UT Neutral citation number: **[2026] UKUT 00020 (TCC)**

UT (Tax & Chancery) Case Numbers: UT-2024-00009
UT-2024-00010

Upper Tribunal
(Tax and Chancery Chamber)

At the Rolls Building, London

PROCEDURE – expert report – whether witness was an expert – whether witness conflicted – held, yes – unfair to admit as expert evidence – whether evidence of fact – if so, whether to admit after the time limit – admitted as evidence of fact

Heard on 11 December 2025
Judgment given on 19 January 2026

Before

JUDGE ANNE REDSTON

Between

RICHARD BRIAN FENECH
HEATHER IMOGEN DUNNE

Applicants

and

THE FINANCIAL CONDUCT AUTHORITY

Respondent

Representation:

For Mr Fenech: Alexander dos Santos of Counsel, instructed by K&L Gates LLP

For Ms Dunne: Douglas Cherry, instructed by Fladgate LLP

For the Authority: Simon Pritchard of Counsel, instructed by the Financial Conduct Authority

DECISION

INTRODUCTION

1. On 2 January 2024, the Authority notified Mr Fenech and Ms Dunne (together "the Applicants") of its decisions to impose financial penalties and prohibition orders on them ("the Decision Notices"). The Applicants referred the Decision Notices to the Upper Tribunal ("the References" and "the UT" respectively).

2. On 6 March 2025, I issued Directions for the parties to prepare for the substantive hearing of the References; this has been listed to take place from 26 January to 13 February 2026; those Directions were subsequently amended following applications from the parties.

3. Direction 3 (as amended) provided that evidence from all witnesses of fact was to be filed and served by 29 August 2025. Direction 11 read:

> "Each of the Applicants and the Authority are permitted to rely on written reports and oral expert evidence from (i) an expert in statistics; and/or (ii) an expert in relation to defined benefit pension transfer advice."

4. On 11 November 2025, the Authority filed and served the witness statement of Ms Rebecca Prestage as being expert evidence in relation to defined benefit pension transfer advice provided under Direction 11 ("the Statement").

5. A case management hearing took place on 11 December 2025, at which the main issue was the Applicants' application for the Statement to be excluded on the basis that (a) Ms Prestage was not an expert and (b) she was conflicted.

6. Mr dos Santos represented Mr Fenech; Mr Cherry represented Ms Dunne and Mr Pritchard represented the Authority. I am grateful for their submissions, and I also recognise the contribution made by their legal teams (including by providing the hearing bundles at short notice).

7. At the case management hearing I issued the following oral judgment:

   (1) I agreed with the Authority that Ms Prestage was an expert, but I agreed with the Applicants that she was conflicted, and it would therefore be unfair to admit the Statement as an expert report.

   (2) Had the Authority wished to tender the Statement as evidence of fact, they were required by the Directions to do so by 29 August 2025. However, having considered the relevant case law, I agreed with the Authority that in all the circumstances it was in the interests of justice to admit the Statement late as evidence of fact.

8. I informed the parties that I would provide my reasons for the above conclusions in a written judgment, and this is that judgment. A number of other matters were considered at the same case management hearing; these are set out at §97ff.

THE UT RULES, THE CPR AND THE CIVIL EVIDENCE ACT

9. The UT is governed by the Tribunal, Courts and Enforcement Act 2007 ("the 2007 Act"); the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the UT Rules") were issued under the *vires* given by the 2007 Act.

10. Rule 5 of the UT Rules is headed "Case management powers" and begins:

> "(1) Subject to the provisions of the 2007 Act and any other enactment, the Upper Tribunal may regulate its own procedure.

(2) The Upper Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction."

11. Rule 15 is headed "Evidence and submissions" and so far as relevant reads:

> "(1) Without restriction on the general powers in rule 5(1) and (2) (case management powers), the Upper Tribunal may give directions as to—
>
> (a) issues on which it requires evidence or submissions;
>
> (b) the nature of the evidence or submissions it requires;
>
> (c) whether the parties are permitted or required to provide expert evidence, and if so whether the parties must jointly appoint a single expert to provide such evidence;
>
> (2) The Upper Tribunal may—
>
> (a) admit evidence whether or not—
>
> (i) the evidence would be admissible in a civil trial in the United Kingdom; or
>
> (ii) the evidence was available to a previous decision maker; or
>
> (b) exclude evidence that would otherwise be admissible where—
>
> (i)-(ii) …
>
> (iii) it would otherwise be unfair to admit the evidence."

12. The Civil Evidence Act 1972 does not apply to the UT, but was cited in some of the case law considered at the hearing. Section 3 of that Act is headed "Admissibility of expert opinion and certain expressions of non-expert opinion" and it provides:

> "(1) Subject to any rules of court made in pursuance of this Act, where a person is called as a witness in any civil proceedings, his opinion on any relevant matter on which he is qualified to give expert evidence shall be admissible in evidence.
>
> (2) It is hereby declared that where a person is called as a witness in any civil proceedings, a statement of opinion by him on any relevant matter on which he is not qualified to give expert evidence, if made as a way of conveying relevant facts personally perceived by him, is admissible as evidence of what he perceived.
>
> (3) In this section 'relevant matter' includes an issue in the proceedings in question."

13. The Civil Procedure Rules ("CPR") also do not apply to the UT, but the UT commonly takes a similar approach. CPR 35 is headed "Experts and Assessors", and paragraph 35.3 reads:

> "(1) It is the duty of experts to help the court on matters within their expertise.
>
> (2) This duty overrides any obligation to the person from whom experts have received instructions or by whom they are paid."

14. CPR 35.10 provides that "[a]t 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".

15. Practice Direction 35 ("PD35") includes the following provisions:

> "2.1 Expert evidence should be the independent product of the expert uninfluenced by the pressures of litigation.

> 2.2 Experts should assist the court by providing objective, unbiased opinions on matters within their expertise, and should not assume the role of an advocate."

16. PD35 provides at paragraph 3.3 that:

> "An expert's report must be verified by a statement of truth in the following form -
>
> I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer.
>
> I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth."

THE FACTS RELEVANT TO THE STATEMENT ISSUE

17. I begin by setting out the relevant facts. These were not in dispute, other than as set out at §25 below.

Mr Fenech and Ms Dunne

18. Between 3 January 2015 and 22 June 2017, Mr Fenech was the sole director of Financial Solutions Midhurst Limited ("FSML") and was approved to perform the CF1 (Director), CF10 (Compliance Oversight), CF11 (Money Laundering Reporting) and CF30 (Customer) controlled functions at FSML. He was also responsible for overseeing Ms Dunne, who was FSML's Appointed Representative providing pension advice.

19. Ms Dunne is a pension transfer specialist who at all relevant times traded as HDIFA (which I have taken to be an acronym for Heather Dunne IFA). Between 30 July 2010 until 28 June 2018, she was approved by the Authority to perform the CF30 (Customer) controlled function at FSML.

Ms Prestage's qualifications and experience.

20. Ms Prestage is a Chartered Financial Planner with over 25 years' experience working with or for regulated firms. She holds the Chartered Insurance Institute's Advanced Diploma in Financial Planning ("APFS") and the Pension Transfer Advice qualification ("AF7"). She joined Grant Thornton ("GT") in December 2015, working in its Financial Services Regulatory team, and was their "lead" on Life and Pensions engagements. She left that role on 31 October 2025.

The file review project

21. On 5 June 2019, GT was engaged by the Authority's Enforcement and Market Oversight division to undertake a review of a sample of client files taken from between 80-100 firms; those firms had provided advice to clients about whether to transfer their pensions from a Defined Benefit ("DB") scheme to a Defined Contribution ("DC") scheme, and the Authority had concerns about the suitability of the advice provided, given the standards prescribed by the Authority's Conduct of Business Sourcebook ("COBS").

22. The steps taken by the GT review team were as follows:

> (1) They triaged the files to identify those to be further reviewed, and used the Authority's internal Defined Benefit Advice Assessment Tool ("DBAAT") for that purpose.

(2) A team of assessors reviewed the identified files to see whether they contained sufficient information to allow the suitability of the advice to be assessed.

(3) The assessors next considered whether the firm had complied with the applicable disclosure requirements.

(4) If the advice was assessed as "unsuitable" and/or the disclosure elements of the file were "non-compliant" the assessors then considered whether the advice and/or the lack of disclosure had caused the client to take a particular course of action, such as to transfer from a DB to a DC scheme.

23. Those further steps: suitability; disclosure and causation, were all conducted using the DBAAT. The assessors' work was quality controlled by other GT employees who worked in a Quality Assurance ("QA") team.

24. Ms Prestage managed the team of assessors and was head of the QA team. In addition, she managed GT's relationship with the Authority's project team and pension transfer specialists, and she chaired both internal and joint regular "case clinic" and "calibration" meetings with the Authority. The clinics and calibration meetings were attended by the Authority's technical specialists and by GT's pension transfer specialist ("PTS") assessors and QA reviewers. Their purpose was to ensure that GT's approach to assessing the files was aligned with the Authority's instructions; they also provided a forum to discuss complex cases and jointly to calibrate the weighting associated with different aspects of a client file so as effectively to align their approach, and the rationale for assessment outcomes.

25. In the Statement, Ms Prestage said she did not personally conduct file reviews, but Mr dos Santos and Mr Cherry submitted that it was clear from emails and other evidence that she had worked on individual files. I did not need to consider the email evidence relied on by the Applicants in order to find that Ms Prestage had seen and considered the details of HDIFA's files during the GT review. That is because Ms Prestage herself said in the Statement that she had QA oversight responsibilities for all the client files (and must therefore have looked at them), and also that she participated in the case clinic and calibration meetings which considered "different aspects of a client file".

Review of Ms Dunne's files

26. The Authority instructed GT to review 16 DB transfer advice files from Ms Dunne; one file contained advice relating to two DB schemes, so GT reviewed 17 of her cases. Eight were initially graded "suitable" but following calibration discussions with the Authority, GT re-considered, and the cases were assessed as "non-compliant".

The Decision Notices

27. The Decision Notice issued to Ms Dunne includes the following passages:

> "…in 2019-2020, the Authority requested and assessed a statistically representative sample of 17 of HDIFA's Pension Transfer files…against the relevant rules in COBS…relating to suitability. The results of the Authority's file reviews revealed the following:
>
> (1) Failure to collect the necessary information to give Pension Transfer advice in 100% of cases, with the consequence that in 71% of total cases the Authority was unable to assess whether Ms Dunne's advice was suitable
>
> (2) Ms Dunne gave unsuitable Pension Transfer advice in 100% of those cases it was able to assess for suitability
>
> (3) Ms Dunne failed to provide the required disclosure to the customer in 100% of cases."

28. The main body of the Decision Notice sets out more details of each of the above, and refers at paragraph 4.53 to "the file reviews carried out by the Authority"; at 4.56 it says that "all cases that failed the assessment during the course of the Authority's review, on the basis of unsuitable Pension Transfer advice, were found to have failed to meet regulatory requirements"; 4.59 begins by saying "in the cases reviewed by the Authority…" and 4.61 says "The Authority also found the Suitability Reports produced in the individual cases reviewed to be lengthy, complex, and likely to confuse the customer". The Decision Notice concludes, *inter alia,* that Ms Dunne "breached Statement of Principle 2 by failing to act with due skill, care and diligence in providing Pension Transfer advice".

29. The Decision Notice issued to Mr Fenech contains the same paragraph as that in Ms Dunne's, see §27 above; it also replicates the passages at §28 (which are paragraphs 4.68; 4.71; 4.74 and 4.76 of Mr Fenech's Decision Notice). One of the conclusions was that he failed to ensure that HDIFA's Pension Transfer Advice complied with the relevant regulatory requirements and standards.

The References and the Statement of Case

30. On 26 and 29 January 2024 respectively, Mr Fenech and Ms Dunne referred their Decision Notices to the UT. On 25 March 2024, the Authority filed and served their Statement of Case, which included the following paragraph:

> "In 2019-2020, the Authority requested and assessed a statistically representative sample of 17 of HDIFA's pension transfer files from the Relevant Periods against the relevant suitability rules in COBS...The file reviews were carried out by Grant Thornton UK LLP ("Grant Thornton") under the instruction of the Authority and details of the experience and qualifications of the individuals who conducted the file assessments for Grant Thornton have been provided to Ms Dunne."

31. The Statement of Case then said "The results of the Authority's file reviews revealed the following", and the next three subparagraphs essentially repeated the passages from the Decision Notices set out at §27, followed by the same more detailed information and the same references to the file reviews having been carried out by the Authority.

32. The Applicants provided Replies to the Statement of Case. One of the points challenged was the DBAAT and the way it had been used by the GT team. The Applicants described the DBAAT as "a flawed tool" which was "used incorrectly" during the file reviews.

The Directions and the Statement

33. The References were listed for hearing from 26 January to 13 February 2026. On 6 March 2025, I issued Directions for the parties to prepare for that substantive hearing; those Directions were subsequently amended following applications from the parties. Direction 3 (as amended) provided that evidence from all witnesses of fact was to be filed and served by 29 August 2025. The parties filed witness statements in accordance with that Direction; the Authority did not file and serve a witness statement from anyone from GT.

34. Direction 11 read:

> "Each of the Applicants and the Authority are permitted to rely on written reports and oral expert evidence from (i) an expert in statistics; and/or (ii) an expert in relation to defined benefit pension transfer advice."

35. The original date by which those expert reports was to be filed and served was 19 September 2025, but this was later extended on application to 7 November 2025. In September 2025, the Authority instructed Ms Prestage to provide an expert report in relation to DB pension transfer advice. On 31 October 2025, Ms Prestage left GT.

36. On 3 November 2025, the Authority contacted the representatives of Ms Dunne and Mr Fenech as follows:

> "We are writing to inform you that the Authority has today been made aware that its expert in defined benefit pension transfer advice, Rebecca Prestage, is no longer working at Grant Thornton. Ms Prestage is herself a pensions transfer specialist and also managed the team of pensions transfer specialists conducting the file reviews the Authority relies on in these proceedings…
>
> We are currently working with Grant Thornton to explore the options available to us in respect of this expert report, but in light of this event we anticipate that we will require an extension to the 7 November 2025 date for the filing and service of this report."

37. The following day, Mr Cherry (on behalf of Ms Dunne) and Mr Michael Ruck of K&L Gates (on behalf of Mr Fenech), replied to the Authority, saying this was the first time they had been informed that Ms Prestage was to be the Authority's expert, and that the Applicants objected, citing her inability to meet the independence requirements for expert witnesses; Mr Cherry and Mr Ruck said Ms Prestage was instead a witness of fact.

38. On 6 November 2025, the Authority wrote again, saying:

> "it has been agreed that Ms Prestage will continue to prepare the expert report on a consultancy basis. However, due to the changes in Ms Prestage's employment, there has been a delay of two-and-a-half days while we confirmed with Grant Thornton whether Ms Prestage would be available on a consultancy basis and instructed Ms Prestage on that basis."

39. The Authority filed and served a report from Dr Susan Purdon, an expert in statistics. on the due date of 7 November 2025. I gave the Authority a short extension of time to file that from Ms Prestage, and it was filed and served on 11 November 2025. At paragraph 1.11, it says:

> "I have been instructed to give this expert report by the Financial Conduct Authority ("Authority") in relation to the above matter before the Upper Tribunal. I have been assisted in the preparation of this report by certain members of GT's staff, working under my supervision, and this is reflected in my reference to 'we' when appropriate. However, I confirm that the opinions expressed are my own."

40. The Statement continues at paragraph 1.12 by saying "In addition, I acknowledge having had previous engagement with the Authority within the scope described below" and then records at paragraph 1.13:

> "In December 2020, we were provided with Ms Dunne's responses to five DBAAT reviews where we had made a finding that the advice was unsuitable…Where appropriate, these responses were factored into our assessments that were contained in the DBAAT assessments."

41. The Statement says at paragraph 1.15:

> "In addition to giving my views on the comments made by Ms Dunne, I was instructed to detail the findings and rationale behind the original assessments made during the file reviews so as to give a comprehensive picture on how the advice given to the clients in the sample had been assessed and the DBAAT outcomes arrived at."

42. The Statement includes the following passages:

> "We conducted the review with an experienced project team of case triage handlers, pension transfer specialist ("PTS") assessors, quality assurance ("QA") reviewers and project management personnel."
>
> "Reporting of finalised outcomes consolidated into a summary spreadsheet, and relevant management information, was provided by our project management team, to allow the Authority to effectively monitor the progress of file reviews in January 2020."
>
> "I did not personally conduct file reviews, but I had QA oversight responsibilities for all the client files that we reviewed, and I have the necessary expertise to opine on the suitability of the advice given to the clients."
>
> "We used the first section of the DBAAT to assess whether the firm had complied with the applicable information gathering requirements…We used sections two and three of the DBAAT to assess the suitability of the pension transfer advice and any associated investment advice…We used the Disclosure section of the DBAAT to assess whether the firm had complied with the applicable disclosure requirements,"
>
> "We were instructed to review 16 DB pension transfer advice client files from Heather Dunne, trading as HDIFA…we were unable to assess the suitability of the advice in 12 cases due to insufficient or non-compliant information gathering."
>
> "In our causation assessment, we concluded that HDIFA's non-compliant conduct caused clients to transfer benefits from DB schemes with safeguarded benefits to schemes with flexible benefits."
>
> "Following calibration discussions with the Authority, and to ensure a consistent application of the assessment methodology across all firms in the review, including all cases from HDIFA, we re-considered the files and decided that the absence of key information about the proposed receiving scheme was material to our assessment."

43. The penultimate paragraph contained a "Statement of Truth" which Ms Prestage had signed. It read:

> "I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer."

44. The final part of the Statement was headed "Expert's Declaration", and it read:

> "I, Rebecca Prestage, declare that:
>
> i. I understand and have complied with my duty as an expert witness is to help the Tribunal on matters within my expertise.
>
> ii. I understand and accept that this duty overrides any obligation to the Authority.
>
> iii. This Report includes all matters relevant to the issues on which my expert evidence is given. Although this Report is provided for the benefit of the Tribunal, I am aware of the requirements of Part 35 of the Civil Procedure Rules 1999, Practice Direction 35 and the Guidance for the Instruction of Experts in Civil Claims 2014 and have sought to comply with their provisions.

> iv. I have given details in this Report of any matters which might affect the validity of this Report.
>
> v. I have addressed this Report to the Tribunal."

45. Both Applicants subsequently applied to the UT asking that the Statement not be admitted as expert evidence because Ms Prestage was conflicted, and it would therefore be unfair to admit it as an expert report; it was, they said, evidence of fact which had been provided late.

THE *FOX-BRYANT* CASE

46. All parties made reference to the case of *Fox-Bryant v FCA* [2024] UKUT 00357 ("*Fox-Bryant*"), during which Ms Prestage and Dr Purdon had given expert evidence. The case was heard between 27 September and 4 October 2024, and concerned Decision Notices issued by the Authority on 3 May 2023 relating to pension transfer advice given by Ms Toni Fox-Bryant and Mr David Price. The UT (Judge Baldwin, Mr Black and Mrs Neill) issued its judgment on 13 November 2024.

47. Ms Prestage's evidence in *Fox-Bryant* was provided by way of an expert report filed and served on 19 February 2024, and by oral evidence in the course of the hearing. The judgment says at [53]:

> "GT was engaged by the Authority to undertake a review of a sample of client files from somewhere between 80 to 100 firms that had provided advice to their clients regarding transfer of pension from DB to DC schemes, and where the Authority had concerns about the suitability of the advice provided by those firms. CFP [Ms Fox-Bryant's firm] was one of those firms. She was involved in the consideration of the sample files as described more fully below."

48. The beginning of that passage, with its reference to "a review of a sample of client files from somewhere between 80 to 100 firms" indicates that this was part of the same overall project as the review of HDIFA's files, see §21 above. The judgment went on to give further details of Ms Prestage's evidence:

> "56. Her written report exhibited tables setting out GT's analysis of the CFP files on which GT had reported to the Authority…
>
> 58. Ms Prestage explained the process used in the file review. GT engaged a team of specialist pension transfer reviewers who were contracted to perform the reviews. Many of the reviewers had previous experience of giving pension transfer advice themselves. The reviewers attended a two-day training course, which included training on how to use the 'DBAAT' tool for analysing the client files.
>
> 68. Ms Prestage said she did not personally conduct the file reviews, but she had QA oversight responsibility. In cross-examination at the hearing, she stated that she had no involvement with the initial triage or suitability review of the files. Her involvement came later when CFP had responded (in December 2023) in writing to the GT written analysis of the CFP files. At that point, a specialist pensions reviewer (who had not been involved in the initial file review) looked at the files, the DBAATs and CFP's commentary, and checked if any further information had come from CFP. The reviewer then discussed her assessment with Ms Prestage and together they went through some of the CFP files, and they agreed the GT reply commentary which is exhibited to her report."

49. In the course of the hearing, Mr Gareth Fatchett, acting on behalf of Ms Fox-Bryant and Mr Price, "appeared to challenge" Ms Prestage's role as an expert. The UT recorded at [54]:

> "During the hearing, prior to Ms Prestage giving her evidence, but 8 months after receiving her written report, Mr Fatchett appeared to challenge whether Ms Prestage could in fact be an expert witness, suggesting that she was instead a witness of fact. The Authority's position was that she was entirely open about the fact that she works for GT and that she did not personally conduct the file reviews herself, but she had Quality Assurance ("QA") responsibilities."

50. However, the UT recorded in the following paragraph that "[i]n the end Mr Fatchett did not pursue these objections". The judgment also records a disagreement about the date on which Ms Prestage became involved:

> "69. During Ms Prestage's cross-examination Mr Fatchett took Ms Prestage to Excel spreadsheets setting out the DBAAT reviews conducted by GT. Mr Fatchett pointed to the document metadata of the spreadsheets which Mr Fatchett had selected, and this appeared to show that Ms Prestage had modified the spreadsheet at the time of the initial review in 2019. This appeared to contradict her testimony that the first time she had seen or accessed this or any file or DBAAT relating to CFP was in December 2023 when responding to CFP's written commentary.
>
> 70. Ms Prestage was adamant in cross-examination that she had not accessed the files at the earlier time, and she could only speculate that her name appeared in the metadata as having modified the document if, as part of the original upload of the completed DBAAT to the FCA working domain, she had opened the document to check that all the boxes in the DBAAT had been completed. In re-examination, the Authority did not take the Tribunal to any explanation for this occurrence.
>
> 71. In closing, Mr Fatchett for the Applicants did not accuse Ms Prestage of dishonesty, but he did say Ms Prestage should have checked before giving her evidence what her involvement was, and she should have had some better explanation as to how the metadata showed the documents were modified in her name in 2019. Mr Temple said that this was an attack on process rather than engagement with the bigger issue, namely the conclusions reached by GT as to the inadequacy of CFP's transfer files and process."

51. On that issue, the UT concluded at [72]:

> "Whilst the metadata issue concerning file access does remain unexplained (and we accept that this is clearly not ideal), the Tribunal accepts Ms Prestage's evidence that she did not take part (at least in any material sense) in the original transfer file review, DBAAT completion or QA of the files during the review in 2019. Even if the Tribunal is wrong on that, it is difficult to see what difference any material earlier involvement (prior to 2023) by Ms Prestage would have made to GT's findings. Although Mr Fatchett said it would amount to Ms Prestage 'marking her own homework' we accept Mr Temple's view that it does not engage with the bigger issue which is that CFP's information gathering was deficient."

52. More broadly, the UT said this at [55] about Ms Prestage's evidence:

> "…whilst the procedure for expert evidence set out in CPR 35 does not apply to Upper Tribunal proceedings, in practice the Upper Tribunal will adopt a procedure closely mirroring CPR 35, and she was treated to all intents and purposes as complying with its provisions."

The submissions

53. Mr Pritchard submitted that in *Fox-Bryant*, "the complaints about Ms Prestage's evidence were rejected and they should be rejected here". He said that her role was the same in that case as it was in relation to Mr Fenech and Ms Dunne.

54. Mr Cherry submitted that the extent of Ms Prestage's involvement in *Fox-Bryant* wasn't clear, while Mr dos Santos contrasted her position in that case with her role here, where she was "materially involved at a much earlier stage". Mr dos Santos also drew attention to the fact that Mr Fatchett's challenge to her evidence had been raised for the first time in the course of the hearing, and was then withdrawn, saying that the UT "did not grapple" with the issue.

55. I agree with the Applicants that this case can be distinguished from *Fox-Bryant* for the following reasons:

(1) In *Fox-Bryant*, the only challenge to the independence of Ms Prestage's evidence came in the course of the hearing, despite her report having been served some eight months previously, and that challenge was then abandoned. The position here is different: the Applicants challenged Ms Prestage's standing as an expert as soon as they were made aware she was to provide the Statement, and Mr dos Santos and Mr Cherry made cogent written and oral submissions challenging her independence.

(2) In *Fox-Bryant* the UT accepted Ms Prestage's evidence that the first time she had "seen or accessed" any file or DBAAT was in December 2023; this was some six months after the Authority had issued its Decision Notices to Ms Fox-Bryant and Mr Price. In contrast, Ms Prestage both saw and accessed HDIFA's files in the course of GT's review, long before the Decision Notices were issued to Mr Fenech and Ms Dunne on 2 January 2024.

56. I also took into account the UT's observation in *Fox-Bryant* that if it was wrong to accept Ms Prestage's evidence about when she accessed the files, it was "difficult to see what difference any material earlier involvement (prior to 2023) by Ms Prestage would have made to GT's findings" because that involvement did not "engage with the bigger issue which is that CFP's information gathering was deficient". I take from that passage and from the judgment read as a whole that the UT was able to form a view on the basis of the factual evidence. In particular, there is no reference in the rest of the judgment to the UT having placed reliance on Ms Prestage's expertise, as distinct from relying on the information she gave about the work done by GT. In contrast, the UT referred to and relied on the expertise of Dr Purdon, see [212].

57. I agree with the Applicants that it would be wrong to place any reliance on the fact that Ms Prestage's expert evidence in *Fox-Bryant* was accepted, because (a) in this case there has been an explicit and timely challenge; (b) in *Fox-Bryant* the UT found that Ms Prestage had a limited role, whereas that is not the position here, and (c) the judgment in *Fox-Bryant* did not include any ruling as to whether Ms Prestage was conflicted.

WHETHER MS PRESTAGE IS AN EXPERT

58. The Applicants accepted that Ms Prestage had a pension transfer advice qualification, but Mr dos Santos and Mr Cherry submitted that she had not provided a "verifiable basis" to show "she was herself a pension transfer specialist, for instance, evidence that she had herself advised on pension transfers". However, on the basis of Ms Prestage's qualifications and experience, see §20 above, I find that she is an expert in the area of DB pension transfer advice, and I reject this part of the Applicants' challenge

WHETHER MS PRESTAGE IS CONFLICTED

59. The main issue was whether it would be unfair to admit the Statement as expert evidence because Ms Prestage was conflicted.

The case law

60. I was provided with extensive case law about the role and responsibility of experts, but it was not necessary to cite all those authorities in this decision: I have instead focused on those which provide particular assistance.

61. In *Whitehouse v Jordan* [1981] 1 WLR 246, Lord Wilberforce said:

> "Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert, uninfluenced as to form or content by the exigencies of litigation."

62. In *Vernon v Bosley (expert evidence)* [1998] 1 FLR 297, Thorpe LJ used the following metaphor to describe the expert's duty of independence:

> "The area of expertise in any case may be likened to a broad street with the plaintiff walking on one pavement and the defendant walking on the opposite one. Somehow the expert must be ever-mindful of the need to walk straight down the middle of the road and to resist the temptation to join the party from whom his instructions come on the pavement."

63. In *Field v Leeds City Council* [2000] 32 HLR 618 ("*Field v Leeds*"), Lord Woolf MR gave the leading judgment, while Waller and May LJJ delivered concurring judgments. The claimant's position was that as the expert witness, Mr Broadbent, was an employee of Leeds City Council, it would be "virtually impossible for him to bring the objectivity which is needed in order to give expert evidence to a court to bear on the issues in this case". Lord Woolf MR said at [16]:

> "I do not dismiss those submissions. I recognise that they can, in an appropriate case, have some force. From the court's point of view there can obviously be advantages in having an expert who is not employed in Mr Broadbent's role. However, without knowing more about Mr Broadbent's experience and the actual nature of his employment, the judge could not decide whether Mr Broadbent was qualified to give evidence as an expert. He could certainly give evidence as to fact."

64. Waller LJ said at [26]:

> "The question whether someone should be able to give expert evidence should depend on whether, (i) it can be demonstrated whether that person has relevant expertise in an area in issue in the case; and (ii) that it can be demonstrated that he or she is aware of their primary duty to the court if they give expert evidence."

65. In *R (oao Factortame) v Secretary of State for Transport, Local Government and the Regions (No 8)* [2002] 3 WLR 1104 ("*Factortame*"), GT had prepared and submitted the claimants' claims for loss and damage, in exchange for a percentage of the final settlement. The government submitted that the agreement was champertous, saying that GT's role was equivalent to that of an expert witness. Lord Phillips MR, giving the judgment of the Court, rejected a suggestion that the test of "apparent bias" should be used in relation to expert witnesses. He said at [70]:

> "This passage seems to us to be applying to an expert witness the same test of apparent bias that would be applicable to the tribunal. We do not believe that this approach is correct. It would inevitably exclude an employee from giving

> expert evidence on behalf of an employer. Expert evidence comes in many forms and in relation to many different types of issue. It is always desirable that an expert should have no actual or apparent interest in the outcome of the proceedings in which he gives evidence, but such disinterest is not automatically a precondition to the admissibility of his evidence. Where an expert has an interest of one kind or another in the outcome of the case, this fact should be made known to the court as soon as possible. The question of whether the proposed expert should be permitted to give evidence should then be determined in the course of case management. In considering that question the judge will have to weigh the alternative choices open if the expert's evidence is excluded, having regard to the overriding objective of the Civil Procedure Rules."

66. He added at [73]:

> "To give evidence on a contingency fee basis gives an expert, who would otherwise be independent, a significant financial interest in the outcome of the case. As a general proposition, such an interest is highly undesirable. In many cases the expert will be giving an authoritative opinion on issues that are critical to the outcome of the case. In such a situation the threat to his objectivity posed by a contingency fee agreement may carry greater dangers to the administration of justice than would the interest of an advocate or solicitor acting under a similar agreement. Accordingly, we consider that it will be in a very rare case indeed that the court will be prepared to consent to an expert being instructed under a contingency fee agreement."

67. In *Armchair Passenger Transport Limited v Helical Bar Plc* [2003] EWHC 367 (QB) ("*Armchair Passenger Transport*") at [29], Nelson J summarised the above case law as follows:

> "i) It is always desirable that an expert should have no actual or apparent interest in the outcome of the proceedings.
>
> ii) The existence of such an interest, whether as an employee of one of the parties or otherwise, does not automatically render the evidence of the proposed expert inadmissible. It is the nature and extent of the interest or connection which matters, not the mere fact of the interest or connection.
>
> iii) Where the expert has an interest of one kind or another in the outcome of the case, the question of whether he should be permitted to give evidence should be determined as soon as possible in the course of case management.
>
> iv) The decision as to whether an expert should be permitted to give evidence in such circumstances is a matter of fact and degree. The test of apparent bias is not relevant to the question of whether or not an expert witness should be permitted to give evidence.
>
> v) The questions which have to be determined are whether:
>
> > (i) the person has relevant expertise and (ii) he or she is aware of their primary duty to the Court if they give expert evidence, and willing and able, despite the interest or connection with the litigation or a party thereto, to carry out that duty.
>
> vi) The Judge will have to weigh the alternative choices open if the expert's evidence is excluded, having regard to the overriding objective of the Civil Procedure Rules.
>
> vii) If the expert has an interest which is not sufficient to preclude him from giving evidence the interest may nevertheless affect the weight of his evidence."

68. In *Toth v Jarman* [2006] EWCA Civ 1028, one of the issues was whether the judgment below should be set aside because reliance had been placed on the evidence of an expert who had not disclosed a conflict of interest. The Court decided that question in the negative, but said at [99] that as the issue "involves important points of principle and practice", it was "appropriate to make some observations on the general issues raised". The Court then said

> "100. We start with the point of principle. Does the presence of a conflict of interest automatically disqualify an expert? In our judgment, the answer to that question is no: the key question is whether the expert's opinion is independent. It is now well-established that the expert's expression of opinion must be independent of the parties and the pressures of the litigation. Authority for this can be found in paragraphs 1 and 2 of the guidance which Cresswell J gave in *National Justice Compania Naviera SA Prudential Assurance Co Ltd* ("the Ikarian Reefer") [1993] 2 Lloyd's Rep.68 as summarised on pages 938-9 of *Civil Procedure* (2006):
>
> > '1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to the form or content by the exigencies of litigation (*Whitehouse v Jordan* [1981] 1 W.L.R. 246, HL, at 256, per Lord Wilberforce).
> >
> > 2. An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise (see *Pollivitte Ltd v Commercial Union Assurance Company Plc* (1987) 1 Lloyds Rep. 379 at 386, *per* Garland J., and *Re J* (1990) F.C.R. 193, *per* Cazalet J. An expert witness in the High Court should never assume the role of an advocate…'
>
> 101. Moreover, CPR 35.3 sets out the overriding duty of an expert witness. His duty is to assist the court in relation to matters which fall within his expertise. The need for the expert to give an independent opinion flows also from this duty, which is stated to override any duty which the expert may owe to his client…
>
> 102. However, while the expression of an independent opinion is a necessary quality of expert evidence, it does not always follow that it is sufficient condition in itself. Where an expert has a material or significant conflict of interest, the court is likely to decline to act on his evidence, or indeed to give permission for his evidence to be adduced. This means it is important that a party who wishes to call an expert with a potential conflict of interest should disclose details of that conflict at as early a stage in the proceedings as possible."

69. In *Rowley v Dunlop* [2014] EWHC 1995 (Ch) at [21], David Richards J identified three common situations where the expert would be conflicted (1) where he has, or may have, a financial interest in the outcome of the litigation; (2) where he has, or may have, a conflicting duty and (3), where he has, or may have, a personal or other connection with a party which might consciously or subconsciously influence, or bias, his evidence.

70. In *Brendon International Ltd v Water Plus Ltd* [2024] 1 WLR ("*Brendon*"), Snowden LJ gave the only judgment, with which Falk and Baker LJJ both agreed. At the High Court, Judge Cadwallader had excluded the expert evidence of one witness, a Mr Griffith, on the basis that he was not qualified to do so, and because his evidence was "entirely self-serving for the defendants". Snowden LJ said:

> "82. The Judge's further reliance upon his view that Mr Griffith's evidence was 'self-serving for the defendants' was also an irrelevant factor so far as his determination as to whether Mr Griffiths was qualified as an expert for the

> purposes of section 3 [of the Civil Evidence Act]. Questions of the independence of a person giving expert opinion evidence and whether their evidence is unbiased go to weight and not admissibility under section 3…
>
> 83. I therefore conclude that the Judge's decision to exclude Mr Griffith's evidence on the basis that he was not adequately qualified to give expert opinion evidence within section 3(1) of the Civil Evidence Act 1972 cannot stand."

Mr Pritchard's submissions on behalf of the Authority

71. I have set out each of Mr Pritchard's submissions below in italics, followed by my view.

(1) *The UT Rules provide complete flexibility, allowing evidence to be admitted even if not admissible in a civil trial.* While that is true, the UT Rules also allow admissible evidence to be excluded if it would be unfair to admit it, and that was the issue I had to decide.

(2) The case law is clear that being an employee of one party was not a bar to providing expert evidence. I accept that it is not a bar, but as Phillips MR said in *Factortame,* if that employee is conflicted, the court or tribunal will need to decide whether he should be permitted to give evidence. In *Armchair Passenger Transport,* Nelson J similarly stated that being an employee "does not automatically render the evidence of the proposed expert inadmissible" but he went on to say that "[i]t is the nature and extent of the interest or connection which matters, not the mere fact of the interest or connection".

(3) *In Field v Leeds, Waller LJ had set out two tests which were required to be satisfied in order to see whether "someone should be able to give expert evidence" and Ms Prestage met both those tests: she had the relevant expertise and she was aware that her primary duty was to the UT and not to the Authority: this was, Mr Pritchard said, clear from the "Expert's Declaration" at the end of the Statement.* I instead agree with the Applicants' representatives that the existence of a declaration does not remove the need for the UT to consider whether expert is conflicted: this is clear from *Factortame.* I also agree with Nelson J, who said in *Armchair Passenger Transport* that the first question to be determined is not only whether the putative expert "is aware of their primary duty to the Court if they give expert evidence" but also is "willing and able, despite the interest or connection with the litigation or a party thereto, to carry out that duty".

(4) *In Brendon, Snowden LJ had said that "Questions of the independence of a person giving expert opinion evidence and whether their evidence is unbiased go to weight". Mr Pritchard submitted that any issues of independence should therefore be decided by the UT at the substantive hearing, when the weight to be given to Ms Prestage's evidence would be assessed.* I disagree: the issue in *Brendon* was whether the requirements of the Civil Evidence Act were met, and the *dicta* in that case do not displace the authorities which explain the approach to be taken when an expert is conflicted. It is clear from *Toth v Jarman* that a court or tribunal may refuse permission for the evidence to be adduced if there is a conflict. Similarly, in *Armchair Passenger Transport,* Nelson J said (my emphasis):

> "Where the expert has an interest of one kind or another in the outcome of the case, the question of <u>whether he should be permitted to give evidence</u> should be determined as soon as possible in the course of case management."

(5) *The consequence of refusing to admit the Statement as expert evidence would be that the UT would not have the benefit of an expert opinion on defined benefit pension transfer advice.* That is correct, but as Lord Phillips said in *Factortame,* when deciding

"whether the proposed expert should be permitted to give evidence" the judge has to "weigh the alternative choices open if the expert's evidence is excluded, having regard to the overriding objective". One of those choices is to proceed without expert evidence. Mr Pritchard very fairly accepted that the panel hearing the References will be "an expert tribunal", and that this would mitigate the effect of refusing to admit the Statement as expert evidence.

(6) *The Authority had contracted GT as experts to carry out the work on the files, and it would be "surprising" if it then had to instruct a different expert to write the expert report.* I disagree: that is exactly what was required, for the reasons explained in the following part of this judgment.

(7) *Ms Prestage gave her opinion on various matters in the course of the Statement*. This was not in dispute, but it does not follow from the inclusion of opinions that the Statement should be admitted as expert evidence despite Ms Prestage being conflicted.

72. In short, I was not convinced by the Authority's submissions. I instead preferred those of the Applicants, to which I now turn.

Submissions made by Mr dos Santos and Mr Cherry on behalf of the Applicants

73. It was the Applicants' case that even if Ms Prestage was an expert, she was not able to give expert evidence in this case, because she was conflicted. In consequence, her evidence lacked the necessary quality of independence, and it would be unfair for the Authority to rely on the Statement as expert evidence at the substantive hearing. Mr dos Santos and Mr Cherry emphasised the following facts:

(1) Ms Prestage was employed by GT, the firm contracted to provide the Authority with pension transfer review advice.

(2) She was the manager of the team carrying out that exercise.

(3) She interacted closely with both the GT team and the Authority in discussing and deciding the approach to reviewing HDIFA's files. In particular, she was involved in the discussions around "recalibrating" eight files from "suitable" to "non-compliant".

(4) In the Statement, she frequently used the term "we" to refer to the file review work and its outcomes, and thus identified herself with the team and with the Authority. For example, she said:

> "We were instructed to review 16 DB pension transfer advice client files."
>
> "…we were unable to assess the suitability of the advice in 12 cases due to insufficient or non-compliant information gathering."
>
> "In our causation assessment, we concluded that HDIFA's non-compliant conduct caused clients to transfer benefits from DB schemes with safeguarded benefits to schemes with flexible benefits"

74. I agree that all the above facts strongly indicate that Ms Prestage's work was inextricably linked with that of the team she managed, and that she was not providing an independent objective view. I add the following additional points:

(1) Ms Prestage was working with the GT team and the Authority on the pension transfer project from June 2019 until at least the end of 2023 (the Decision Notices were issued in January 2024), so her involvement spanned several years.

(2) The Statement of Case describes the GT team as being carried out "under the instruction of the Authority", see §30 above.

(3) The Authority identified the findings made by the GT team as its own, see the Decision Notices which rely on "the results of *the Authority's* file reviews", and which include statements such as "in 71% of total cases *the Authority was unable* to assess whether Ms Dunne's advice was suitable"; "cases that failed the assessment during the course of *the Authority's review*"; "the cases *reviewed by the Authority*" and "*the Authority also found* the Suitability Reports…to be lengthy, complex, and likely to confuse the customer". The same identification continues in the Statement of Case, which repeats many of the same passages and also says that "*the Authority requested and assessed* a statistically representative sample…".

(4) The GT team provided the evidence on which the Authority made the findings in the Decision Notices: this can be seen by comparing the summaries in the Decision Notices with the review findings in the Statement. Those findings are a significant part of the evidence which will be relied on by the Authority in putting its case at the substantive hearing.

75. I am thus in no doubt that Ms Prestage is significantly conflicted, because she has been working for years with the Authority as part of a team acting under instructions from the Authority; she supervised the team which produced the results on which the Decision Notices are based; she chaired the calibration meetings at which some of Ms Dunne's files were reassessed from "suitable" to "non-compliant", and the Authority identified the output of the team as its own and will rely on that work in putting its case at the substantive hearing.

76. Ms Prestage thus comes within the last of the categories set out by Richards J in *Rowley v Dunlop*: she has a connection with the Authority which might consciously or subconsciously influence her evidence. It is therefore not possible for her to give independent, disinterested expert evidence about the outcomes of the file reviews. To borrow Mr Fatchett's comment in *Fox-Bryant,* this would amount to Ms Prestage "marking her own homework". Or, to use the analogy from *Vernon v Bosley,* it was not possible for her to "walk straight down the middle of the road and to resist the temptation to join the party from whom [her] instructions come on the pavement", because she was already on the "same pavement" as the Authority. In short, it would be unfair and a breach of the overriding objective were the Statement to be admitted as expert evidence.

77. Mr dos Santos and Mr Cherry submitted that Ms Prestage was conflicted for a further reason. The Authority was an important client for GT: the project had run for several years and required a team of employees to carry out the work. Mr dos Santos described it, correctly, as a "long standing and large project". Ms Prestage was the senior GT employee who managed GT's relationship with the Authority's project team and pension transfer specialists. GT plainly had a direct and significant financial interest in the work being carried out, and that work fed through into the Decision Notices. In their submission, as Ms Prestage was a senior employee who was paid by GT for her work on that project, she too had a direct financial interest.

78. I agree that Ms Prestage had a financial interest, because (a) GT was paying her salary for her work on the file review project, and (b) the Authority was paying GT for the file review work. I add that Ms Prestage also had a duty to GT, her employer. Ms Prestage therefore also comes within the other two categories identified by Richards J in *Rowley v Dunlop*: she had a financial interest in the work which underpinned the Decision Notices and her duty to GT may conflict with her duty to the UT.

79. I add one further point not mentioned by the parties. The DBAAT was criticised by both Applicants in their Replies to the Authority's Statement of Case. An independent expert might reasonably have been expected to provide the UT with an unbiased assessment of its role and

function. However, the GT team relied on the DBAAT at all stages of the review process: Ms Prestage simply records its usage:

> "We used the first section of the DBAAT to assess whether the firm had complied with the applicable information gathering requirements…We used sections two and three of the DBAAT to assess the suitability of the pension transfer advice and any associated investment advice…We used the Disclosure section of the DBAAT to assess whether the firm had complied with the applicable disclosure requirements".

Conclusion

80. For the reasons set out above, I allow the Applicants' applications. It would be unfair to admit the Statement as expert evidence.

WHETHER THE STATEMENT SHOULD BE ADMITTED AS EVIDENCE OF FACT

81. The Applicants' position was that the Statement essentially set out evidence of fact. Mr dos Santos and Mr Cherry nevertheless submitted that it should not be admitted, because factual evidence was required to be filed and served by 29 August 2025, over three months earlier.

82. Mr Pritchard's response was that the Authority would be severely prejudiced if the Statement was not admitted, because no other witness evidence had been filed and served from any GT employee about the file review process, and he applied for permission to the Statement to be admitted late, as evidence of fact.

The case law

83. CPR 3.9 reads:

> "(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –
>
> (a) for litigation to be conducted efficiently and at proportionate cost; and
>
> (b) to enforce compliance with rules, practice directions and orders."

84. In *Denton v TH White Limited* [2014] EWCA Civ 906, the Court of Appeal said at [24]:

> "A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the 'failure to comply with any rule, practice direction or court order' which engages rule 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate 'all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b)]'."

85. The Court then said at [32] that the two factors identified at (a) and (b) in Rule 3.9(1) "are of particular importance and should be given particular weight at the third stage when all the circumstances of the case are considered".

86. The UT (Judges Berner and Poole) applied the above approach in *Martland v HMRC* [2018] UKUT 0178 (TCC) ("*Martland*"), and at [44] recommended the following three stage approach:

(1) establish the length of the delay and whether it is serious and/or significant;

(2) establish the reason(s) why the delay occurred; and

(3) evaluate all the circumstances of the case, using a balancing exercise to assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission, and in doing so take into account "the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected".

87. In *Umuthi Healthcare v FCA* [2022] UKUT 00275 (TCC) at [30], Judge Raghavan held that the same approach should be taken to extensions of time in financial services cases such as this one.

88. In *Medpro v HMRC* [2025] UKUT 255 (TCC) ("*Medpro*") at [88], a differently constituted UT, made up of Marcus Smith J and Judge Cannan, endorsed the three stage test in *Martland*, describing it as "an unimpeachable approach". However, the two judges disagreed as to whether the UT should place "particular importance" on the need for litigation to be conducted efficiently and at proportionate cost and to enforce compliance with rules, practice directions and orders. Judge Cannan held that approach to be correct, but Smith J said no special weight should be given to those factors. As he was the senior of the two judges, he had the casting vote. HMRC has subsequently appealed that finding to the Court of Appeal, and the case is due to be heard in early 2026.

89. In deciding whether to give the Authority permission to provide the Statement as evidence of fact after the compliance date, I applied the test as formulated in *Medpro,* but I confirm that the outcome would have been the same had I decided it on the basis of *Martland.*

The three stages

90. The delay was over three months, which was both serious and significant. The reason for the delay was that the Authority thought Ms Prestage's evidence was expert evidence, which had to be filed much later.

91. Mr Pritchard relied on the fact that the Authority had taken the same approach in *Fox-Bryant,* where Ms Prestage's evidence had been accepted as that of an expert. He submitted that it was reasonable for the Authority to have thought it could do the same here. Mr dos Santos and Mr Cherry disagreed, saying that the Authority (a) should have understood the difference between expert evidence and evidence of fact, and (b) should have been on notice from Mr Fatchett's challenge that Ms Prestage's role as an expert was (at least) problematic.

92. I agree with Mr Pritchard that it is unsurprising that the Authority had assumed it could take the same approach in this case as in *Fox-Bryant,* although I agree with the Applicants that had the Authority taken a step back and considered Ms Prestage's role in relation to Ms Dunne and Mr Fenech, it should have realised she was too conflicted to be able to give evidence as an expert.

93. In considering all the circumstances, I take into account the serious and significant delay, as well as the reasons for the delay. In addition, I agree with Mr Pritchard that the Authority would be seriously prejudiced if the Statement was not admitted, because there would be a lacuna in the evidence on which it was relying. Mr Pritchard also pointed out that the Applicants had received the Statement in early November, so over two months before the substantive hearing.

94. For their part, Mr dos Santos and Mr Cherry did not identify any prejudice which the Applicants would suffer were the Statement to be admitted late. However, they criticised the Authority for not having notified them until 3 November 2025 that Ms Prestage was to be their expert, saying it should have been obvious to the Authority that she would not be acceptable to the Applicants.

95. On that point I agree with the Applicants: as Phillips MR said in *Factortame* "[w]here an expert has an interest of one kind or another in the outcome of the case, this fact should be made known to the court as soon as possible". In *Toth v Jarman*, the Court similarly said that "it is important that a party who wishes to call an expert with a potential conflict of interest should disclose details of that conflict at as early a stage in the proceedings as possible" . However, when carrying out the balancing exercise I have placed no weight on this factor because the Applicants did not identify any disadvantages flowing from the Authority's delay.

96. The main factors on the scales are thus the serious and significant delay, and the prejudice to the Authority if the Statement is not admitted. Taking into account that the Applicants will have two months to consider the evidence in the Statement, in my judgment the balance favours the Authority. I therefore gave the Authority permission for the Statement to be admitted as late evidence of fact.

OTHER MATTERS

97. A number of other matters were listed to be considered at the case management hearing, but some were abandoned by the party in question during the proceedings.

The Statement

98. It was suggested on behalf of the Applicants that the Statement would need to be revised to remove passages which contained opinions. I reject that suggestion. Witness statements frequently (albeit incorrectly) include opinions. The UT and legal representatives are well used to identifying and ignoring these passages, and none of the barristers at this hearing had any difficulty distinguishing facts from opinions in the Statement. As a result, the Authority is not required to file and serve an amended version of the Statement.

Timetable for substantive hearing

99. The Applicants applied for the Authority to be directed to set out all of its case at the substantive hearing, including the expert evidence, before the Applicants' witnesses gave evidence. Mr Pritchard resisted this on the basis that normal UT practice was for expert evidence to follow all the evidence of fact. I agreed with Mr Pritchard and directed that Dr Purdon's evidence was to follow that of the other witnesses, including that of Ms Prestage (as a witness of fact).

Opus 2 live transcript

100. The Authority and Mr Fenech have contracted with Opus 2 to be provided with live transcripts in the course of the hearing. Mr Cherry's instructions were that Ms Dunne was unable to afford the cost, and he asked the UT to direct that it be paid by the Authority.

101. I refused that application, because the UT, like the Tax Chamber of the First-tier Tribunal, has no free-standing power or discretion to award costs, see *Eclipse Film Partners No 35 LLP v HMRC* [2016] UKSC 24.

Attendance at the hearing

102. Mr Cherry asked whether Ms Dunne could attend the hearing remotely; I understood this to mean attending by video. He said this was not a formal application, but that Ms Dunne was anxious there might be difficulties with the weather in January and February, and she would also have to bear the travel costs.

103. I directed that when Ms Dunne was giving evidence (either in chief or under cross-examination), she was to attend the hearing centre in person, because there will be extensive evidence, and if she is using paper bundles, it is much easier to ensure she has identified the correct document if she is in the hearing room as compared to attending remotely. Even if she

plans to use electronic bundles, that brings the risk of technical issues which are easier to rectify if she is in the hearing room.

104. I inferred from Mr Cherry's question that Ms Dunne was anxious about attending the hearing. I observed that in the normal course of cases such as this, there will always be breaks in the morning and afternoon for transcribers, but added that Ms Dunne would be able to have more breaks if that would assist her. If Ms Dunne considers other reasonable adjustments would be of assistance, her representatives are to notify the UT.

105. The weather is of course not within our control, but it is rare for the train network to be entirely suspended even in mid-winter. If that were to happen, the UT would take whatever steps necessary to ensure that the proceedings suffered as little disruption as possible. As to the costs, that is not a matter over which I have any jurisdiction, and it clearly does not outweigh the very considerable benefits of Ms Dunne attending in person when she gives evidence at the hearing of her own Reference.

106. As to the remainder of the case (ie when Ms Dunne is not giving evidence) it is a matter for her whether she attends the hearing centre; if not, she can apply to listen to the hearing by using the live audio link. It will be a matter for her and her legal representatives to consider whether she will be disadvantaged if she is not present during the hearing to give instructions or otherwise communicate with her legal team.

Privacy issues

107. The underlying files considered by the Authority relate to individuals who are not parties to the References. The parties agreed to co-operate so as to avoid the use of the individuals' names in oral submissions as the hearing may be attended by third parties unconnected with the Authority or with the Applicants. The parties will also consider whether redactions are needed to the Bundles, or whether this should be addressed if or when there is an application for third party access.

Dr Purdon's expert report

108. Mr Cherry originally challenged the expert report from Dr Purdon, but he withdrew that application in the course of the hearing. I say no more about that application other than to confirm that Dr Purdon's report has been admitted as expert evidence in the proceedings.

Instructions

109. Mr dos Santos applied for the Authority to be directed to provide the instructions issued to Ms Prestage. Mr Pritchard objected on the basis that the instructions were covered by legal privilege. However, Mr dos Santos withdrew his application after I gave my outcome decision refusing to admit the Statement as expert evidence and I have therefore not considered it.

Lacunae in the evidence and new evidence

110. The parties agreed to discuss between themselves some newly identified issues with the evidence and to seek to resolve those issues without further directions from the UT.

OVERALL CONCLUSION AND APPEAL RIGHTS

111. For the reasons explained in the main body of this judgment, I allow the Applicants' applications and find that it would be unfair to admit the Statement as expert evidence. However, I also allow the Authority's application for the Statement to be admitted late as evidence of fact.

112. The parties' rights of appeal against this judgment are coterminous with their appeal rights against the judgment which will be issued following the substantive hearing of the References: in other words, time will not begin to run until the parties receive written notice of the decision in the substantive case.

ANNE REDSTON
UPPER TRIBUNAL JUDGE

Release 19 January 2026