HOUSE OF LORDS BEFORE Lord Lloyd of Berwick Lord Goff of Chieveley Lord Hoffmann Lord Hope of Craighead Lord Hutton

LORD LLOYD OF BERWICK My Lords,

1. I would decide this appeal on the first of the two principles discussed by my noble and learned friend Lord Hoffmann. This was the ground on which Sir Michael Davies decided the case, correctly in my view. He was following the closely reasoned judgment of Brooke J. in ***Mahon v. Rahn*** [1998] Q.B. 424. Unfortunately Brooke J.'s judgment was reversed on appeal. This provided Mr. Leolin Price Q.C. with the ammunition which he needed.

2. The Court of Appeal [1997] 4 All E.R. 887 in the present case held that it was bound by its previous decision in ***Mahon v. Rahn***. So they could not decide against the plaintiff on the preferred ground of an implied undertaking. Instead they turned with relief (see *per* Millett L.J. at p. 905) to an alternative ground not argued before them. They held that the absolute immunity which attaches to witnesses and potential witnesses should be extended to all those taking part in a criminal investigation with a view to a prosecution or possible prosecution. Since the point was not argued, it may be that if it had not been for ***Mahon v. Rahn*** it would never have been decided.

3. Whereas the implied undertaking is a clear cut and relatively straightforward point, the absolute immunity raises issues of far reaching importance on which I would for my part have wished to hear fuller argument. In ***Watson v. M'Ewan*** [1905] A.C. 480 the House extended the original absolute privilege attaching to a witness's statement in court to his statements in preparation for court proceedings. This was a natural, necessary and indeed obvious extension of the principle. But I am not persuaded that it is obvious or necessary to extend the principle to those who are not witnesses or potential witnesses at all, but whose only function is to investigate and prosecute crime, such as the Serious Fraud Office, the Crown Prosecution Service and the police.

4. The new rules on disclosure of unused material, to which my noble and learned friend Lord Hope attaches importance, do not seem to me to justify the extension of absolute privilege to a different class of beneficiary. Nor can I see any logical reason for doing so. Indeed logic would seem to point in the other direction. If the immunity is absolute, how is it to be reconciled with proceedings against the police for malicious prosecution? If there is to be an exception for malice, is this not more consistent with qualified privilege rather than absolute privilege? It is said that qualified privilege is insufficient protection for the reasons stated by Fry L.J. in ***Munster v. Lamb*** (1883) 11 Q.B.D. 588, 601. But the same could be said of every case in which the law allows qualified but not absolute privilege.

5. It is said that the absolute privilege or immunity will not apply unless what is said or done is "fairly part" of the investigation process. But the absolute privilege of the judge and advocate are not subject to that qualification. The privilege applies even though what is said is gratuitous and irrelevant to every issue in the trial: ***Munster v. Lamb***. Does this mean that there is now to be an intermediate level of privilege lying somewhere between absolute privilege on the one hand and qualified privilege on the other?

6. Reliance was placed on a dictum of Drake J. in ***Evans v. London Hospital and Others*** [1981] 1 W.L.R. 184. But I do not see how that case helps. The third and fourth defendants in that case were clearly potential witnesses. This is how Drake J. approached the case at page 191-192. This is how Lord Browne-Wilkinson understood the case in ***X (Minors) v. Bedfordshire County Council*** [1995] 2 A.C. 633, 755. In that case, too, the psychiatrist was clearly a potential witness. This is confirmed by Mr. Caldecott Q.C.'s own treatment of the decision in paragraph 3.3 of his written case. The passage in Drake J.'s judgment, at p. 192 on which particular reliance is placed begins with the words *"The protection exists only where the statement or conduct is such that it can fairly be said to be part of the process of investigating a crime. . . ."* But this passage is prefaced by the words *"I would alter it [i.e. the test suggested in **Rees v. Sinclair** [1974] 1 N.Z.L.R. 180, 187] to apply it to the immunity attaching to a witness or possible witness in a criminal investigation."* There is nothing in these decisions which would extend absolute immunity to the Crown Prosecution Service, the Serious Fraud Office or the police.

7. The merit of deciding the case on the first ground is that it allows a degree of flexibility. It enables the court to keep control of the material in question. This was regarded by Brooke J. and Sir Michael Davies as a factor of importance. I agree with them. There will be little if any flexibility, and little if any control by the courts, if the police are to enjoy absolute immunity in the course of their investigations. Instead of investigating complaints by members of the public whose rights have been infringed, the courts will presumably be met in every case with an application to strike out. I am bound to say that I regard this development with some alarm. But, as your Lordships take a different view, I say no more about it.

8. On the first ground I am in complete agreement with the speech of my noble and learned friend Lord Hoffmann. I would dismiss the appeal on that ground, but leave the second ground undecided.

LORD GOFF OF CHIEVELEY My Lords,

9. I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Hoffmann. For the reasons which he gives I would dismiss the appeal.

LORD HOFFMANN My Lords,

1. The Facts

10. In 1994 the Serious Fraud Office ("S.F.O.") was investigating a fraud involving US $8 million alleged to have been committed by James Fuller, John Savage and a London solicitor named Charles Deacon. The money which they obtained from the victim had passed through the hands of the first appellant, Mr. Taylor, who was a solicitor practising in the Isle of Man, or the second appellant, a company with which he was connected called Monarch Assurance plc. By a letter dated 4 May 1994, Katherine McKenzie, a lawyer employed by the S.F.O., made a formal request to the Attorney-General for the Isle of Man, asking for his assistance in the investigation of the fraud. She requested the Attorney-General to exercise his powers under section 24 of the Criminal Justice Act 1990 (Isle of Man) by summoning Mr. Taylor for an interview about the transactions. This section, so far as material, provides as follows:

> *"(1) The powers of the Attorney-General under this section shall be exercisable in any case in which it appears to him -*
>
> *(a) on reasonable grounds that there is a suspected offence involving serious or complex fraud, wherever committed; and*
>
> *(b) that there is good reason to do so for the purpose of investigating the affairs, or any aspect of the affairs, of any person.*
>
> *(2) The Attorney-General may by notice in writing require the person whose affairs are to be investigated ('the person under investigation') or any other person whom he has reason to believe has relevant information to attend before the Attorney-General at a specified time and place to answer questions or otherwise furnish information with respect to any matter relevant to the investigation. . . .*
>
> *(10) The Attorney-General may authorise any person to exercise on his behalf all or any of the powers conferred by this section but no such authority shall be granted except for the purpose of investigating the affairs, or any aspect of the affairs, of a person specified in the authority."*

11. Ms McKenzie's letter presented the facts as they appeared to the S.F.O. They depicted Mr. Taylor's part in the transaction in such a way as to suggest that the S.F.O. suspected him to have been a party to the fraud. The letter concluded with a statement that by reason of the facts stated, the S.F.O. had reason to believe that the use of the powers contained in section 24 was justified and desirable. It invited the Attorney-General to authorise Ms McKenzie and a police officer to exercise those powers on his behalf by interviewing Mr. Taylor.

12. On 3 June 1994 the Attorney-General sent Mr. Taylor a formal notice requiring him to attend for an interview but owing to illness he was unable to do so. Meanwhile Ms McKenzie had been pursuing her inquiries and on 17 May 1994 she and a colleague called upon a Mr. Rogerson, who worked for the Law Society in the administration of the solicitors' compensation fund, to talk about the transaction, which had given rise to a claim by the victim against the fund. She made a file note of the interview, recording among other things Mr. Rogerson's view that Mr. Taylor should be struck off as a solicitor and her own contention that Mr. Taylor was a co-conspirator.

13. Mr. Fuller and Mr. Deacon were indicted on charges of conspiracy to defraud and eventually convicted. Mr. Savage was in the United States and died before an application for extradition had run its course. Mr. Taylor, despite the suspicions I have recorded, was not charged. Mr. Fuller's solicitors asked him to give evidence on his behalf. Before meeting him to discuss the case, they gave him a file of documents which had been disclosed to them by the S.F.O. as unused material in accordance with the principles stated by the Court of Appeal (Criminal Division) in ***Regina v. Ward (Judith)*** [1993] 1 W.L.R. 619, 679-81 and ***Regina v. Keane*** [1994] 1 W.L.R. 746. It included a copy of the letter of 4 May 1994 to the Attorney-General of the Isle of Man and the file note of the meeting with Mr. Rogerson on 17 May 1994.

2. The Litigation

14. Mr. Taylor commenced an action for libel. He alleged that the letter contained a libel published by the S.F.O. and Ms McKenzie to the Attorney-General and that the file note contained a libel published by the S.F.O. and Ms McKenzie to Mr. Rogerson as well as a libel published by Mr. Rogerson to Ms McKenzie. He also relied upon a publication by Ms McKenzie of both documents by their disclosure to Mr. Fuller's solicitors.

15. All four defendants took out summonses to strike out the action as an abuse of process. On 26 July 1996 they were heard by Sir Michael Davies, sitting as a High Court judge. He struck out the action on the ground that the disclosure of the two documents to Mr. Fuller's solicitors had been subject to an implied undertaking, similar to that which applies to documents produced on discovery in civil proceedings, that they would not be used for any purpose other than Mr. Fuller's defence. It followed that they could not be used as the basis of a libel action by Mr. Taylor without the leave of the court.

16. Mr. Taylor appealed. Shortly before the appeal was heard in June 1997 by a Court of Appeal consisting of Kennedy and Millett L.JJ. and Sir Brian Neill, the case of ***Mahon v. Rahn*** [1998] Q.B. 424 had been decided by a differently constituted Court of Appeal. The holding, according to the headnote, was that: *". . . material disclosed by the prosecution to a defendant in criminal proceedings, whether obtained by compulsion or voluntarily, . . . was not subject to any implied undertaking analogous to that which existed in relation to material discovered in civil proceedings. . . ."*

17. I shall examine this case in more detail later, but the Court of Appeal regarded it as a binding authority which obliged it to hold that the ground upon which Sir Michael Davies had struck out the action could not be sustained. But the court invited argument on whether the striking out could be affirmed for a different reason, namely that the documents were immune from suit because they were brought into existence for the purposes of a criminal investigation. The court accepted this alternative submission and dismissed the appeal. Mr. Taylor appeals to your Lordships' House on the ground that the Court of Appeal extended the principle of immunity from suit beyond its proper sphere. The respondents, on the other hand, say that ***Mahon v. Rahn*** [1998] Q.B. 424 was wrongly decided and that the judgment ought also to be upheld on the ground upon which they succeeded before Sir Michael Davies.

3. The Two Principles

18. The two principles in debate are each well established and the question before your Lordships is the extent of their reach. The concept of an implied undertaking originated in the law of discovery in civil proceedings. A solicitor or litigant who receives documents by way of discovery is treated as if he had given an undertaking not to use them for any purpose other than the conduct of the litigation. As Hobhouse J. pointed out in ***Prudential Assurance Co. Ltd. v. Fountain Page Ltd.*** [1991] 1 W.L.R. 756,764 the undertaking is in reality an obligation imposed by operation of law by virtue of the circumstances in which the document or information is obtained. The reasons for imposing such an obligation were explained by Lord Keith of Kinkel in ***Home Office v. Harman*** [1983] 1 A.C. 280, 308: *"Discovery constitutes a very serious invasion of the privacy and confidentiality of a litigant's affairs. It forms part of English legal procedure because the public interest in securing that justice is done between parties is considered to outweigh the private and public interest in the maintenance of confidentiality. But the process should not be allowed to place upon the litigant any harsher or more oppressive burden than is strictly required for the purpose of securing that justice is done."*

19. The question in this appeal is whether the public interest in the administration of justice requires the application of an analogous principle to documents disclosed by the prosecution to the defence in criminal proceedings.

20. Likewise, the core of the principle of immunity from suit is not in doubt. By the end of the nineteenth century it was settled that persons taking part in a trial - the judge, the advocates, the witnesses - could not be sued for anything written or spoken in the course of the proceedings. The immunity was absolute and could not be defeated even by proof of malice. The reason for the immunity was explained by Fry L.J. in a well-known passage in ***Munster v. Lamb*** (1883) 11 Q.B.D. 588, 607: *"Why should a witness be able to avail himself of his position in the box and to make without fear of civil consequences a false statement, which in many cases is perjured, and which is malicious and affects the character of another? The rule of law exists, not because the conduct of those persons ought not of itself to be actionable, but because if their conduct was actionable, actions would be brought against judges and witnesses in cases in which they had not spoken with malice, in which they had not spoken with falsehood. It is not a desire to prevent actions from being brought in cases where they ought to be maintained that has led to the adoption of the present rule of law; but it is the fear that if the rule were otherwise, numerous actions would be brought against persons who were merely discharging their duty. It must always be borne in mind that it is not intended to protect malicious and untruthful persons, but that it is intended to protect persons acting bona fide, who under a different rule would be liable, not perhaps to verdicts and judgments against them, but to the vexation of defending actions."*

21. In ***Watson v. M'Ewan*** [1905] A.C. 480 the House of Lords extended the immunity to statements made by the witness to a party and his legal advisers with a view to giving evidence. The question in this case is whether the immunity extends more generally to statements made to or by investigators for the purposes of a criminal investigation.

22. It will be noticed that although both principles are concerned with public policy in securing the proper administration of justice, the interests which they are intended to protect are somewhat different and this is reflected in differences in their scope. The implied undertaking in civil proceedings is designed to limit the invasion of privacy and confidentiality caused by compulsory disclosure of documents in litigation. It is generated by the circumstances in which the documents have been disclosed, irrespective of their contents. It excludes all collateral use, whether in other litigation or by way of publication to others. On the other hand, the undertaking may be varied or released by the courts if the interests of justice so require and, unless the court otherwise orders, ceases to apply when the documents have been read to or by the court, or referred to, in proceedings in open court: Rules of the Supreme Court, Ord. 24, r. 14A.

23. The immunity from suit, on the other hand. is designed to encourage freedom of speech and communication in judicial proceedings by relieving persons who take part in the judicial process from the fear of being sued for something they say. It is generated by the circumstances in which the statement was made and it is not concerned with its use for any purpose other than as a cause of action. In this respect, however, the immunity is absolute and cannot be removed by the court or affected by subsequent publication of the statement.

24. While therefore the effect of the two principles may occasionally overlap, it is easy to think of cases in which one would apply but not the other. For example, a statement protected by the immunity may be disclosed on discovery and subsequently read out in court. The implied undertaking would cease to apply and anyone would be free to publish the statement but it still could not form the basis of a cause of action.

25. Nevertheless, there is some degree of interaction between the two principles. The implied undertaking prevents, so far as possible, the publication or dissemination of disclosed documents and therefore restricts the extent to which damage can be caused by defamatory statements which they may contain. In this sense, the injustice which may be caused by the fact that such defamatory statements are protected by the immunity is reduced.

26. It is now time to make a separate examination of the scope of the two principles. I shall begin with the implied undertaking.

4. The Implied Undertaking

27. We are concerned in this appeal with whether an implied undertaking is created by the disclosure of documents pursuant to the prosecution's duty at common law, in accordance with the principles most recently discussed by Lord Hope of Craighead in ***Regina v. Brown (Winston)*** [1988] A.C. 367, 374-77. Since the trial of Fuller and Deacon took place, the law of disclosure has been put on a statutory basis by the Criminal Procedure and Investigations Act 1996. Section 17 imposes obligations of confidentiality in relation to disclosed material, but I do not think that the statute is of any assistance in deciding whether such obligations existed at common law.

28. Until recently there was no authority on the subject. The reason, I suspect, is that the perception by prosecuting authorities of their disclosure obligations was substantially widened by the decisions of the Court of Appeal in ***Regina v. Ward (Judith)*** [1993] 1. W.L.R. 619 and ***Regina v. Keane*** [1994] 1. W.L.R. 746. Under the earlier Attorney-General's Guidelines (*Practice Note (Criminal Evidence: Unused Material)* [1982] 1 All E.R. 734), the documents disclosed would almost invariably have fallen within the immunity principle as extended in ***Watson v. M'Ewan*** [1905] A.C. 480. We were told that the disclosure of internal memoranda made by investigators or letters passing between investigators is a relatively new practice.

29. The matter was however discussed by the Court of Appeal in ***Ex parte Coventry Newspapers Ltd.*** [1993] Q.B. 278. The case was unusual in a number of respects and did not involve normal disclosure by the prosecution in advance of the trial. The documents in question were in fact disclosed by the Police Complaints Authority pursuant to an order of the Court of Appeal for the purposes of an appeal against conviction. They related to an investigation of the conduct of police officers who had given evidence against the appellant. As a result of the information contained in the documents, his appeal was allowed. A newspaper which was being sued for libel by the same police officers applied to the court for the accused to be given leave to allow it to use the documents in its defence. Both sides proceeded on the assumption that there had been an implied undertaking which it was necessary to vary. Lord Taylor of Gosforth C.J. endorsed this assumption. He said, at p. 285: *"But for such proposed order the appellant would clearly be unable to hand over the documents: he would be subject to an implied undertaking, analogous to that arising on discovery in civil proceedings, not to use the disclosed documents otherwise than for the purposes for which discovery was given, here the pursuance of the criminal appeal, which is now, of course, successfully concluded."*

30. The court went on to hold that the interests of justice required the undertaking to be varied so as to allow the appellant in the criminal proceedings to hand over the documents to the newspaper upon its undertaking to use them only for the purposes of its defence.

31. At first instance in ***Mahon v. Rahn*** (unreported), 19 June 1996, Brooke J. held that counsel in ***Ex parte Coventry Newspapers Ltd.*** [1993] Q.B. 278 had been right to concede the existence of an implied undertaking. The case concerned a libel action brought by two directors of a London firm of stockbrokers against two Swiss bankers. The alleged libel was contained in a document provided by the bankers to The Securities Association and the Serious Fraud Office in connection with an investigation which led to a prosecution of the plaintiffs on charges of conspiracy to defraud. The document was disclosed to the plaintiffs as an exhibit to a witness statement before the trial and subsequently read in open court. At the end of the prosecution case the plaintiffs successfully submitted that there was no case to answer and were acquitted.

32. Brooke J. said that in his view the general principle was that the use of documents disclosed for the purpose of legal proceedings should remain under the control of the court. The undertaking could always be varied in an appropriate case but the court should retain control. It was a necessary tool for preventing its process from being abused. He also held that the undertaking applied to material disclosed by the prosecution as intended to be used at the trial as well as to unused material and that it survived the use of the document in open court.

33. In the Court of Appeal [1998] Q.B. 424 his decision was reversed. Otton L.J. said that he could find "no basis for an implied undertaking in criminal proceedings on the grounds of privacy and confidentiality." The reason, as I understand it, was that it was foreseeable that the information, if acted upon, would be made public. It is true that in ***Mahon v. Rahn*** the letter had actually been made public by use in open

court. But that raised the separate and subsequent question of whether the undertaking, if it exists, should survive publication in open court. In the case of information which has not been made public, like the letter and file note in this case, the fact that publication may have been foreseeable as a possibility at the time when the documents were written does not mean that privacy and confidentiality should not be preserved so far as it is possible to do so. It is equally foreseeable that documents disclosed in civil discovery will be published in open court but that does not mean that there is no point in the court retaining control over the use of documents which have not been published or even, for some purposes, over those which have.

34. Otton L.J. went on to say that he saw no analogy between the position of the Crown in a criminal case and that of a party in civil proceedings. It could not be said that the Crown would be deterred from complying with its obligations of disclosure, whether at common law or now under statute, by concern that the accused might use the documents for some ulterior purpose.

35. I am not sure that it is right to treat the implied undertaking in civil proceedings merely as an inducement to a litigant to disclose documents which he might otherwise have been inclined to conceal. I think that it more a matter of justice and fairness, to ensure that his privacy and confidentiality are not invaded more than is absolutely necessary for the purposes of justice. But I readily accept that these considerations do not apply to the Crown as prosecutor with the same force as they apply to an individual litigant. In the case of material disclosed by the prosecution, the main interest in privacy and confidentiality lies at one or sometimes two removes: in the persons who provided the information and in the persons to whom the information refers.

36. Otton L.J. said that the most impressive argument in favour of an implied undertaking was the need to protect informers close to criminals. But in his view sufficient protection was already provided by public interest immunity, which entitled the prosecution to apply for leave to withhold documents which would disclose the identity of a police informer, and by the immunity from suit accorded to statements made for the purpose of litigation, which I shall consider in more detail later.

37. In my view, this takes too narrow a view of the interests which require protection and too broad a view of the other rules which may be available for that purpose. Many people give assistance to the police and other investigatory agencies, either voluntarily or under compulsion, without coming within the category of informers whose identity can be concealed on grounds of public interest. They will be moved or obliged to give the information because they or the law consider that the interests of justice so require. They must naturally accept that the interests of justice may in the end require the publication of the information or at any rate its disclosure to the accused for the purposes of enabling him to conduct his defence. But there seems to me no reason why the law should not encourage their assistance by offering them the assurance that, subject to these overriding requirements, their privacy and confidentiality will be respected.

38. One must also consider the interests of persons who are mentioned in the statements. Information given to the police or investigatory authorities will frequently contain defamatory or at least hurtful allegations about other people. That is to be expected in a criminal investigation. Such people may never be charged or know that they were under suspicion or that anything untoward was said about them. If such allegations are given publicity during the course of the proceedings, they will have to suffer the consequences because of the public interest in open justice. Even then, the judge will often be able to prevent the introduction of allegations about third parties which are not relevant to the issues in the case. But there seems to me no reason why the accused should be free, outside court, to publish such statements to the world at large. The possibility of a defamation action is for most people too expensive and impractical to amount to an adequate remedy.

39. Otton L.J. thought that the rules of public interest immunity, immunity from suit and qualified privilege should be sufficient protection for people who might be adversely affected by collateral use of disclosed documents. But the first two of these rules are not designed to protect the same interests as those protected by the implied undertaking and can therefore offer only accidental protection. Public interest immunity, in a criminal trial, involves weighing the public interest in confidentiality against the interests of justice - usually, the interests of the accused in being able to establish his defence. But the interests at

stake when a question of collateral use arises are quite different. One is, by definition, no longer concerned with the use of the information for the purposes of establishing a defence at the trial. The interests to be weighed are, on the one hand, the public interest in allowing the collateral use (as in ***Ex parte Coventry Newspapers Ltd***. [1993] Q.B. 278) and, on the other hand, the public interest in avoiding unnecessary invasion of the privacy and confidentiality of the maker of the statement and anyone to whom it refers. There may be occasions on which the answers produced by these two exercises will coincide but that will be accidental.

40. Likewise, as I mentioned earlier, the interests protected by the immunity rule are different. The immunity rule, for example, offers no protection of the privacy or reputations of people mentioned in the statement. On the contrary, it makes their position worse, since they cannot even clear their names by bringing a libel action against the maker. In the present case, the plaintiff might have taken some comfort from the fact that the documents which showed that he had been under suspicion could go no further than the files of the S.F.O. and Mr. Fuller's solicitors. They could not have damaged his reputation in the outside world. Instead, he chose to bring libel proceedings and (apparently due to the thoughtlessness of his solicitors) put the statements into the public domain by quoting them in extenso on a specially indorsed writ.

41. In addition, the immunity rule, at its widest, protects only statements made for the purposes of the investigation. It offers no protection for documents in existence at the time when the investigation commences and which are given to the police or investigators for the purposes of the prosecution. But these documents too would have been disclosed only because the interests of justice so required and there seems no reason why that should justify their collateral use.

42. Finally, qualified privilege also seems to me an inadequate answer, both for the reasons given by Fry L.J. in ***Munster v. Lamb*** (1883) 11 Q.B.D. 588, 607 and because it does nothing to protect the privacy of persons mentioned in the statements.

43. In my opinion, therefore, the disclosure of documents by the prosecution as unused material under its common law obligations did generate an implied undertaking not to use them for any collateral purpose. I agree with the reasoning of Brooke J. on this point in ***Mahon v. Rahn*** and I think that Sir Michael Davies was right to strike out the action for the reasons which he gave.

44. I do not propose to express a view on the further points which arose in of ***Mahon v. Rahn*** [1998] Q.B. 424, namely whether the undertaking applies also to used materials and whether it survives the publication of the statement in open court. I do not do so because these questions may well have been overtaken by the express provisions of the 1996 Act. But I would draw attention to the comments of Brooke J. in *Mahon* ***v. Rahn*** on the question of whether the provisions of Ord. 24, r. 14A (which was introduced in response to a decision of the European Court of Human Rights holding that the previous law unduly limited freedom of expression) and, by parity of reasoning, section 17(3)(*b*) of the 1996 Act, are not too widely drawn. There seems to me much force in his view that the court should nevertheless retain control over certain collateral uses of the documents, including the bringing of libel proceedings.

5. Immunity from Suit

45. In view of the opinion I have expressed on the implied undertaking, it is not strictly necessary for me to consider the ground upon which the Court of Appeal dismissed the appeal, namely immunity from suit. Nevertheless, the question was fully argued before your Lordships and I think it is right to deal with it. It could easily have happened that, as in ***Mahon v. Rahn***, the documents were read in open court. I think it would be right for your Lordships to decide whether in that case the plaintiff would have been entitled to rely upon them for the purposes of an action in libel.

46. I have already described the evolution of the principle of immunity from suit in respect of statements made in the course of litigation and its extension in ***Watson v. M'Ewan*** [1905] A.C. 480 to statements made before the proceedings. In that case, a wife who had brought matrimonial proceedings in Scotland claimed that a doctor (who had examined her) had made defamatory statements in the course of giving evidence for her husband. This was held to be subject to absolute immunity, but she relied also upon the publication of the same statements before trial to her husband and his lawyers. In the House of Lords,

Lord Halsbury L.C. said that the earlier statements were subject to the same immunity. He said, at p. 487: *"It is very obvious that the public policy which renders the protection of witnesses necessary for the administration of justice must as a necessary consequence involve that which is a step towards and is part of the administration of justice--namely, the preliminary examination of witnesses to find out what they can prove. It may be that to some extent it seems to impose a hardship, but after all the hardship is not to be compared with that which would arise if it were impossible to administer justice, because people would be afraid to give their testimony."*

47. In later cases there has been some discussion of the general principle upon which this extension was based. Judges have rightly cautioned against further extension merely by analogy. In ***Mann v. O'Neill*** (1997) 71 A.L.J.R. 903, 912 McHugh J. identified two dangers in judicial reasoning - a Scylla and Charybdis through which it was necessary to navigate. The first was: *". . . the temptation to recognise the availability of the defence for new factual circumstances simply because they are closely analogous to an existing category (or cases within an existing category) without examining the case for recognition in light of the underlying rationale for the defence."*

48. On the other hand, there was an opposite peril in: *". . . the temptation too readily to dismiss the defence as applicable in novel circumstances because the case is not within or analogous to an existing category but without determining the matter by reference to the defence's underlying rationale."*

49. There is no doubt that the claim for absolute immunity in respect of statements made by one investigator to another (as in the case of the letter from the S.F.O. to the Attorney-General of the Isle of Man) or by an investigator to a person helping with the inquiry (as in the statements of Ms McKenzie recorded in the file note) or to an investigator by a person helping the inquiry who is not intended to be called as a witness (as in the remarks of Mr. Rogerson included in the file note) is a novel one. So far as I know, it is not a category of absolute immunity which has been considered before. But it should not for that reason be rejected. Again, I would imagine that the reason why this question now arises for the first time is that before the broadening of the prosecution's disclosure obligation, such letters and memoranda, internal to the investigation, would never have seen the light of day. At any rate, the question is now whether they fall within the underlying rationale for the existence of immunity from suit.

50. In ***Mann v. O'Neill*** (1997) 71 A.L.J.R 903, 907 the judgment of Brennan C.J., Dawson, Toohey and Gaudron L.JJ. describes the rationale as one of necessity: *"It may be that the various categories of absolute privilege are all properly to be seen as grounded in necessity, and not on broader grounds of public policy. Whether or not that is so, the general rule is that the extension of absolute privilege is 'viewed with the most jealous suspicion, and resisted, unless its necessity is demonstrated.' Certainly, absolute privilege should not be extended to statements which are said to be analogous to statements in judicial proceedings unless there is demonstrated some necessity of the kind that dictates that judicial proceedings are absolutely privileged."*

51. Thus the test is a strict one; necessity must be shown, but the decision on whether immunity is necessary for the administration of justice must have regard to the cases in which immunity has been held necessary in the past, so as to form part of a coherent principle.

52. Approaching the matter on this basis, I find it impossible to identify any rational principle which would confine the immunity for out of court statements to persons who are subsequently called as witnesses. The policy of the immunity is to enable people to speak freely without fear of being sued, whether successfully or not. If this object is to be achieved, the person in question must know at the time he speaks whether or not the immunity will attach. If it depends upon the contingencies of whether he will be called as a witness, the value of the immunity is destroyed. At the time of the investigation it is often unclear whether any crime has been committed at all. Persons assisting the police with their inquiries may not be able to give any admissible evidence; for example, their information may be hearsay, but nonetheless valuable for the purposes of the investigation. But the proper administration of justice requires that such people should have the same inducement to speak freely as those whose information subsequently forms the basis of evidence at a trial.

53. When one turns to the position of investigators, it seems to me that the same degree of necessity applies. It would be an incoherent rule which gave a potential witness immunity in respect of the statements which he made to an investigator but offered no similar immunity to the investigator if he passed that

information to a colleague engaged in the investigation or put it to another potential witness. In my view it is necessary for the administration of justice that investigators should be able to exchange information, theories and hypotheses among themselves and to put them to other persons assisting in the inquiry without fear of being sued if such statements are disclosed in the course of the proceedings. I therefore agree with the test proposed by Drake J. in *Evans v. London Hospital Medical College (University of London)* [1981] 1 W.L.R. 184, 192: *". . . the protection exists only where the statement or conduct is such that it can fairly be said to be part of the process of investigating a crime or a possible crime with a view to a prosecution or a possible prosecution in respect of the matter being investigated."*

54. This formulation excludes statements which are wholly extraneous to the investigation - irrelevant and gratuitous libels - but applies equally to statements made by persons assisting the inquiry to investigators and by investigators to those persons or to each other.

55. As the policy of the immunity is to encourage freedom of expression, it is limited to actions in which the alleged statement constitutes the cause of action. In ***Marrinan v. Vibart*** [1963] 1 Q.B. 528 the Court of Appeal held that the immunity in respect of statements made in court or with a view to a prosecution could not be circumvented by alleging that it formed part of a conspiracy with other witnesses to give false evidence. That seems to me to be right. On the other hand, the immunity does not apply to actions for malicious prosecution where the cause of action consists in abusing legal process by maliciously and without reasonable cause setting the law in motion against the plaintiff. It does not matter that an essential step in setting the law in motion was a statement made by the defendant to a prosecuting authority or even the court: see ***Roy v. Prior*** [1971] A.C. 470.

56. Actions for defamation and for conspiracy to give false evidence plainly fall within the policy of the immunity and actions for malicious prosecution fall outside it. In between, there is some disputed ground. In ***Evans v. London Hospital Medical College (University of London)*** [1981] 1 W.L.R. 184 Drake J. held that it precluded reliance on the statement in an action for negligence in which it was alleged that a carelessly prepared post mortem report had led to the plaintiff being unjustifiably arrested and charged with murder. I express no view on this case, which I think might nowadays have been decided on the ground that the defendants owed the plaintiff no duty of care. There is also some dispute over whether it applies to the emergent tort of abuse of public office. In ***Silcott v. Commissioner of Police for the Metropolis*** (1996) 6 Admin. L.R. 633 and again in ***Docker v. Chief Constable of West Midlands Police*** (unreported), 17 March 1998, Court of Appeal (Civil Division) Transcript No. 472 of 1998, the Court of Appeal decided that it did while in ***Bennett v. Commissioner of Police for the Metropolis*** (1997) 10 Admin. L.R. 245 Sir Richard Scott, V.-C. decided that it did not. The point has not been argued before your Lordships and I therefore likewise express no view. But I am satisfied that the Court of Appeal was right in holding that the statements relied upon in this case were protected by absolute immunity and for that reason also I would dismiss the appeal.

LORD HOPE OF CRAIGHEAD My Lords,

57. The plaintiffs in this case are Mr. Taylor, who is an English solicitor practising in the Isle of Man, and Monarch Assurance Plc., an Isle of Man company of which Mr. Taylor is the managing director. Their action is one of damages for defamation. It is based entirely upon the contents of two documents.

58. The first document is a letter dated 4 May 1994 which was sent by the second defendant Katherine McKenzie, an investigating lawyer employed by the first defendant, the Serious Fraud Office (the S.F.O.), to the Attorney- General of the Isle of Man. It was a letter of request which was written in connection with an investigation which was being carried out in the S.F.O. into an allegation of fraud committed within the United Kingdom by Charles Deacon and James Fuller and by another man named John Patrick Savage who later died. The request was for assistance to enable enquiries to be undertaken in the Isle of Man under the Criminal Justice Act 1990 (Isle of Man). The second document is a file note which was prepared on 14 May 1994 by the second defendant following a meeting which took place on that date as part of the same investigation at the Solicitors Complaints Bureau. At that meeting the second defendant was accompanied by Detective Inspector Hulse of the Staffordshire Police. They had gone to see the fourth defendant, an employee of the third defendant, the Law Society, to obtain information from him about how the compensation fund could be expected to work in the circumstances

of the alleged fraud. The plaintiffs maintain in their Statement of Claim that the letter and the file note contain words which, in their natural and ordinary meaning, are defamatory of them because they allege that they were involved in the fraudulent activity which was being investigated.

59. A copy of the letter was retained within the office of the S.F.O. together with the file note as part of the papers relating to the investigation. Some months later the criminal proceedings which had been commenced against Deacon and Fuller were transferred to the Crown Court. On 24 October 1994 the solicitors for Deacon and Fuller received from the S.F.O. under the common law disclosure rules material falling within the category of "unused material" which included these two documents. In May 1995 Mr. Taylor was asked by counsel representing Fuller whether he would be willing to assist him with his defence. A meeting with him was then arranged, and in order to enable him to prepare for it he was shown a number of documents. These included the copy letter and the file note which had been disclosed to the solicitors by the S.F.O. In January 1996 Deacon and Fuller were convicted of conspiracy to defraud after a trial in which Mr. Taylor did not, in the event, give evidence. Neither of the two documents were produced or referred to at the trial. The second and fourth defendants were not called upon either by the Crown or by the defence to attend the trial as witnesses.

60. Two points emerge clearly from this brief narrative. The first is that, had it not been for the obligation which rested on the S.F.O. under the common law disclosure rules, these two documents would never have been seen by Mr. Taylor or by anyone else who was not involved in the investigation by the S.F.O. into the alleged fraud. The copy letter and the file note would have remained on the S.F.O.'s files. There would have been no dissemination to anybody outside its office of any defamatory material which was contained in them. The second is that, as none of the defendants were witnesses or potential witnesses at the trial, they do not have the protection of the absolute privilege which is available in respect of what is said in court by witnesses and in statements which are taken when the case is being prepared for trial by potential witnesses: ***Watson v. M'Ewan*** [1905] A.C. 480.

61. Two further points need to be made about the common law disclosure rules in order to set these issues into their proper context. The first point relates to the scope of these rules. They have provided the basis for the rules which have now been introduced by statute: see sections 1--21 of the Criminal Procedure and Investigations Act 1996. By October 1994, when the material which is relevant to this case was disclosed by the S.F.O., it was no longer enough to disclose details of the evidence which the prosecution proposed to use at the trial. The duty extended to "unused" material as well, namely to material which the prosecution had decided not to use but which might be useful to the defence. It extended to statements taken from witnesses whom the prosecution had decided not to call at the trial, to items which the prosecution had decided not to exhibit but which the defence might wish to use in support of the defence case and to all manner of other material, irrespective of whether it would be admissible in evidence, which might possibly be helpful to the defence or damaging to the prosecution case. In the interests of ensuring a fair trial the duty had been extended far beyond the original concept of giving fair notice to the defendant of the case which he had to meet. And the consequences of non-disclosure had become so serious for the administration of justice--the setting aside of a conviction, with the prospect of much adverse publicity--that in practice the duty extended to everything on the prosecutor's files which could not be made the subject of a specific request for non-disclosure. Thus the correspondence, file notes and working papers of investigators, which in the past would have been regarded as purely internal to the prosecutor and not available at all for defence scrutiny, had now become disclosable.

62. The second point is the recent origin of this development. It first found expression in the *Attorney-General's Guidelines* Practice Note (Criminal Evidence: Unused Material) [1982] 1 All E.R. 734. But the extent of the modern common law rules was not clearly established until a series of cases in which the Court of Appeal held that a failure to disclose what ought to have been disclosed was an irregularity in the course of the trial. This enabled the court to hold that the conviction was unsafe: ***Regina v. Maguire*** [1992] Q.B. 936; ***Regina v. Ward (Judith)*** [1993] 1 W.L.R. 619 and ***Regina v. Davis*** [1993] 1 W.L.R. 613. The history of the matter was described in ***Regina v. Brown (Winston)*** [1994] 1 W.L.R. 1599, [1998] AC 367. The fact that the development is so recent is important, as one compares the modern law rules about disclosure with the absolute immunity which is given to witnesses for things said in court and in

statements taken from potential witnesses. Central to the present case is the question whether the law about the immunity of witnesses and potential witnesses, which was settled by authority long before the evolution of the modern disclosure rules, is in need of some adaptation or adjustment in order to keep pace with the widening of the disclosure rules.

63. In my opinion it is necessary here, as in so many matters affecting the criminal law, to balance the public interest in the administration of justice against the interests of the individual. The history of the evolution of the disclosure rules shows that the balance has swung a long way towards the interests of the individual who is being prosecuted. This is in recognition of the fact that the defendant in criminal proceedings has the right to insist on a fair trial. Fairness to the defendant demands the widest possible disclosure. In practice, to avoid the risk of unfairness and because the prosecutor does not have the time or the resources to edit out every item which need not be disclosed, disclosure under the modern rules tends to provide the defence with more material than is strictly necessary.

64. But the administration of justice is not all about fairness to the defendant. It is also about the interests of those individuals who may be affected by dissemination of the material. There is a public interest also, in the detection and punishment of crime. If that interest is put at risk because of the consequences of the disclosure rules, the balance between the public interest and the interests of the individual is disturbed. It needs to be adjusted in favour of the public interest. This cannot be done by reducing the scope of the disclosure rules. That would prejudice the right of the defendant to a fair trial, which is always paramount. What can be done is to increase the protection to those who may be affected by the disclosure rules against the collateral use of such material--that is to say, against its use for purposes other than to ensure that the defendant has a fair trial.

65. I consider that Mr. Caldecott Q.C. for the respondents took your Lordships to the heart of the matter when he submitted that the public interest required that all those involved in a criminal investigation should be able to communicate freely without being inhibited by the threat of proceedings for defamation such as those which have been brought in the present case. Those who give or may give evidence at the trial are protected by the traditional witness immunity when they are in the course of preparing their evidence. But the traditional protection has until now been applied only to persons who fall within that category. Yet the typical criminal investigation involves many other people who are not witnesses or potential witnesses. They include those who simply provide information to the investigators. The information which they give may be useful as background but not worth investigating further for use at the trial. It may not even be admissible as evidence. But it may nevertheless be worth putting on record, perhaps to close one line of inquiry or to open up one which has not yet been investigated. As soon as it has been recorded, perhaps in a file note to ensure that it is not lost sight of should further reference to it become necessary, it is at risk now of being disclosed to the defence. Then there are the investigators themselves and the prosecuting officials with whom they are required to communicate. They are likely to be members of a team, perhaps working from various offices. The memberships of the team may change from time to time. The efficiency of the investigation may be dependent upon the completeness and accuracy of the information which has been committed to paper by the investigators. Yet anything which is committed to paper, whether by the official or the investigator, is now at risk of being disclosed under the disclosure rules.

66. The risk to the administration of justice lies in the inhibiting effect of collateral use of this material. A criminal investigation may travel in various directions before it settles down and concentrates on the activities of those against whom the prosecutor believes there is sufficient evidence. Those who provide information to investigators usually do so in the belief, which may or may not be expressed by them, that the information is being given out of a sense of public duty and in confidence. That information may, if it is to be useful to the investigator, contain material which is defamatory. So long as the information goes no further, no harm is done to anybody. But disclosure releases the defamatory material from the control of the prosecutor. Unless protected, it may be disseminated further and become actionable.

67. It requires little imagination to appreciate the damaging effects on the supply of information if those who supply it are to be subjected to claims for damages for defamation arising from what they have

said. The process of investigation is likely to be inhibited if the investigator is at risk of such a claim because of something which he has recorded for his own use, or for use by others in his team, in a file note. As Lord Keith of Kinkel remarked in ***Hill v. Chief Constable of West Yorkshire*** [1989] A.C. 53, 63D, in a different but analogous context, the imposition of liability in such circumstances may lead to the exercise of the investigatory function being carried on in a detrimentally defensive frame of mind. This may prejudice the defendant, because other possible lines of inquiry which might assist his defence will not appear anywhere in writing lest they should be thought, following disclosure, to be defamatory. I do not think that it is possible to overstate the importance, in the public interest, of ensuring that material which is disclosed in criminal proceedings is not used for collateral purposes.

68. Under the existing rules all those who participate in a criminal investigation in good faith are entitled to claim the protection of qualified privilege. But that is an imperfect protection, because qualified privilege requires to be pleaded and established as a defence. No action can be struck out on the ground of qualified privilege. The requirement therefore is to extend to informants, investigators and prosecutors whose statements are revealed by the operation of the disclosure rules the benefit of the absolute privilege in respect of the statements made which is already accorded to witnesses and potential witnesses. And it is necessary to extend to them the same absolute immunity against actions for conspiracy or for negligence based upon disclosed material as has already been recognised in the case of the police: see ***Marrinan v. Vibart*** [1963] 1 Q.B. 529; ***Hill v. Chief Constable of West Yorkshire*** **[**1989] A.C. 53. Such material may however still be actionable on other grounds where malice and lack of reasonable and probable cause can be established. Just as proceedings for perjury are available to deal with the witness who would otherwise be protected against statements made in the witness box, so also the public interest requires that a remedy for malicious prosecution should remain available against those who would be entitled to the benefit of the absolute privilege but who have acted maliciously and without reasonable and probable cause during the investigation process. But that is a quite separate matter as it is the malicious abuse of process, not the making of the statement, which provides the cause of action. The public policy argument for extending the absolute privilege, consistently with established principles, seems to me to be unanswerable.

69. I see the two solutions as complementary to each other. If the absolute privilege and the consequent immunity are to be kept within the limits which are necessary for the administration of justice, they must be accompanied by a rule which restricts the use and dissemination of disclosed material. The purpose of the immunity is to ensure the integrity of the investigation process. The disclosure should extend no wider than is necessary to serve the public interest in the administration of justice. It should not be accompanied by risks to the good name of those who are not on trial from whom the protection of defamation proceedings has been removed by the immunity. So a restriction on the release and collateral use of the disclosed material by means of the implied undertaking can be seen as a necessary balance against the possible harm which might flow from the absolute nature of the immunity.

70. For these reasons as well as those given in the speech of my noble and learned friend, Lord Hoffman, which I have had the benefit of seeing in draft and with which I agree, I would dismiss the appeal.

LORD HUTTON My Lords,

71. I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Hoffmann and Lord Hope of Craighead, with which I am in agreement, and will only add a few observations of my own in relation to the principle of immunity from suit. Under this principle it is settled that no action can be brought against the judge, counsel, witnesses, jurors and parties for words spoken or written in the course of a trial, and this immunity is absolute and cannot be defeated by proof of malice. In *Munster v. Lamb* (1883) 11 Q.B.D. 588, 604 Brett M.R. stated: *"The rule of law is that what is said in the course of the administration of the law, is privileged; and the reason of that rule covers a counsel even more than a judge or a witness. To my mind it is illogical to argue that the protection of privilege ought not to exist for a counsel, who deliberately and maliciously slanders another person. The reason of the rule is, that a counsel, who is not malicious and who is acting bona fide, may not be in danger of having actions brought against him. If the rule of law were otherwise, the most innocent of counsel might be unrighteously harassed with suits, and*

therefore it is better to make the rule of law so large that an innocent counsel shall never be troubled, although by making it so large counsel are included who have been guilty of malice and misconduct."

72. The immunity was extended by this House in ***Watson v. M'Ewan*** [1905] A.C. 480 to statements made by a witness to a party and his solicitor in preparing for a trial, the Earl of Halsbury L.C. stating at p. 487: *"It is very obvious that the public policy which renders the protection of witnesses necessary for the administration of justice must as a necessary consequence involve that which is a step towards and is part of the administration of justice--namely, the preliminary examination of witnesses to find out what they can prove. It may be that to some extent it seems to impose a hardship, but after all the hardship is not to be compared with that which would arise if it were impossible to administer justice, because people would be afraid to give their testimony."*

73. In recent years the procedure has developed whereby very full disclosure is given to the defendant in a criminal case, so that he will become aware, and others may become aware, of what has been said by investigators and those who speak to them in the course of the investigation which preceded the prosecution. Therefore, just as the preliminary examination of a witness by a party's solicitor out of court is a step towards the administration of justice which requires to be protected, I consider that the investigation of a suspected crime is a step towards the administration of justice so that the protection of absolute privilege should be given to those who, in the course of their public duty in investigating a suspected crime, speak or write to persons who may be able to provide relevant information, and to such persons in respect of what they say or write to the investigators, and to the giving of information by investigators to their colleagues who are also concerned with the investigation. If this protection were not given police officers and investigators, such as officers of the Serious Fraud Office, who had conducted investigations into suspected crimes and persons who gave information to them "might be unrighteously harassed with suits" and, as Fry L.J. stated in *Munster v. Lamb* at p. 607, there would be the risk that "numerous actions would be brought against persons who were merely discharging their duty."

74. In my opinion the argument should not prevail that the defence of qualified privilege would give adequate protection to investigators and those who spoke to them because I consider that there would be a real risk that an unfounded allegation of malice made by a plaintiff bringing an action for defamation would subject an investigator or informant to harassment to which he should not be subjected.

75. I am in agreement with the statement of Drake J. in ***Evans v. London Hospital*** [1981] 1 W.L.R. 184, 192C in respect of witnesses and possible witnesses that: *". . . the protection exists only where the statement or conduct is such that it can fairly be said to be part of the process of investigating a crime or a possible crime with a view to a prosecution or possible prosecution in respect of the matter being investigated."*

76. I would also apply this requirement to an investigator or a person who gives him information so that the protection will not apply to a gratuitous defamatory remark made by an investigator to a third party or by a third party to an investigator.

77. In ***D. v. National Society for the Prevention of Cruelty to Children*** [1978] A.C. 171 this House held that a similar immunity from disclosure of their identity should be given to those who gave information about neglect or ill treatment of children to a local authority or the N.S.P.C.C to that which the law allowed to police informers. In rejecting an argument that such an immunity could give protection to a malicious informant Lord Simon of Glaisdale said at p. 233B: *"I cannot leave this particular class of relevant evidence withheld from the court without noting, in view of an argument for the respondent, that the rule can operate to the advantage of the untruthful or malicious or revengeful or self-interested or even demented police informant as much as of one who brings information from a high-minded sense of civic duty. Experience seems to have shown that though the resulting immunity from disclosure can be abused the balance of public advantage lies in generally respecting it."*

78. In this case, whilst the immunity may on occasions benefit a malicious investigator, I consider that the balance of public advantage lies in allowing it to the defendants.

79. I would dismiss the appeal.