[2021] UKUT 0318 (TCC)

Appeal number UT-2020-000204

Procedure – appeal from dismissal of application for disclosure of communications between a solicitor for a party and that party's expert witness – scope of without prejudice privilege and legal professional privilege – CPR 35.10 and 35.12 – appeal dismissed

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

WIRED ORTHODONTICS LIMITED
IAN HUTCHINSON
SUSAN BESSANT

Appellants

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: MR JUSTICE MILES

Sitting in public at The Royal Courts of Justice, Rolls Building, London on 30 November 2021 & 1 December 2021

Andrew Thornhill QC and Ben Elliott, instructed by Enyo Law LLP, for the Appellants

Adam Tolley QC and Charles Bradley, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal against the decision of the FTT (Judge Amanda Brown) released on 8 July 2020 refusing the Appellants' application for disclosure of communications passing between HMRC's solicitor and their appointed expert witness, Mr Andrew Orrock. The FTT granted permission to appeal against its own decision on 13 October 2020.

2. The application sought an order for disclosure of all correspondence passing between HMRC's solicitor and Mr Orrock between 11 November 2019 and 20 December 2019. The Appellants said in their application notice that they may seek to rely on this evidence at the substantive hearing of these appeals to undermine the weight to be given to Mr Orrock's evidence at the trial. In their skeleton for this appeal they said (alternatively) that they may seek to have him excluded entirely as an independent expert.

3. The application notice for the order for disclosure referred to a series of emails between Mr Orrock and the Appellants' expert, Mr Steven Brice, in which they discussed the terms of a draft joint statement following their experts' meeting.

4. The Appellants made it clear that this inter-expert correspondence was being relied upon only for the purposes of the application and that they would not seek to rely on it for the purpose of the substantive trial.

5. They submitted below and before me that the inter-expert correspondence shows an inappropriate intervention by HMRC's solicitor in the dealings between the experts.

6. They said in their application notice that it gives rise to at least a prima facie concern that HMRC's solicitor provided input on the substantive content of the joint statement and to a reasonable suspicion that the solicitor's intervention led to Mr Orrock changing his position in a significant respect.

7. It was and is common ground that the correspondence passing between Mr Orrock and Mr Brice is in principle subject to the without prejudice rule of admissibility. The Appellants say (on various bases) they may nonetheless properly refer to it for the purposes of making the application for disclosure. The Respondents say that the correspondence is inadmissible and cannot be relied on for that or any other purpose.

8. The FTT accepted the Respondents' arguments and held that it was unable to order disclosure because the inter-expert correspondence (which

constituted the whole of the evidence in support of the application) was covered by without prejudice privilege.

9. Though this case is proceeding in the FTT the parties agreed that the tribunal should follow and apply the principles found in CPR 35 concerning expert evidence.

Factual background

10. The proceedings concern an appeal against a PAYE determination, NIC decision and a closure notice issued in relation to certain transactions entered into by the Appellants. The present application and appeal concerns the position of the First Appellant ("Wired").

11. The underlying dispute was summarised by the FTT at [2]-[3] as follows:

> 2. The present application arises in the context of a dispute concerning a transaction under which Wired and each of Ian Hutchinson and Susan Bessant (together "the Employees") entered into a tripartite agreement with an employee benefit trust ("Trust"). Pursuant to that agreement Wired agreed to purchase an asset for the relevant Employee subject to those Employees undertaking an obligation to pay the value of the asset to the Trust.
>
> 3. There are several live issues in the appeal. One such issue is whether Wired is entitled to a corporation tax deduction in relation to its expenditure in purchasing the assets for the Employees ("Deduction"). Central to one of the issues is whether Wired's profit and loss account and specifically the Deduction was compliant with generally accepted accounting principles ("the GAAP Issue").

12. The FTT gave directions permitting each party to instruct an expert to prepare a report about the GAAP Issue, to include a statement that the expert understood their duties under CPR 35, CPR PD 35 and the Guidance for the Instruction of Experts in Civil Claims 2014. The experts were directed to meet and produce a statement of areas on which they agreed and disagreed.

13. HMRC appointed Mr Orrock, an HMRC employee, as their expert; the Appellants appointed Mr Brice. They exchanged reports on 20 September 2019.

14. Mr Orrock concluded in his report that Wired was required under GAAP to recognise the asset in its accounts and that the treatment in the accounts did not comply with GAAP. Mr Brice concluded that it was permissible in accordance with GAAP for Wired not to recognise the asset.

15. On 9 October 2019 a meeting took place between Mr Brice and Mr Orrock, with a view to them agreeing the wording of a statement of areas in which they agreed and disagreed, including the reasons for any disagreement.

16. What then happened was set out by the FTT at [14] – [29] (slightly amended for typos):

> 14. Following the exchange of expert reports the experts met and on 23 October 2019 Mr Brice subsequently provided Mr Orrock with the first draft of the Joint Report.
>
> 15. Section 4 of the Joint Report deals with the second question and the accounting treatment adopted in the 2015 financial statements. Paragraph 4.2.1 of this draft records as issue b) and c):
>
> > "b) Recognition of assets subject to uncertainty: In accordance with the Statement of Principles: "Simply because a transaction or other event results say, in a new asset being created, it does not follow that the new asset will be recognised […]" Where there is uncertainty as to whether an asset may yield future economic benefit in order to recognise an asset it is necessary to have sufficient evidence.
> > The Accounting Experts agree that given the specific characterises of the Wired transactions and specific restrictions on the EBT that there are two alternative interpretations that could be reached under GAAP by a reasonable accountant as to whether an asset should or should not be recognised by the Company. However, the Accounting Experts disagree as to the most appropriate treatment with regard to accounting for the EBT asset and therefore this is considered further in Section 4.3.1 (a) below under areas of disagreement between the Accounting Experts.
> >
> > c) Alternative accounting treatment: The Accounting Experts agree that this is not a standard EBT transaction both Accounting Experts acknowledge that each other's treatment could be reached by a reasonable accountant but ultimately disagree over the most appropriate treatment (see Section 4.3.1(a) below) that should be applied in Wired's 2015 Financial Statements."
> > (original italics emphasis)
>
> 16. By email response dated 31 October 2019. Mr Orrock returned an amended second draft of the report stating that he had made "a small number of amendments to your original entries" continuing: "Hopefully you will be happy with these changes … If you want to discuss anything please let me know."

17. An amendment was made to 4.2.1 b) and c) as follows:

> "b) … The Accounting Experts agree that given the specific characterises of the Wired transactions and specific restrictions on the EBT that there ~~are~~ could be two alternative interpretations that ~~could~~ might be reached under GAAP by a reasonable accountant as to whether an asset should or should not be recognised by the Company. However, the Accounting Experts disagree as to the most appropriate treatment with regard to accounting for the EBT asset and therefore this is considered further in Section 4.3.1 (a) below under areas of disagreement between the Accounting Experts.
>
> c) Alternative accounting treatment: The Accounting Experts agree that this is not a standard EBT transaction both Accounting Experts acknowledge that each other's treatment could be reached by a reasonable accountant if a typical EBT transaction was in point, but ultimately they disagree over the most appropriate treatment (see Section 4.3.1(a) below) that should be applied in Wired's 2015 Financial Statements." (the changes shown were not tracked in the original document)

18. When Mr Brice reverted on 11 November 2019 with version 3 the changes related only to c):

> "c) Alternative accounting treatment: The Accounting Experts agree that this is not a standard EBT transaction both Accounting Experts acknowledge that each other's treatment could be reached by a reasonable accountant ~~if~~ ~~a typical~~ *given the atypical nature of* the EBT transaction ~~was~~ in point, but ultimately they disagree over the most appropriate treatment (see Section 4.3.1(a) below) that should be applied in Wired's 2015 Financial Statements." (all changes shown were not tracked in the original document new changes shown in italics and double strike through)

19. On 14 November 2019 Mr Orrock emailed Mr Brice:

> "Unfortunately my instructing solicitor has pointed out a potential ambiguity in the JS as it currently stands and I am now thinking of how to deal with it. The ambiguity is contained in paras. 4.2.1 (b) and (c). Where we are currently saying on the one hand that we agree a "reasonable accountant" could come to either of 2 views and then say that we disagree, but detail our disagreement further down. My solicitor is concerned that this may suggest to the Tribunal that we both agree that either outcome is acceptable. Unfortunately, whilst I can agree that a reasonable

> accountant might come to let's say your view, that isn't the same as saying that I agree that such a view is acceptable, merely I can see how another person would come to the alternative view.
> Anyway he has suggested a way to avoid any possible misunderstanding is as follows:
> **'The best way to resolve this issue may be for both you and the opposing expert to take a far simpler approach and to just succinctly set out your respective interpretation and the most appropriate accounting treatment that you each say follows from that interpretation on these particular facts. The Tribunal will then have clearly stated in front of them the expression of your respective positions and the clear choice it can make.'**
> In view of this I will now try and come up with a form of words that achieves that aim and will let you see it as soon as possible …" (original emphasis)

20. This was followed up with an email on 15 November 2019 which stated:

> "I made some amendments to the draft JS last night and sent it off to the solicitor, just for peace of mind that any ambiguity was removed… ."

21. On 21 November 2019 Mr Brice emailed Mr Orrock enquiring after the further draft and by reply also on 21 November 2019 Mr Orrock confirmed that he was "still waiting to hear from the solicitor … I also don't know, yet, whether any ambiguity in what we have agreed between us has now been removed from the JS. I would hope to hear something today." Later that day Mr Orrock provided a further draft stating in his cover email:

> "Thank you for your patience in this matter. I now attach a revised draft of the joint statement where some further changes have been reflected primarily to eliminate a possible ambiguity in the matters that we have agreed upon. Essentially I did not want the joint statement to suggest that I was agreeing with your view that it was possible under Scenario A to recognise an expense and be in accordance with UK GAAP. Generally, I do accept that even a reasonable accountant may not always be successful in applying UK GAAP. Consequently you will note that I have eliminated references to "reasonable accountant", because I think that could suggest that a reasonable accountant will always successfully apply UK GAAP."

22. In the enclosed revised draft the relevant paragraphs now read:

> "b) Recognition of assets subject to uncertainty: The Accounting Experts agree that where there is uncertainty as to whether an asset may yield future economic benefit in order to recognise an asset it is necessary to have sufficient evidence. This is derived from where the Statement of Principles says: *"Simply because a transaction or other event results, say in a new asset being created it does not follow that the new one will be recognised […].* However, as their respective individual reports conclude, the Accounting Experts disagree on the accounting treatment with regard to accounting for the EBT asset and therefore this is considered further in Section 4.3.1(a) below under areas of disagreement between the Accounting Experts.
>
> c) Alternative accounting treatment: The Accounting Experts agree that this is not a typical EBT transaction but ultimately disagree over the accounting treatment (see section 4.3.1(a) below) that should be applied to Wired's 2015 Financial Statements as their respective individual reports conclude."

23. Further exchanges of emails took place some of which were not included in the bundle, in particular an email of 29 November 2019. That email is referenced in an email dated 10 December 2019. That latter email indicates that by the 29 November 2019 email Mr Orrock had confirmed to Mr Brice that he "did not think [Mr Brice was] unreasonable going the way [Mr Brice has], but I just don't agree with it". Consequent upon that email Mr Brice further amended 4.2.1 of the joint statement:

> "b) …
> Whilst the Accounting Experts consider each other individual positions are reasonable under GAAP, ~~However,~~ as their respective individual reports conclude, the Accounting Experts disagree on the appropriate accounting treatment with regard to accounting for the EBT asset and therefore this is considered further in Section 4.3.1(a) below under areas of disagreement between the Accounting Experts.
>
> c) Alternative accounting treatment: The Accounting Experts agree that this is not a typical EBT transaction but ultimately disagree over the appropriate accounting treatment (see section 4.3.1(a) below) that should be applied to Wired's 2015 Financial Statements as their respective individual reports conclude." (original tracking)

24. In response, by email dated 12 December 2019 Mr Orrock stated:

> "As my report says I consider that the 2015 accounts should not recognise an expense and to do so is not in accordance with my interpretation of UK GAAP. I appreciate that your report does allow for either an expense or an asset and that you are more comfortable with an expense. However as I don't agree with that, because I believe there is sufficient evidence to support recognition of an asset, I have tried to eliminate the possibility of someone reading what we have agreed as suggesting that."

25. The further amended draft read:

> "b) Recognition of EBT assets ~~subject to uncertainty~~: The Accounting Experts agree that where there is uncertainty as to whether an asset may yield future economic benefit in order to recognise an asset it is necessary to have sufficient evidence. FRSSE defines asset as "rights or other access to future economic benefits controlled by an entity as a result of past transactions or events"
>
> The Accounting Experts agree that in order to recognise an expense rather than an asset, it is necessary to demonstrate that the Company does not have the right to receive future economic benefits from the amounts transferred or has no control of such rights or access to future economic benefits. However, as their respective individual reports conclude, the Accounting Experts disagree on whether the company has the right to receive future economic benefits or control of such rights and therefore disagree on the most appropriate accounting treatment. This is considered further in section 4.3.1. (a) below under areas of disagreement between the Accounting Experts. ~~Whilst the Accounting Experts consider each other individual positions are reasonable under GAAP, However, as their respective individual reports conclude, the Accounting Experts disagree on the appropriate accounting treatment with regard to accounting for the EBT asset and therefore this is considered further in Section 4.3.1(a) below under areas of disagreement between the Accounting Experts.~~
>
> c) Alternative accounting treatment: The experts agree that the correct treatment is dependent upon the interpretation of the facts of the case. The experts ultimately disagree (see section 4.3.1 below) on the most appropriate accounting treatment as their respective reports conclude. ~~The Accounting Experts agree that this~~

~~is not a typical EBT transaction but ultimately disagree over the appropriate accounting treatment (see section 4.3.1(a) below) that should be applied to Wired's 2015 Financial Statements as their respective individual reports conclude.~~"

26. Mr Brice continued to seek clarity as to why, having accepted the amendments made by Mr Orrock to version 2 further amendment was required. By way of response Mr Orrock stated:

> "I wasn't aware that any wording had been agreed. I am concerned that a joint statement setting out what we have agreed and disagreed might be capable of more than one interpretation. Consequently I have merely changed any wording that might not be sufficiently clear to convey what we have said in our respective reports. I am only trying to ensure that on first reading the Tribunal will appreciate the essence of what we have both said in our individual reports. As previously stated, I don't think that your conclusion that the company should recognise an expense in the 2015 accounting period is in accordance with UK GAAP. Whilst I can see how someone might come to that conclusion, that is not the same as saying that accounts finalised showing either the recognition of an asset or an expense would both be in accordance with UK GAAP. After all, my report says that the 2015 accounts are not correct in recognising an expense under scenario i). This is, I think, quite clear from a reading of section 5 in my report."

27. Mr Brice considered that the area of agreement was so limited 4.2.1 was revised only to state:

> "b) Recognition of ~~EBT~~ assets: The Accounting Experts agree that where there is uncertainty as to whether an asset may yield future economic benefit in order to recognise an asset it is necessary to have sufficient evidence. FRSSE defines asset as "rights or other access to future economic benefits controlled by an entity as a result of past transactions or events"
>
> c) Alternative Accounting Treatment: The Accounting Experts agree that this is not a typical EBT transaction. Furthermore, the experts agree that the ~~correct~~ appropriate treatment is dependent upon the interpretation of the facts of the case. The experts ultimately disagree (see section 4.3.1 below) on the most appropriate accounting treatment that should be applied in Wired's 2015 Financial Statements as their respective reports conclude."

> 28. In addition, however, Mr Brice sought to amend 4.2.1(a) to reflect that Mr Orrock had amended his position post the meeting of experts. Mr Orrock objected to the amended narrative in this regard relying on without prejudice privilege.
>
> 29. Following this exchange, the Appellants notified the Tribunal that the experts had been unable to agree a joint statement. However, subsequently a joint statement was signed and provided to the Tribunal.

The application

17. On 8 January 2020 the Appellants' representatives wrote to the Respondents setting out the background, and requesting that the Respondents provide certain information about the process by which the joint statement had been produced.

18. On 27 January 2020, the Respondents responded saying among other things that that nobody other than Mr Orrock made amendments to any version of the Joint Report. The Respondents refused to answer the further requests for information.

19. The Appellants were not satisfied and applied to the FTT on 13 March 2020 seeking disclosure of the correspondence between HMRC's legal representatives and Mr Orrock.

20. The Appellants explained in the application that they might seek to use the documents at any substantive hearing of the appeals to undermine the weight that should be given to Mr Orrock's evidence. They said on the appeal that they might want to argue that his evidence should be excluded entirely.

21. As already explained the Appellants are not applying for permission to rely on the inter-expert correspondence for the purpose of the substantive trial of the dispute. They say that the correspondence is being deployed only for the purpose of supporting the present application.

The decision of the FTT

22. The FTT decided that the inter-expert correspondence was covered by without prejudice privilege and was therefore not admissible for the purposes of making the application for disclosure. The FTT decided that none of the exceptions to the without prejudice rule advanced by the Appellants applied on the present facts.

Outline of the parties' submissions on this appeal

23. The Appellants submitted that, though the inter-correspondence was prima facie covered by without prejudice privilege, they are entitled to rely on the inter-expert correspondence for the purpose of the present application because the Appellants are not relying on that correspondence as evidence of any admissions that are relevant to the substantive issues in the appeals. Indeed they do not wish to rely on it for any purpose other than making the application.

24. They contended alternatively that the "unambiguous impropriety" exception to without prejudice privilege applies. They also contended that the case came within other recognised exceptions to the without prejudice exclusionary rule; or that the tribunal should recognise a new exception to enable it properly to police compliance with the requirements of Part 35 of the CPR.

25. They submitted that they are entitled to disclosure of the correspondence between the Respondents' solicitor and Mr Orrock on the grounds that (a) on the Respondents' own case the concerns raised by their solicitor ought to have been raised with both experts (and the Appellants) and/or (b) the correspondence constitutes "material instructions" to Mr Orrock within the meaning of CPR 35.10.

26. The Respondents submitted first that the inter-expert correspondence is covered by without prejudice privilege and does not fall within any of the exceptions to the rule and is therefore inadmissible.

27. The Respondents submitted next that (if the Appellants could surmount the first barrier) the relevant communications between the Respondents' solicitor and Mr Orrock were covered by litigation privilege and did not fall within the "material instructions" abrogation of such privilege.

28. The Respondents also submitted (in support of a respondent's notice) that the tribunal should not in any event order disclosure in the exercise of its discretion.

Can the Appellants rely on the inter-solicitor correspondence for the purposes of the present application?

29. The first question logically is whether the Appellants can deploy the inter-expert correspondence to advance their application for disclosure of the separate correspondence between Respondents' solicitor and its expert.

30. It is common ground that discussions between experts are in general covered by the without prejudice rules. The rule, which renders evidence

which would otherwise be relevant inadmissible, is founded upon the public policy of encouraging litigants to settle their differences rather than litigate them to a finish see e.g. *In Rush & Tompkins Ltd v Greater London Council* [1989] A.C. 1280 at p.1299.

31. CPR 35.12 provides that the court may order a discussion between experts to discuss and seek agreement on the expert issues. CPR 35.12(4) provides that "[t]he content of the discussion between the experts shall not be referred to at the trial unless the parties agree".

32. The White Book (2021 edn.) explains that this rule expressly applies the principles of without prejudice privilege to experts' discussions.

33. Expert meetings are not settlement discussions. The experts meet to try to narrow the expert issues, not to compromise the litigation. But the underlying rationale for the without prejudice protection is analogous to that concerning settlement meetings. There is a public interest in efficient and economical litigation. Experts should be able to have full and frank discussions without worrying that what they say may later be deployed against them openly. Their ability to discuss and narrow the issues is in turn likely to promote settlements or at least reduce the time and cost spent on expert issues at the trial.

34. There was a discussion of the way joint statements should be prepared in *BDW Trading Ltd v Integral Geotechnique (Wales) Ltd* [2018] EWHC 1915 (TCC). In that case one of the experts had sent a draft joint statement to their solicitor for comments, received feedback and made some changes to their draft as result. The judge said this at [17] – [18]:

> 17. [Counsel for the Claimant] rightly complained that it was quite inappropriate for independent experts to seek input from their client's solicitors into the substantive content of their joint statement or, for that matter, for the solicitors either to ask an expert to do so or to provide input if asked, save in the limited circumstances referred to in paragraph 13.6.3 of the TCC Guide, which states that:
>
> > "Whilst the parties' legal advisers may assist in identifying issues which the statement should address, those legal advisers must not be involved in either negotiating or drafting the experts' joint statement.
> >
> > Legal advisers should only invite the experts to consider amending any draft joint statement in exceptional circumstances where there are serious concerns that the court may misunderstand or be misled by the terms of that joint statement.
> >
> > Any such concerns should be raised with all experts involved in the joint statement."

> This is consistent with the Practice Direction to Part 35, which at paragraph 9 makes clear that:
>
> (1) The role of the legal representatives in expert discussions is limited to agreeing an agenda where necessary and, whilst they may attend the discussions if ordered or agreed, they must not intervene and may only answer questions or advise on the law.
>
> (2) Experts do not require the authority of the parties to sign a statement, which should be done at the conclusion of the discussion or as soon thereafter as practicable and in any event within 7 days.
>
> 18. What happened here was, I agree, a serious transgression and it is important that all experts and all legal advisers should understand what is and what is not permissible as regards the preparation of joint statements. To be clear, it appears to me that the TCC Guide envisages that an expert may if necessary provide a copy of the draft joint statement to the solicitors, otherwise it would not be possible for them to intervene in the exceptional circumstances identified. However, the expert should not ask the solicitors for their general comments or suggestions on the content of the draft joint statement and the solicitors should not make any comments or suggestions save to both experts in the very limited circumstances identified in the TCC Guide. That is consistent with the fact that any agreement between experts does not bind the parties unless they expressly agree to be so bound (see Part 35.12(5)). There may be cases, which should be exceptional, where a party or its legal representatives are concerned, having seen the statement, that the experts' views as stated in the joint statement may have been infected by some material misunderstanding of law or fact. If so, then there is no reason in my view why that should not be drawn to the attention of the experts so that they may have the opportunity to consider the point before trial. That however will be done in the open so that everyone, including the trial judge if the case proceeds to trial, can see what has happened and, if appropriate, firmly discourage any attempt by a party dissatisfied with the content of the joint statement to seek to re-open the discussion by this means."

35. These passages are set out in the White Book (2021) at note 35.12.1.

36. Counsel for the Appellants argued that this passage showed that solicitors should only comment on a draft joint statement in exceptional circumstances; and that, where they did so, solicitors should send any comments to both experts and on an open basis so that they could then be considered by the court or tribunal at trial.

37. Counsel for the Respondents submitted that in the last part of paragraph 18 (starting with the words "There may be cases …") the judge must have been addressing the position once the joint statement had actually been agreed. The FTT agreed with this reading of the passage. I also agree. The passage cannot sensibly be read as saying that comments on a draft joint statement should be conducted openly and in a way that could be considered by the trial judge. That reading would contravene the express terms of CPR 35.12(4) by opening up the discussions to scrutiny by the court at trial. Moreover the passage in the TCC Guide to which the judge referred does not say that any communications with the expert should be open in the sense of being outside the without prejudice protection. It says that any concerns should be raised with all the experts. I shall return to this point below.

38. Counsel for the Appellants relied more generally on the principle that experts must be independent of the party appointing them. I agree that this is baked into the relevant rules and the guidance for experts. CPR 35.3 states that the expert has an overriding duty to the court which overrides any duty to the appointing party. The FTT helpfully set out the relevant parts of CPR 35 and the Practice Direction to Part 35 and the relevant guidance. I shall not repeat those passages here. I agree that the preservation of the independence of experts is a cardinal feature of our procedural system.

39. With these general considerations in mind I turn to consider whether the Appellants are able to rely on the inter-expert correspondence in support of their application by coming within an exception to the without prejudice rule.

40. The recognised exceptions were set out in a passage in the judgment of Robert Walker LJ in *Unilever v Proctor & Gamble* [2000] 1 WLR 2436 at p.2444. I shall come back to some of these below.

41. The authorities concerning one of these exceptions (unambiguous impropriety) were recently reviewed by the CA in *Motorola Solutions Inc v Hytera Communications* [2021] EWCA Civ 11. I shall say more about this later but I note at this stage that at para [31] Males LJ said that the without prejudice rule was a strong one which must be scrupulously and jealously protected so that it does not become eroded. He also noted at [47] that part of the important public policy underlying the without prejudice rule was the avoidance of highly undesirable satellite litigation about what was said in without prejudice communications.

42. The strength of the without prejudice rule is shown by the fact that, where it applies, the court is deprived of evidence which may be crucial for establishing a cause of action or for meeting a limitation defence or the absence of which may even allow a party or witness to maintain false sworn evidence. Its application therefore leads to the exclusion of evidence which may be of central or decisive relevance to the issues in the case. The application of the general rule may therefore lead to results which are in

individual cases contrary to the interests of justice. That is the price paid to encourage settlements.

43. In another recent decision of the Court of Appeal, *Berkeley Square Holdings Ltd v Lancer Property Asset Management Ltd* [2021] EWCA Civ 551, David Richards LJ reviewed the authorities concerning a number of the exceptions to the without prejudice rule. Two observations relevant to the present case may be drawn from that review. The first is that the public policy in favour of without prejudice communications is not to be defeated by competing public policies (including that parties to proceedings are not able to take advantage of their lies in sworn testimony): see [24] – [25].

44. The second concerns the proper approach to extensions of the recognised exceptions to the without prejudice rule. At [32] and [33] David Richards LJ said:

> 32 Mr Quest submitted that an extension must represent a principled, incremental development by reference to existing exceptions. It is not a question of asking whether an extension is justified on the facts of a particular case. Regard must be had to its wider legal and commercial consequences. In particular, any exception must be sufficiently certain to be readily applied by practitioners engaged in without prejudice communications and discussions: see Robert Walker LJ in *Unilever* [2001] 1 WLR 2436 at pp 2443—2444 and Lord Hope in *Ofulue v Bossert* [2009] AC 990 at para 12 in the passage quoted above. …
>
> 33 I pause here to say that I agree with much of these submissions. In two respects, however, I consider that Mr Quest seeks to set boundaries to the court's approach which are too narrow. First, although it has no relevance in the present case, I do not accept that any extension must be an incremental development by reference to existing exceptions. New factual circumstances may arise, or conditions or attitudes may change, and the common law must retain the ability to meet them. …

45. The Appellants' first argument that the inter-expert communications were not excluded by the without prejudice privilege rule was that the Appellants are not seeking to rely on the communications as admissions on the merits. They seek instead to deploy them as evidence of wrongful interference by the solicitor in the process of agreeing the expert statements.

46. The Appellants contended that this is not strictly speaking an exception to the without prejudice privilege rule. They said that the use to which they wish to put the correspondence does not engage the exclusionary rule at all. The Appellants submitted that the question may be posed in this way: are they seeking to deploy the inter-expert correspondence as evidence of an admission which is relevant to the issues between the parties in the substantive proceedings? They say that the answer is no. They do not rely

(and do not intend to rely) on it for the purpose of using an admission against HMRC in relation to the GAAP Issue.

47. But if this way of putting things is to be treated as an exception to the rule the Appellants argued that this case is analogous to that found in *Family Housing Association (Manchester) Ltd. v. Michael Hyde and Partners* [1993] 1 W.L.R. 354. That was a case of striking out for want of prosecution. The Court of Appeal held that the respondents could rely on the contents of without prejudice correspondence to justify an apparent delay. At pp.361-362 Hirst LJ said:

> "(i) The admission in an application of this kind of the contents of without prejudice correspondence for the limited purpose of explaining the passage of time, and the conduct of the parties during negotiations, does not infringe the policy which lies behind the exclusion of such correspondence for other purposes and on other issues. The policy is only infringed if admissions etc. are opened up on issues which will be before the trial judge.
> …
> (iii) In so far as the exclusion is founded on agreement between the parties, such agreements should by implication be confined to the opening up of admissions and concessions on the merits of the issues likely to be raised at the trial, and should not extend to exclusion of material explaining delay and the conduct of the parties.

48. The Appellants also relied on the discussion of the *Family Housing* case in *Somatra Ltd v Sinclair Roche & Temperley* [2000] 1 WLR 2436, and suggested that the cases taken together showed that there was a distinction between cases where the without prejudice material was deployed on the merits and those where it was not.

49. The Respondents submitted that the Appellants' approach is wrong in law. The cases show that it is not possible for parties to elude without prejudice privilege by saying that they are not seeking to establish an admission. The Respondents say that this was clearly established in a series of cases including *Unilever* and *Ofulue*.

50. The Respondents submitted secondly that the Appellants are in substance seeking to rely on the contents of the discussions in order to establish an admission. The Appellants' application notice put the application on the basis that Mr Orrock had changed his position; that he initially accepted one thing (namely that there is more than one acceptable approach under GAAP) and then changed this in the later drafts (to say that the accounts did not accord with GAAP).

51. I prefer the Respondents' submissions on this point. I agree that the Appellants' approach is wrong in principle. There is no general exception to without prejudice privilege where a party is not seeking to establish an

admission. The exclusion of without prejudice material is not confined to admissions but applies to everything that is communicated in the course of without prejudice discussions. It is common ground here that the emails and draft joint statements passing between the experts formed a continuous without prejudice discussion.

52. A party cannot circumvent without prejudice privilege by saying that it does not seek to establish an admission. The cases of *Unilever* and *Ofulue* show that the rule covers all statements made in the course of without prejudice negotiations. Nor can the rule be circumvented by a party saying that it is not seeking to establish the truth or falsity of a statement.

53. Counsel for the Appellants emphasised that the purpose of the application was to gather evidence to enable them to challenge the independence of Mr Orrock and that they did not wish to use the inter-expert material on the merits of the case. The inter-expert correspondence is therefore being used only on an interlocutory application and is not being deployed to make any argument on the merits.

54. But in my judgment there is no exception to the without prejudice privilege rule that the material is sought to be deployed only at an interlocutory stage on an issue that does not go to the merits.

55. The closest exception, *Unilever* no. (5), is where a party relies on without prejudice communications to explain delay or acquiescence. An illustration of this was the *Family Housing* case.

56. Robert Walker LJ explained the exception fairly narrowly. He said that it was concerned with delay or acquiescence. He did not suggest that it was illustrative of a broader exception for the deployment of without prejudice material on interlocutory applications. Nor to my mind has such an exception been established by later cases. Indeed, if there was an exception for interlocutory applications where the material goes to issues other than the merits *Motorola* would have been decided differently. There the question was whether without prejudice communications could be relied on to show improper dissipation to support the grant of a freezing injunction. The entire discussion concerned *Unilever* exception (4) (unambiguous impropriety). That would have been unnecessary had there been a more general exception for interlocutory hearings where the issue (risk of dissipation) had nothing to do with the merits to be determined at trial.

57. I therefore conclude that there is no basis for an extension of *Unilever* exception (5) to cover interlocutory hearings, even where the merits of the case are not directly in issue. And I do not consider that the case falls within exception (5) itself as the material is not sought to be relied on to explain a delay.

58. I also agree with the submission of the Respondents that in substance the Appellants would have to rely on the contents of the inter-expert correspondence at trial to make sense of the solicitor-expert evidence. This will therefore involve the deployment of the without prejudice material at trial. Counsel for the Appellants ultimately accepted that it might be necessary to refer to the inter-expert material in order to understand and explain the correspondence between the expert and the solicitor but said, nonetheless, that the purpose of any deployment of the inter-expert material would be to put in issue Mr Orrock's independence. I fail to see how in practice the solicitor-expert correspondence would make any sense without the tribunal also being referred to the drafts of the joint statement. Anything said by the solicitor about the draft statements will make little or no sense unless read together with the draft statements themselves. Hence this is not a case (like *Family Housing*) where (if the attack on the expert's independence was to be made) the without prejudice material could be locked up in a silo, away from the trial judge. So I do not think that it can properly be said here that the without prejudice communications will be deployed only on issues (such as delay) wholly divorced from the merits. And it does not appear to me to be an answer for the Appellants to say their motive for seeking to use the material is to undermine or challenge Mr Orrock's independence.

59. The Appellants' next argument was that their application falls within *Unilever* exception (6) which was described like this:

> (6) In *Muller's* case (which was a decision on discovery, not admissibility) one of the issues between the claimant and the defendants, his former solicitors, was whether the claimant had acted reasonably to mitigate his loss in his conduct and conclusion of negotiations for the compromise of proceedings brought by him against a software company B and its other shareholders. Hoffmann L.J. treated that issue as one unconnected with the truth or falsity of anything stated in the negotiations, and as therefore falling outside the principle of public policy protecting without prejudice communications. The other members of the court agreed but would also have based their decision on waiver.

60. In *Muller v Linsley & Mortimer* [1996] PNLR 74 the defendant contended that the claimant had failed to mitigate its loss in negotiations (which were without prejudice) with B and sought disclosure of the communications between the plaintiff and B. The Court of Appeal held that the defendant was entitled to disclosure.

61. There is nothing analogous to *Muller* in the facts of the present case. But as I understood their submission, the Appellants argued that exception (6) was another case where the party seeking disclosure did not seek to establish an admission. Framed in that way, it appeared to be a reiteration of the arguments I have already addressed and rejected above.

62. The Appellants also suggested that exception (6) could be given a broader application, but did not do much to elaborate the argument. I found the suggestion unpersuasive. The exception has been considered in a number of cases including *Berkeley Square*. Though the Court of Appeal in that case did not ultimately need to reach a decision on the scope of the exception, David Richards LJ reviewed a number of earlier first instance authorities which had suggested a broader "justiciability" exception. The suggestion in some of those cases was that without prejudice material should be admitted where the court could not otherwise fairly dispose of a central issue in the proceedings. But the court in *Kings Security v King* [2020] EWHC 2996 (Ch) had doubted that there could be such a broad exception as it would be in danger of swallowing the entire without prejudice rule.

63. David Richards LJ said at [58] of *Berkeley Square* that exception (6) was troublesome because neither basis for the *Muller* case given by the Court of Appeal can stand. The rationale for *Muller* suggested by Hoffmann LJ (that the rule was restricted to admissions) was rejected by the House of Lords in *Ofulue*; and reliance on waiver was misplaced because the parties to the without prejudice communications were not the parties to the action.

64. At [59] David Richards LJ said:

> "Nonetheless, the decision in *Muller*, as opposed to its reasoning, has not been overruled and has been treated as correct. I accept that the court must proceed on this basis, although for my own part I think it unhelpful to attempt to retrofit a ratio to a decision which was not considered by the court in its judgments. When a decision has no visible means of support, it may be better to start again on the facts of a new case."

65. He went on to discuss the first instance decisions which had suggested a justiciability exception. He explained that this proposal was problematic for a number of reasons (including those identified in *Kings Security*) and concluded at [90] that that was not the right case to decide the issue once and for all. However he expressed the view that any new exception should be shaped according to first principles rather than by seeking to fit the case within exception (6).

66. Based on this authority, I conclude that *Unilever* exception (6) should be restricted to cases corresponding to *Muller* and that *Muller* itself should be regarded as being authority only for cases falling within its fact pattern. I do not think that it is possible to deduce a broader exception of the kind suggested by the Appellants. It does not assist the Appellants here.

67. The Appellants also relied on the fourth exception in *Unilever*, namely where the exclusion of the evidence would act as a cloak for perjury, blackmail or other unambiguous impropriety.

68. The Appellants argued that there was evidence of wrongful interference by the Respondents' solicitor with Mr Orrock. They put the point in various ways. They said that the inter-expert correspondence showed that he had been unduly influenced by the solicitor and therefore lacked independence; that it was wrong for a solicitor to suggest wording to an expert; and that the solicitor had actually instructed Mr Orrock not to agree the draft joint statement provided by Mr Brice. They also pointed out that the experts stated in the draft and final versions of the joint statement that "we have neither jointly been instructed to, nor has it been suggested that we should, avoid or otherwise defer from reaching agreement on any matter within our competence." The Appellants argued that this was not true in the light of the 14 November 2019 email ("the 14/11 email").

69. They submitted that this showed that there had been an abuse of the rules concerning expert evidence. This was a form of impropriety and it was unequivocal and unambiguous. The Appellants acknowledged the public policy considerations underlying the without prejudice rule but emphasised that there is a competing public policy in upholding the independence of expert witnesses. The court should, they said, uphold the latter public policy by recognising that inappropriate influence over witnesses may amount to impropriety.

70. The Appellants submitted that the categories of impropriety are not closed and can include, for example, statements made at a without prejudice meeting that constitute direct sexual or racial discrimination: in *BNP Paribas v Ms A Mezzotero* [2004] IRLR 509 the Employment Appeal Tribunal confirmed that such statements could be relied upon because such statements would constitute unambiguous impropriety and also because it was in the public interest for such evidence to be placed before the Tribunal.

71. The Appellants relied on the findings of the FTT. It said it was "extremely concerned as to the conduct of both HMRC's instructing solicitor and Mr Orrock in this matter" [55]; that "…in the present case the material available gives rise to a perception of impropriety" [90]; that "there is evidence of, at the very least, potential inappropriate interference with the independent evidence of an expert witness" [122]; that "there is prima facie evidence of impermissible interference by HMRC through the auspices of the solicitor in the finalisation of the joint statement. At the very least there is a perception of such interference"; and that "[t]he perception given of the interactions given by reference to the material available, does, in the Tribunal's view, give very real cause for concern that there is an impropriety." [83-84].

72. The Respondents submitted (in summary) that the test under exception (4) was "unequivocal or unambiguous impropriety" and that the Appellants own application was framed at the lower target of a potential or prima facie case. They said, secondly, that the emails are consistent with there being no impropriety here. A solicitor may properly review a draft joint statement to ensure that it does not contain anything misleading or inaccurate. The emails are consistent with Respondents' solicitor having noticed that the draft joint statement appeared to involve Mr Orrock changing his opinion from that in his expert report and they raised with him whether that was indeed his intention. Once this had been pointed out Mr Orrock made changes to the draft joint statement to reflect his actual opinion (which had not changed from his first report). There is an obligation under the rules for experts to state in terms when their opinions had changed from those expressed in their reports; and the emails are consistent with the solicitor pointing out to Mr Orrock that there seemed to be a change in his views. There was no instruction to withhold consent or to say anything specifically in the joint statement. Nor did the solicitor insist on substantive changes to the wording. The Respondents submitted, thirdly, that for the exception to apply there must be an abuse of the privileged occasion itself. Here there was no impropriety alleged in the statements made between the experts; the suggested wrongdoing was in what occurred between the expert and the solicitor.

73. Exception (4) was recently considered by the Court of Appeal in *Motorola*. Males LJ thoroughly reviewed the authorities. He concluded that it was not sufficient to establish the exception that there was a good arguable case of impropriety or a plausible evidential basis for the allegation (see [60]). That would be contrary to one of the main aims of the without prejudice rule, which is to protect the parties from possible satellite litigation about what happened in without prejudice discussions. Impropriety must be established unambiguously in the sense that there is no room for reasonable argument. Males LJ acknowledged that setting the test at that level may mean that there are individual cases where there is a risk that the privilege has been abused, but that is outweighed by the public interest in the settlement of litigation (see [62]).

74. I am prepared to assume that improper interference with the independence of an expert witness in relation to the preparation of a joint statement may amount to impropriety for the purposes of exception (4). I also agree with the Appellants that there is indeed an important public interest in maintaining the independence of witnesses and that it may in principle be an abuse of the without prejudice privilege to use it as a shield to prevent the court even considering the matter. I am not however satisfied that on the facts they have established that this is a case of unequivocal impropriety as explained in *Motorola*.

75. The starting point is that the application notice was not made in those terms. It recorded that:

> "the Appellants accept that it is possible that nothing untoward has occurred and that Mr Orrock has complied with all of his duties under CPR 35. However, in these unusual circumstances there is a prima facie and reasonable case that an expert has changed his view in a significant manner following an intervention from his solicitor and therefore the only means of discovering what has occurred is by HMRC providing the requested disclosure." (para [37]).
>
> And "the evidence supports a reasonable suspicion that the legal representatives' intervention has led to the expert changing his position in a significant respect" (para [38]).

76. The Appellants expressly accepted in those passages that the evidence is consistent with innocence on the part of Mr Orrock. Having brought the application on that basis I do not consider that it would be fair for the Appellants now to be allowed contend that this is a case of unambiguous impropriety. That is sufficient to dispose of the point, but I shall go on to consider the substance of the allegation.

77. I note that the FTT decided that there was a prima facie case of wrongful interference with the expert. I have already set out the FTT's findings in this regard. In the language of *Motorola* these are findings that there is a plausible evidential basis or good arguable case of wrongdoing. They do not constitute unequivocal impropriety as explained by Males LJ.

78. The Appellants have not persuaded me that the FTT did not go far enough.

79. The highwater mark of the Appellants' argument was based on the 14/11 email. The Appellants submitted that this email shows unequivocally that the Respondents' solicitor wrongly interfered with Mr Orrock and that he responded by changing his report. The Appellants went yet further and submitted that the solicitor actually instructed Mr Orrock to change the joint

statement and that he did so. The Appellants submitted that the bold text in the email was a specific instruction to change the joint statement.

80. I do not accept that the Appellants have established these allegations (which range well beyond the application notice) to the necessary standard. The 14/11 email is to my mind consistent with the Respondents' solicitor noticing that the draft joint statement appeared to represent a change from Mr Orrock's report and asking him if that was indeed what he intended. The start of the email is consistent with the solicitor saying that there was a possible problem (described as a potential ambiguity). It does not say that the joint statement had to be changed. The next part of the email is consistent with Mr Orrock realising as a result of this suggestion that the joint statement did not represent his true opinion. He then drew a distinction between the alternative view being one a reasonable accountant might come to and an acceptable view. This passage is consistent with his own process of reflection. The bold text that follows (which looks to be quoting the Respondent's solicitor, though that is not entirely clear) does not say that Mr Orrock must take a different approach; it says that the experts "may" wish to follow a suggested course. Mr Orrock then said that he would come up with other wording. I consider that the email is therefore consistent with an explanation which does not involve Mr Orrock being told what to do and then doing the bidding of the Respondents' solicitor.

81. I also consider that the 14/11 email needs to be read together with the later emails. These show Mr Orrock continuing to say that he did not think that the approach taken in the accounts was compliant with GAAP and that a reasonable accountant might compile non-compliant accounts. A lawyer may find that kind of distinction a testing one, but it appears to have been Mr Orrock's view. The emails read as a whole show him saying that he did not mean to change the view from his original report. The Appellants seek to draw the inference that he was wrongly induced to do so under pressure from the Respondents' solicitor; but that is only one possible inference. Another is that Mr Orrock was in danger of going down the wrong track and was put right by a query raised by the solicitor.

82. The Appellants went further and submitted that even to comment on the draft joint statement without corresponding with both experts is a serious transgression of the rules and amounted to unambiguous impropriety. They relied on the passage from *BDW* cited above. I am not persuaded that any comment by the solicitor on the joint statement would amount to a serious impropriety capable of constituting an exception to the without prejudice protection. *BDW* itself shows that there may be some exceptional cases where a comment may be made. I agree with the Appellants that it is important to uphold the independence of experts. But (as the Appellants' own application notice showed) it is not clear from the evidence contained in the inter-expert correspondence that the comments offered by the Respondents' solicitors amounted to undue pressure or had the effect of distorting the evidence of the

expert. It would doubtless have been better for any comments on the joint statement to be made to both experts (and indeed to the Appellants' solicitors) rather than to Mr Orrock alone.

83. It seems to me that the touchstone for present purposes is whether what passed between the solicitor and Mr Orrock distorted his true opinion. I am unable to conclude from the material placed before the court that improper pressure was applied to Mr Orrock or that he compromised his independence. The evidence is necessarily incomplete but I repeat that when they made the application the Appellants expressly accepted that it is possible that nothing untoward has occurred and that Mr Orrock has complied with all of his duties under CPR 35. That appears to me a fair description of the conclusions that may reasonably be drawn from the evidence.

84. Overall the Appellants have failed to satisfy me that the inter-expert correspondence establishes unequivocal or unambiguous impropriety. So the Appellants have not established a case within *Unilever* exception (4).

85. The Appellants also argued that the court should if necessary shape an exception in order to enable it to police the requirements of CPR 35 and in particular the duty of an expert to the court. Their counsel emphasised that there was an important public policy in ensuring the independence of experts and that this should take precedence over the public policy in protecting without prejudice discussions between the experts.

86. I have already explained that I accept that there is indeed a strong public interest in maintaining the independence of experts. But I am unable to accept this argument for the following reasons.

87. First, as explained by David Richards LJ in *Berkeley Square*, any extension to the recognised exceptions must be justified on a principled basis and cannot turn on the outcome of the particular case.

88. Secondly, the cases cited in *Berkeley Square* establish that the court will uphold the without prejudice rule (with all of its exceptions) notwithstanding competing public policies. A strong illustration of this approach is that the without prejudice rule is not defeated even where it appears that a party who relies on the privilege will be able to maintain a lie in a sworn document (see *Berkeley Square* at [25]). The privilege is upheld in such cases despite its operating to undermine the integrity of the court's processes. It is indeed hard to see a worse abuse of the court's processes than a party or witness being able to lie in sworn testimony; yet that is the effect of the evidence being rendered inadmissible. I do not see that the argument based on the independence of experts is materially different: it is again concerned with the integrity of the court's processes.

89. Thirdly, I do not think that the arguments for the suggested new exception add anything of substance to the arguments going to *Unilever* exception (4); and, equally, if accepted, the new exception could only operate subject to the same stringent conditions as apply to exception (4). Males LJ in *Motorola* set out the policy reasons underlying those conditions and they would have to apply to any further exception. The reasons include the avoidance of satellite litigation about the contents of without prejudice discussions. As Males LJ said the without prejudice rule is to be jealously guarded against infractions. It follows, in my judgment, that any exception based on avoiding an abuse of the process would have to be established unequivocally and unambiguously. It would not be enough to show a good arguable case or plausible evidential basis for an allegation of abuse of process. That being so, the Appellants would be unable to meet that standard for the reasons already given.

90. The Appellants finally relied on a separate argument for circumventing the without prejudice protection. They said that the bold text in the 14/11 email amounted to a "material instruction" to Mr Orrock within the meaning CPR 35.10 and that he failed to reflect this in the statement of his instructions in his expert reports.

91. I shall address below the question whether the email was a "material instruction": I am not satisfied that it was. But it also seems to me that, even if it was, this suggested route around the without prejudice rule fails. The Appellants accepted that the emails passing between the experts were (subject to any exceptions) covered by without prejudice privilege. These included the 14/11 email. The Appellants said that the part of the email they were relying on (the part marked in bold) was admissible because it was not a part of the expert discussions; it was a record of a separate instruction. But I reject that submission. As David Richards LJ put it in *Berkeley Square* at [38] (following earlier cases including *Unilever* and *Ofulue*) the exclusion of without prejudice material is not confined to particular categories or types of statement but applies to everything that is communicated in the course of without prejudice communications. I do not think that it is possible to slice and dice the 14/11 email in the way the Appellants suggested.

92. For these various reasons I conclude that the inter-expert correspondence is covered by without prejudice privilege and that there is no relevant exception which would allow the Appellants to rely on it for the purposes of making their application. I reject the various challenges to the FTT's decision on this point.

93. This conclusion is sufficient to decide the appeal. However for completeness I shall briefly consider the position on the assumption that I am wrong.

Legal professional privilege

94. Since a party may properly withhold legally professionally privileged documents the Appellants have also to establish that the relevant communications between the solicitor and Mr Orrock are not privileged.

95. Communications between a solicitor for a party to litigation and that party's expert witness are subject to litigation privilege. In *Jackson v Marley Developments* [2004] EWCA Civ 1225, Longmore LJ explained at [13] – [15] that draft expert reports are privileged; that it is common for reports to be circulated among the legal advisers before finalisation and completion; and that CPR 35.10 is a limited and specific exception to the privilege that would otherwise apply.

96. CPR 35.10 provides as follows:

> "Contents of report
> (1) An expert's report must comply with the requirements set out in Practice Direction 35.
> (2) At the end of an expert's report there must be a statement that the expert understands and has complied with their duty to the court.
> (3) The expert's report must state the substance of all material instructions, whether written or oral, on the basis of which the report was written.
> (4) The instructions referred to in paragraph (3) shall not be privileged against disclosure but the court will not, in relation to those instructions –
>
> (a) order disclosure of any specific document; or
> (b) permit any questioning in court, other than by the party who instructed the expert, unless it is satisfied that there are reasonable grounds to consider the statement of instructions given under paragraph (3) to be inaccurate or incomplete."

97. The concept of material instructions was considered by the Court of Appeal in *Lucas v Barking* [2003] EWCA Civ 1102. Waller LJ did not attempt to paraphrase or gloss the rule but said (non-exhaustively) that material supplied by the solicitor to the expert as the basis on which the expert is being asked to advise is part of the instructions.

98. The Appellants submitted, first, that the communications between the solicitor and Mr Orrock were material instructions. Secondly, any communications with the experts about the draft joint statement ought to have been addressed to both of them on an open basis and had that happened the communications would not have been covered by legal professional privilege.

99. For the first of these submissions Counsel again concentrated on the 14/11 email and submitted that it showed that the solicitor had instructed Mr Orrock to change the draft joint statement from the version which he had previously indicated he was content with. The Appellants said that the email was either an instruction to change the wording to that indicated in bold or an instruction not to agree the previous draft of the joint statement.

100. The Respondents submitted that the 14/11 email was not and did not contain a material instruction. It was not part of the material on which the expert was asked to advise. It evidenced a comment or query about a possible misunderstanding that might arise on the wording of the current draft joint statement.

101. The Appellants have not satisfied me that the communications with the expert were "material instructions" within CPR 35.10. I am unable to conclude that the emails (particularly the 14/11 email) contained or evidenced an instruction from the solicitor to Mr Orrock not to agree the previous draft or only to agree a joint statement containing the suggested wording. I have already considered the 14/11 email in some detail above. It did not say that Mr Orrock was required not to agree the joint statement or that he had to frame the joint statement in specific terms.

102. It seems to me that the Appellant is asking the tribunal to read between the lines of what is actually said in the email. As I have already said it seems to me that the email is consistent with the solicitor asking Mr Orrock whether he intended to depart from the conclusion in his expert report (that the approach taken by the Company in its accounts was not in accordance with GAAP) and, if that was not his intention, whether the wording properly captured his views. The bold text does not say that a change must be made; it says that it may be better to express it along the lines suggested. I am therefore unable to conclude that the emails contain or evidence a material instruction to Mr Orrock which he was required to reflect in the joint statement or a later report.

103. The Appellants argued that the FTT had found at [109] – [110] that the communications amounted to instructions though the nature of the instructions was not transparent. It is not clear to me that the FTT made any such finding. At any rate I do not think that the FTT made a finding that the instructions were "material instructions" within the meaning of CPR 35.10.

104. The Appellants' second argument was that any comments by the solicitors about the joint statement should have been communicated to both experts and should have been made openly (in the sense of not being without prejudice). Had that happened there would have been no legal professional privilege and, the Appellants argued, the Respondents cannot rely on its own wrongdoing to assert privilege.

105. I am not persuaded by this argument. First, I do not think that where a solicitor considers it appropriate to raise a query about a draft joint statement the solicitor must do so openly (i.e. not without prejudice). The basis for the Appellants' submission was the passage from *BDW* set out above. I have already explained why I do not consider that the case is authority for the proposition advanced. The TCC Guide to which the judge referred does not say that any comments had to be made on an open basis. I consider that in the relevant passage in *BDW* the judge was addressing two distinct stages, before and after the finalisation of the joint statement. I do not think that he could have meant to suggest that any comments about the draft joint statement should be open (and therefore available to the trial judge) as that would contravene the express terms of CPR 35.14 which prevents the parties referring to the contents of the discussions between the experts (other than the signed joint statement itself).

106. Secondly and in any case the relevant communications in issue were between the solicitor and the expert and I do not think that the court can act on the fiction that they were between the solicitor and both expert witnesses. Even if that contravened the guidance set out in the *BDW* case, the tribunal cannot operate on a deemed basis at odds with what actually happened. These were privileged communications and the Respondents have not waived privilege.

107. For these reasons, even if the Appellants had been able to deploy the inter-expert correspondence in support of the application, I would not have been satisfied that there was a basis for ordering disclosure of the correspondence between the expert and the Respondents' solicitor.

Disposition

108. The appeal is dismissed. I do not need to consider the Respondents' further argument (raised in the respondent's notice).

109. This judgment should not be published until the end of the substantive proceedings.

SIGNED ON ORIGINAL

MR JUSTICE MILES

RELEASE DATE: 17 DECEMBER 2021