is most candid. There may be no one present to warn him that the privilege with which the meeting began is in the process of being lost, or of the danger of self-incrimination. In such circumstances cases of fraud or dishonesty become almost impossible to settle. So here, whatever be the motives which led Mr Fincken to admit his ownership of the shares, which are unknown, it is in theory possible that, in seeking a final compromise, Mr Fincken, or someone in an analogous position to his, would be conscious that he might never be able to achieve finality without exposing his own past faults. Alternatively, the less scrupulous who make no admissions are better served by the very rules which

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are designed to encourage frank exchanges than are the more candid. Moreover, the well-advised litigant will be told that if he makes his admission in a hypothetical form, contingent upon settlement, then, as Ms Gloster herself accepted, the privilege cannot be lost. This is a recipe for legalism and has the danger of turning the without prejudice meeting into a potential trap and one which may moreover be exploited by litigants who do not enter into such discussions altogether in good faith, a point which it is common ground does not arise in this case but which was emphasised by Simon Brown LJ in the passage quoted above from ***Fazil-Alizadeh***.

60. Finally, there is the question whether Ms Gloster is in fact right to submit that her reliance on an admission which is inconsistent with a previous sworn statement has never before been the subject of judicial comment or decision. I do not think that she is. In para 53 of this court's judgment in ***Berry Trade*** (quoted above at para 51) Peter Gibson LJ said – *"If the without prejudice rule can be breached in this case, we do not see why it cannot be breached in any case where an admission, inconsistent with some pleading or sworn assertion, is alleged to have been made."*

61. Subject to the need to prove the admission unambiguously, that comment applies to this case.

62. It is of course distasteful for this or any court to avert its eyes from an admission which, subject to any point about value, appears to incriminate Mr Fincken in lying in a sworn document. However, in the tension between two powerful public interests, it seems to me that that in favour of the protection of the privilege of without prejudice discussions holds sway – unless the privilege is itself abused on the occasion of its exercise.

63. I would therefore conclude that Ms Gloster is wrong to submit that the unambiguous impropriety exception is a broad and flexible rule which covers this case. It follows that the judge below and this court should never have known of the admission as to ownership of the shares relied on by SIB.

Issue two: Can the judge's discretion be faulted?

64. This issue presupposed that the judge was correct to rule that evidence of Mr Fincken's admission as to his ownership of the shares was admissible. Since I consider the judge to have been wrong in this ruling, this second issue does not arise. It is moreover common ground that if there can be no reference to the without prejudice meeting, then the basis of the judge's approach to the exercise of discretion has gone and it falls to this court to exercise its own discretion anew, and indeed to do so in response to what became Ms Gloster's primary, and to a large extent new, argument. It is to this that I now turn.

Issue three: how should this court exercise its discretion anew?

65. Ms Gloster put in the forefront of her argument a new submission that this court should exercise its own discretion to grant permission to SIB to amend its statement of claim so as to make a new case of ownership of the shares based on documents alone, irrespective of Mr Fincken's admission at the without prejudice meeting. Her primary submission was therefore designed to meet the possibility that this court would disagree with Patten J as to the operation of the unambiguous impropriety exception.

66. On consideration of this new submission, it seemed to the court that it should be supported by a respondent's notice and fresh material. Overnight Ms Gloster produced such a notice and a (third) witness statement from Mr Coleman. The notice said that the judge would have been entitled to grant permission to amend in the terms of the draft approved by him below because the allegation of ownership of the shares was sufficiently supported by the inferences to be drawn from the documents exhibited to Mr Coleman's (second) witness statement, which was before the judge, as well as by the statement of truth on the draft and by the absence of any challenge from Mr Fincken. The purpose of Mr Coleman's third statement was "to clarify the facts from which this inference may be drawn". The third statement also developed the inferences which SIB seeks to draw from the documents relating to Mr Fincken's alleged loan.

67. As thus developed, the essential argument appears to be as follows. It is said that WPH used to be in the ownership of the Lee family, with Mr Nathan Lee being the registered owner of 24,998 out of 25,000 shares of £1 and the other two shares being split between other members of his family. On 5

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July 1990, however, the Lee family transferred all their shares to Hallam or Mr Paul Fincken (Mr Fincken's nephew). A further 25,000 shares were issued as shown in the accounts of WPH for the year to 31 March 1990, and in the annual return dated 18 January 1991 but made up to 30 September 1990 Hallam is seen as the owner of 49,998 shares and Paul Fincken as holding 2 shares. Mr Fincken signed this return as director. The annual return as at 6 June 1993 but signed 21 May 1993 shows Hallam as owner of 47,500 and Paul Fincken as owner of 2,500. In the meantime the annual return as at 15 May 1992 shows that 250,000 redeemable preference shares of £1 had been issued: and a return of allotments of shares dated 30 April 1992 shows that these shares had been allotted to Hallam on 17 September 1991 "*as nominee*". When WPH went into liquidation in 1994, the statutory information annexed to Cork Gully's report of the statutory meeting of creditors showed Projected Trust as the owner of the 47,500 shares and Paul Fincken as the owner of his 2,500 shares. The report stated that Projected Trust "*had been founded by Mr Fincken's father, is based in Monaco and its beneficiaries are the Wildlife Fund and the Fincken family.*"

68. Two points may be made about this account. The first is that it is materially different from the facts stated in the amendment for which Patten J gave permission. The differences are both of addition and of omission. The essential omission from Mr Coleman's account is the pleaded allegation that at the meeting of 13 December 1991 Mr Fincken had said that the Hallam shares were held for Mr Nathan Lee. This was perhaps omitted (unless it was done by inadvertence) because of the controversy as to whether that meeting was itself without prejudice (see above at para 9): Mr Coleman in his earlier statement had said it was. The essential addition is the information provided through Cork Gully's report that the true owner of the Hallam shares was the Projected Trust and that this had been founded by Mr Fincken's father and that its beneficiaries included the Fincken family. Both omission and addition are significant. If the Hallam shares were owned by a Fincken family trust rather than by Mr Lee, then Mr Fincken's lie, if that is what it was, might itself give rise to an inference against him. If, however, the meeting of 13 December 1991 cannot itself be referred to, then the basis of that inference disappears. In any event, reference to the Fincken family trust as the owner of the shares is of course highly relevant, but it does not by itself reveal that the beneficiary of the Trust's ownership is or includes Mr Fincken as distinct from other members of his family. The statement that Mr Lee was the owner could again have been relevant here, for if Mr Fincken had no beneficial interest in the shares, then he had no reason to lie about that: but it involves a without prejudice occasion and there has been no submission that that privilege, if such it was, should be broken.

69. The second point, however, is that all this information, whether in the pleading or in Mr Coleman's third statement, and all proper inferences that can be derived from it, appear to have been available to SIB's liquidators throughout the period of these proceedings. It derives from publicly available documents. Mr Coleman nowhere states that this material was not to hand, and it is for SIB to explain its delay in raising the subject-matter of its amendment. Plainly, even in 1991 the liquidators knew about Mr Fincken's interest in WPH and were suspicious that Hallam was a nominee for him. If WPH's accounts and returns suggest that the Lee family sold out to Mr Fincken in 1990, as is now said, then that is a matter which the liquidators could have pursued in December 1991 or at latest when these proceedings began and thus set in train SIB's long drawn out attempt to establish the particulars of its complaints.

70. As for the loan, SIB's case to be derived from Mr Coleman's third statement is as follows. It is now said that the 250,000 preference shares were issued not on 17 September 1991 but earlier, as indeed the accounts for the year ended 31 March 1991 signed off on 28 September 1991 suggest under their note 6 ("During the year [the preference shares] were allotted and fully paid in cash at par to increase the capital base of the Company"). It is said that this allotment was in capitalisation of a loan made to WPH by Mr Fincken in the sum of £250,000, and that this sum had been borrowed by Mr Fincken from Guinness Mahon, on-lent to WPH by Mr Fincken and on-lent again by WPH to Pyrok. Mr Fincken disclosed his borrowing from Guinness Mahon in his affidavit of means but not his loan of the same amount to WPH. Ms Gloster has drawn attention to this in her submissions. However, Mr. Coleman now states that this is not the director's loan of which complaint is made, perhaps because the loan had by December 1991 already been capitalised by the allotment of the preference shares. If

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so, this could be further material to support the inference that the preference shares were owned by Mr Fincken: but it is not presented as such in Mr Coleman's statement and is not mentioned at all in the amendment for which the judge gave permission. The director's loan about which complaint is made is stated in the accounts as at 31 March 1991 at £202,946 (as "Director's loan"), in the accounts as at 31 March 1992 at £291,480 (as "Directors loan"), and in the statement of affairs in WPH's liquidation as at 23 June 1994 at £190,670. The last figure is expressly there described as being owed to Mr Fincken, but the director's loans shown in the earlier accounts are innominate. However, SIB also rely on the letter dated 20 December 2002 from Mr Franklin (see para 24 above) in which the director's loan of £292,480 shown in the accounts as at 31 March 1992 is identified as Mr Fincken's. It is therefore said that all three figures relate to Mr Fincken and show that between 31 March 1992 and 23 June 1994 he had been repaid £100,810 by WPH.

71. Mr Coleman states that Mr Franklin's letter "*for the first time revealed the true picture*", but that is an overstatement. The only directors of WPH at the relevant times were Mr Fincken and his nephew Paul. The loan was stated on the face of WPH's public accounts. Mr Fincken's status as a creditor for £190,670 in WPH's liquidation was plain on the face of the statement of affairs. However, WPH's accounts also state that the loan (or loans) concerned were to "Creditors due more than one year": therefore, whatever be the explanation for the apparent repayment of £100,810, it would seem that in theory the loan may not have been recoverable before the liquidation, in which case it would have been worthless.

72. The question is whether permission ought to have been given to amend SIB's particulars to introduce these matters in February 2003, against the background of the litigation as a whole and the imminence of the trial date in March.

73. Ms Gloster submitted that that question should be answered, Yes. The amendments had a reasonable prospect of success; they were supported by the documents referred to; they met the composite test propounded by Peter Gibson LJ in ***Cobbold*** (see at para 32 above); the lateness of the amendments was not decisive, especially as the trial could not have taken place in March 2003 in any event, in very large part because of the foot-dragging of Mr Fincken himself; the complaint was one of fraud and it was only right that SIB should be permitted to put forward its real case.

74. In my judgment, however, the amendments should not be permitted. It is important to bear in mind that at this stage of the exercise Mr Fincken's admission at the meeting of 13 December 2002 has to be put out of mind. SIB's case is therefore derived entirely from documents which for all the court knows have always been in the liquidators' possession (with the exception of Mr Franklin's letter) and which Mr Coleman says set up inferences which are plain. No explanation has been given for the liquidators' sitting on their hands in these respects, other than the suggestion that they had no need to look closely at WPH's accounts pending Mr Fincken's admission of ownership of WPH shares in December 2002. Thus Mr Coleman said in his second statement that it was as a result of that admission that "Mr Jordan and I looked more closely at the WPH accounts". I would not accept that explanation. The liquidators always knew, or must on a moment's consideration of the accounts have known, of Mr Fincken's interest in WPH, that he and his nephew were at the relevant time the sole directors, that he derived an income of £25,000 a year from the company, that the sole shareholders were Hallam and Mr Fincken's nephew, and that Hallam was a nominee company operated by WPH's auditors. The court has not been told when the liquidators obtained knowledge of WPH's liquidation and of Cork Gully's report: but, in the absence of being told that this was only recently acquired knowledge, the obvious inference is that the liquidators knew about this, if not immediately at any rate by 1998 when, in the context of these proceedings, the liquidators appear to have left no stone unturned in the search for and assertion of Mr Fincken's allegedly undisclosed assets. The liquidators have had Mr Coleman's assistance at all relevant times since at least 1991 (see his letter dated 13 December 1991 reporting on the meeting with Mr Fincken of that date and discussing his role in WPH including the Guinness Mahon and Pyrok transactions in detail).

75. In such circumstances, it seems to me that the liquidators do not start off with an attractive reason for saying that the court should exercise its discretion in their favour to allow a very late amendment. It is

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not as though the liquidators' case in these proceedings has been inadequately analysed so that the amendment requested, although late, is necessary to give coherence to that case, in order that "the real dispute can be adjudicated upon". On the contrary, the amendments are merely further examples of that "real dispute", examples which the liquidators sought to introduce originally on the basis of a privileged admission or as a consequence of such an admission, but which they now say are to be inferred from public documents which they either always had in their possession or could have had. Moreover, these amendments, although in one sense merely further examples of what is said to be dishonest non-disclosure, raise in their own way an entirely new case, concerning the affairs of WPH and as a necessary consequence involving issues as to the proper way to value that company. These raise new avenues of inquiry. Up until SIB's application made in January 2003 WPH had never figured in this litigation. In context, therefore, the fact that these amendments are in support of an existing case in fraud operates at best as a double-edged sword: for a defendant should not be harassed shortly before trial with fresh allegations of fraud which, if they are to be derived from documentation in SIB's possession in the way in which Ms Gloster submits they should be, could well have been put before.

76. Ms Gloster submits that it is enough that these amendments have some prospect of success. That may be a suitable test where an amendment comes at a reasonably early stage of proceedings. After all, if any pleading whether by amendment or not, cannot meet the test of some real prospect of success, it is in danger of being struck out. In my judgment, however, the proper rule or guideline calls for a sliding scale: the later the amendment, the more it may require to commend it. Although the inferences to be derived from the documents are now said to be plain for the purposes of the test of some real prospect of success, Ms Gloster did not put her case higher than that on the basis that Mr Fincken's admission has to be ignored.

77. It is critical therefore, to my mind, that these amendments, which, at any rate in the case of the shares, are even now in the process of being reformulated, came only shortly before trial and involved the loss of the trial date. Ms Gloster submits that the trial date was doomed in any event: but that was not the concluded view of the judge below, and it is not my view. The judge said that the parties approached the court on the footing that they could have been ready for 17 March 2003 on the basis of the existing pleading, even if he also said that there must be a real doubt as to whether that was in fact achievable. If there is uncertainty about that, it seems to me that it operates against the party which is both claimant and the applicant for amendment. The judge did not blame Mr Fincken for prejudicing the trial date but rather said that the directions for trial had been overtaken by the parties' attempts "very sensibly" to compromise the proceedings. But even if Mr Fincken were to have to accept more than an equal share of blame in failing to ensure compliance with the directions for trial, as Ms Gloster submits he should, the fact remains that SIB is the claimant and as such had every opportunity to maintain the trial date. If a defendant seeks to prejudice the trial date by non-compliance, then the claimant should seek directions from the court to ensure compliance or else the imposition of appropriate sanctions, even summary dismissal of all or part of the defence or an order disallowing the calling of expert evidence. It should not seek to find in such non-compliance a belated excuse for a late amendment which undoubtedly precludes the trial from being effective. The judge thought that there would inevitably be some prejudice to the defendant in having to continue to deal with such long-lasting litigation. I agree: the trial date has been lost and, were the amendments to be allowed, the litigation would be extended into entirely new areas some twelve years or so after the events which form their subject-matter. SIB cannot now be in a better position, having caused the loss of the trial date, than it would have been earlier in the year when it was seeking its amendments.

78. In sum, it is in my judgment commensurate with each of the concepts set out in CPR 1.1 as making up the overriding objective that cases should be dealt with justly, that SIB's application for amendment as now reformulated should fail. SIB has had every opportunity given to it in the past to formulate its case as it would wish. Although in form, were the third deed to be rescinded, this case might appear to be worth a lot of money, in practice it is worth no more than Mr Fincken is worth, and SIB has found itself unable to pursue its one time allegations of hidden bank accounts and the like. The considerations involved in ensuring that the parties are on an equal footing, of dealing with the case proportionately, expeditiously and fairly, and of allotting to it an appropriate share of the court's

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resources, all militate against exercising the court's discretion in favour of SIB. I would therefore allow this appeal.

79. As a postscript I would add that, although decided prior to the introduction of the CPR and concerned with an egregious application to change direction in the course of trial itself, the judgment of this court in ***Worldwide Corporation Ltd v. GPT Limited*** (CA, 2 December 1998, unreported) contains a full compendium of citation of authorities as at that date which emphasises that, even before the CPR, the older view that amendments should be allowed as of right if they could be compensated in costs without injustice had made way for a view which paid greater regard to all the circumstances which are now summed up in the overriding objective.

Lord Justice Carnwath:

80. I agree.

Mr. Francis Tregear QC (instructed by Messrs Radcliffes Le Brasseur (incorporating Jay Benning & Peltz)) for the Appellant
Miss Elizabeth Gloster QC & Mr. David Ashton (instructed by Messrs Kendall Freeman) for the Respondent

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