NCN: [2020] UKFTT 0290 (TC)

TC07774

PROCEDURE – application for disclosure of communications between HMRC instructing solicitor and HMRC expert – scope of without prejudice and litigation privilege – interpretation of CPR 35.10 and 35.12

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/02328, 03598, 05452, and 0543

BETWEEN

WIRED ORTHODONTICS LIMITED
IAN HUTCHINSON
SUSAN BESSANT **Appellants**

-and-

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

TRIBUNAL: JUDGE AMANDA BROWN

Telephone hearing held on 17 June 2020.

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

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

DECISION

INTRODUCTION

1. This is an application by Wired Orthodontics Limited ("**Wired**") made pursuant to rule 5(3) Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("**FTT Rules**") for disclosure of documents and information passing between the solicitors for HM Revenue & Customs ("**HMRC**") and their appointed expert witness.

CONTEXT

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**").

4. Critical to the decision to be taken by the Tribunal in the substantive appeal therefore is a complete understanding of the relevant GAAP accounting treatment of the Deduction. Pursuant to directions issued by the Tribunal each of Wired and HMRC appointed independent experts to prepare reports for the benefit of the Tribunal. The directions provided that each expert prepare and serve any report on which they intended to rely. Such reports were required to contain a statement that "the expert (a) understands their duty to the Tribunal, and has complied with that duty; and (b) is aware of the requirements of CPR[1] 35, CPR PD 35 and the Guidance for the Instruction of Experts in Civil Claims 2014". The reports were to be exchanged simultaneously.

5. Having produced their reports the experts were then directed to meet and produce a statement of areas on which they agree and those of which they disagree with reasons for such disagreement.

6. The present application arises from the circumstances in which the joint statement was prepared.

AMENDMENTS TO THE JOINT STATEMENT

7. The directions made by Judge Kempster in this matter on 11 March 2019 provided for the preparation of an agreed statement of facts and issues by 15 March 2019. A 9-page Statement of Facts was agreed between the parties setting out the principal features of the transactions and the chronology of the dispute.

8. As set out above the directions also provided for preparation and the simultaneous exchange of expert reports concerning the GAAP Issue on 24 May 2019 followed by a meeting of the experts and the preparation of a joint statement setting out the matters on which they agreed and disagreed with reasons for such disagreement.

9. The expert reports were duly produced and exchanged but not within the time limit initially directed by the Tribunal.

[1] CPR is the recognised abbreviation for Civil Procedure Rules

10. Mr Orrock was appointed to act as the expert for HMRC. His report was provided to the Tribunal for the purposes of this application.

11. So far as material for the purposes of this application Mr Orrock report provided as follows:

(1) 1.2 – identified Simon Pooley of HMRC Solicitor's Office as his instructing solicitor and identified that the instructions received were appended as Appendix D.

(2) 1.3 – stated that the documents and sources of information he referenced were identified in Appendix B.

(3) 2.2 – identifies that he was instructed that the details of the transactions in question were as set out in the documents, in particular, the Statement of Agreed Facts of which he had been provided a copy.

(4) 2.4 – sets out the questions on which he was asked to express his opinion.

(5) Section 3 sets out his understanding of the facts by reference to the Statement of Agreed Facts and the various documents with which he had been supplied. The summary runs to 4 pages of the report.

(6) Section 4 sets out his analysis in connection with the questions asked. The first question concerned GAAP compliance of an expense recognised by Wired in the financial statements for the year ended 30 April 2014 and the second question concerned the expense shown in the financial statements for the year to 30 April 2015 under two scenarios.

(7) At 4.40, in respect of the first scenario under question 2 Mr Orrock states:

> "In my opinion no expense arises for the purchase of gold in the year ended 30/04/15. It appears to me that the substance of the arrangement involving the use of the trust means that the directions do not get an outright transfer of the £180,000, rather all they get is the use of that sum for a period of 10 years. Under these circumstances the company should recognise an asset. This means that the accounts are not in accordance with UK GAAP. …"

(8) In paragraphs 4.42 – 4.50 Mr Orrock sets out his explanation for why an asset should be recognised effectively, and in simple terms not used by Mr Orrock, neutralising the expense.

(9) Section 5 sets out a summary of his conclusions. At the highest level of summary: Mr Orrock considered that in respect of question 1 the expense was not recognised in accordance with UK GAAP. In respect of the second question, under the first scenario (a) he was of the view that no expense should be recognised on the basis that an asset should have been recognised. Under scenario (b) his view was that the expenses should be recognised.

(10) Section 6 provides the expert declaration.

(11) Appendix B appears to represent the index to 4 volumes enclosing 191 documents and the Appellant's list of documents.

(12) Appendix D is a full copy of the instructions in the name of Simon Pooley (5 pages). The instructions set out the relevant provisions of the CPR, identify the transactions and set out the questions.

12. It is not necessary to deal in any detail with the report prepared by Mr Brice (the expert appointed by the Appellants) however, somewhat obviously Mr Brice's opinion was that the inclusion of the disputes expense in Wired's accounts was in accordance with UK GAAP. The

documents provided to Mr Brice (by reference to the appendices to his statement) were less extensive than those provided to Mr Orrock not least of all because Mr Orrock was provided with what appears to have been all the correspondence arising from the enquiry by HMRC. Mr Brice was provided with copies of witness statements prepared by Mr Hutchinson, Mrs Bassett and Mr Devapal which did not appear to have been provided to Mr Orrock with his instructions.

13. At the hearing Mr Thornhill QC indicated that the later provision of the witness statements to Mr Orrock after his report was prepared but prior to the meeting of experts was significant. However, following an enquiry by the Tribunal after the hearing it was confirmed by HMRC that whilst the witness statements were not initially provided to Mr Orrock (because his instructions had been prepared prior to the receipt of the statements) they were provided to him prior to the preparation of his report. The Tribunal is prepared to accept that as the factual position despite the obvious fact that Mr Orrock failed to then record in the relevant parts of his statement the further instructions/material he received in this regard nor his position on their importance (or otherwise) in reaching his opinion.

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 4.3.1(b) 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 <u>if a typical EBT transaction was in point,</u> but ultimately <u>they</u> 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* <u>EBT transaction</u> ~~was~~ <u>in point,</u> but ultimately <u>they</u> 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 WPP.

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.

OUTLINE OF THE POSITION OF THE PARTIES

30. By reference to the chronology of the production of various drafts of the joint statement and to email exchanges between the experts the Appellants are concerned that there was impermissible interference by HMRC's expert's instructing solicitor regarding the production of the joint statement. The Appellants seek disclosure of the communication passing between the solicitor and the expert with the stated purpose of establishing the credibility and, more specifically, the independence of HMRC's expert in order to determine whether to challenge the reliability of the expert's opinion on the GAAP Issue.

31. HMRC raise a fundamental objection to the admissibility of the application. HMRC contend that the exchanges between the experts on which the application is founded are protected from disclosure by without prejudice privilege ("**WPP**") and as such may be referred to only with their consent. As such, and as consent is withheld, there is no basis for the application. HMRC contend that if the Tribunal were to agree with such a submission the application would immediately fail.

32. The Appellant contends that the exchanges between experts giving rise to the application are not without prejudice communications contending that all communications between experts and their respective instructing solicitors and clients in the context of the preparation of the joint statement are, by reference to the terms of rule 35 CPR and the associated practice direction, guidance and relevant case law, open correspondence.

33. HMRC respond that even if the Tribunal is permitted to review the correspondence exchanged between the experts on the basis that they are not protected by without prejudice privilege the instructions given by the solicitor to the expert are subject to litigation privilege and therefore not disclosable.

34. To this the Appellants' retort is that as is apparent from the exchanges between the experts and the consequent impact on the draft joint statement, the instructions given amount to material instructions for which there is, at the very least, a reasonable basis on which to conclude that the substance of those instructions has not, to date, been disclosed thereby justifying the application.

35. As is therefore apparent, at the heart of this application lie some fundamentally important principles ensuring that justice is served namely: the independence of experts and their duty to the court/tribunal and the sanctity of privileged communications.

RELEVANT PROVISIONS OF CPR

36. Part 35 CPR provides the framework for the provision of expert evidence in civil litigation.

37. The key provisions relevant to this application are:

(1) Rule 35.3 – Experts overriding duty to the court:

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

(2) Rule 35.10 – Contents of report

> "(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 at 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 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."

(3) Rule 35.12 – Discussion between experts:

> "(1) The court may, … direct a discussion between experts for the purposes of requiring experts to (a) identify and discuss the expert issues in the proceedings; and (b) where possible, reach an agreed position on those issues.
>
> (3) The court may direct that following a discussion between the experts they must prepare a statement for the court setting out those issues on which (a) they agree; and (b) they disagree, with a summary of the reasons for disagreeing.
>
> (4) The content of the discussion between the experts shall not be referred to at the trial unless the parties agree.
>
> (5) where experts reach agreement on an issue during their discussions, the agreement shall not bind the parties unless the parties expressly agree to be bound by the agreement.

38. The Practice Direction to Rule 35, so far as material to the present application provides:

(1) Paragraph 2 – Expert evidence general requirements:

> "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.
>
> 2.5 If, after producing a report, an expert's view changes on any material matter, such change of view should be communicated to all parties without delay, and when appropriate top the court."

(2) Paragraph 3 – Form and content of an expert's report

"3.2 An expert's report must … contain a statement setting out the substance of all facts and instructions which are material to the opinions expressed in the report or upon which those opinions are based.

3.6 Where there a is a range of opinion on the matters dealt with in the report (a) summarise the range of opinions and give reasons for the expert's own opinion."

(3) Paragraph 5 – Instructions

"Cross-examination of experts on the contents of their instructions will not be allowed unless the court permits it (or unless the party who gave the instructions consents). Before it gives permission the court must be satisfied that there are reasonable grounds to consider that the statement in the report of the substance of the instructions is inaccurate or incomplete. If the court is so satisfied, it will allow the cross-examination where it appears in the interests of justice to do so."

(4) Paragraph 9 – Discussions between experts

"9.2 The purpose of discussions between experts it is not for experts to settle cases but to agree and narrow issues and in particular identify: (i) the extent of the agreement between them; (ii) the points of and short reasons for any disagreement; (iii) action, if any, which may be taken to resolve any outstanding points of disagreement; and (iv) any further material issues not raised and the extent to which these issues are agreed.

9.4 Unless ordered by the court, or agreed by all parties, and the experts, neither the parties nor their legal representatives may attend experts' discussions.

9.5 If the legal representatives do attend: (i) they should not normally intervene in the discussion, except to answer questions put to them by the experts or to advise on the law; and (ii) the experts may if they so wish hold part of their discussion in the absence of the legal representatives.

9.6 A statement must be prepared by the experts dealing with paragraphs 9.2(i) - (iv) above. Individual copies of the statements must be signed by the experts at the conclusion of the discussion, or as soon thereafter as practicable, and in any event within 7 days. Copies of the statements must be provided to the parties no later than 14 days after signing.

9.7 Experts must give their own opinions to assist the court and do not require the authority of the parties to sign a joint statement.

9.8 If an expert significantly alters an opinion, the joint statement must include a note or addendum by that expert explaining the change of opinion."

39. The "Guidance for the instruction of experts in civil claims 2014" issued by the Civil Justice Council provides a narrative to the provisions of the CPR rules and the practice directions. Some of the guidance restates or reiterates the provisions of the rules. The guidance which is additive to the rules/practice direction and relevant to this application is set out below:

(1) Paragraph 11:

"Experts must provide opinions that are independent, regardless of the pressures of litigation. A useful test of 'independence' is that the expert would express the same opinion if given the same instructions by another party. Experts should not take it upon themselves to promote the point of view of the party instructing them or engage in the role of advocates or mediators."

(2) Paragraph 13:

"Experts should take into account all material facts before them. Their reports should set out those facts and any literature or material on which they have relied in forming their opinions. They should indicate if an opinion is provisional, or qualified, or where they consider that further information is required or if, for any other reason, they are not satisfied that an opinion can be expressed finally and without qualification."

(3) Paragraph 14:

"Experts should inform those instructing them without delay of any change in their opinions on any material matter and the reasons for this (see also paragraphs 64-66)."

(4) Paragraph 55:

"The mandatory statement of the substance of all material instructions should not be incomplete or otherwise tend to mislead. The imperative is transparency. The term "instructions" includes all material that solicitors send to experts. These should be listed, with dates, in the report or an appendix. The omission from the statement of 'off-the-record' oral instructions is not permitted. Courts may allow cross-examination about the instructions if there are reasonable grounds to consider that the statement may be inaccurate or incomplete."

(5) Paragraph 65:

"Experts should not be asked to amend, expand or alter any parts of reports in a manner which distorts their true opinion, but may be invited to do so to ensure accuracy, clarity, internal consistency, completeness and relevance to the issues. Although experts should generally follow the recommendations of solicitors with regard to the form of reports, they should form their own independent views on the opinions and contents of their reports and not include any suggestions that do not accord with their views."

(6) Paragraph 66:

"Where experts change their opinion following a meeting of experts, a signed and dated note to that effect is generally sufficient. Where experts significantly alter their opinion, as a result of new evidence or for any other reason, they must inform those who instruct them and amend their reports explaining the reasons. Those instructing experts should inform other parties as soon as possible of any change of opinion."

(7) Paragraph 78:

"The content of discussions between experts should not be referred to at trial unless the parties agree (CPR 35.12(4)). It is good practice for any such agreement to be in writing."

(8) Paragraph 82:

"Agreements between experts during discussions do not bind the parties unless the parties expressly agree to be bound (CPR 35.12(5)). However, parties should give careful consideration before refusing to be bound by such an agreement and be able to explain their refusal should it become relevant to the issue of costs."

WITHOUT PREJUDICE PRIVILEGE

40. HMRC resist this application on the basis the email exchange and attached draft joint statements on which the application is founded are inadmissible as those exchanges benefit from WPP.

41. It is therefore necessary to outline the scope of such privilege in the context of the discussion between the experts and the production of the joint statement.

42. WPP protects from disclosure in any subsequent litigation connected with the same subject matter, evidence of any admissions made with a genuine intention to reach a settlement. WPP exists as a point of public policy, consistently reflected in case law, to encourage parties to engage in settlement negotiations without fear that the existence or content of such negotiations may then be used by their opponent should settlement not be reached, and the matter proceed to trial. (See *Rush & Tompkins Ltd v Greater London Council and Another* [1989] AC 1280 by reference to *Cutts v Head* [1984] Ch 290).

43. The scope of WPP is wide and will include communications in which admissions are made and not only the admissions contained within them. As the Court of Appeal confirmed in *Unilever Plc v Procter & Gamble Co* [2000] 1 WLR 2436 at 2446 B "one party's advocate should not be able to subject the other party to speculative cross-examination on matters disclosed or discussed in without prejudice negotiations simply because those matters do not amount to admissions."

44. There is no dispute between the parties that WPP applies in the context of the interaction between experts the dispute concerns the scope of WPP vis a vis the discussions which take place between the experts prior to the preparation of a finalised joint statement and the circumstances in which WPP is overridden.

45. In the matter of *Robin Ellis Ltd v Malwright Ltd* (19990 1TCLR 249 the Technology and Construction Court considered that without prejudice meetings of experts meets the "more limited immediate public interest" that if a matter cannot be settled the parties should be prepared for and fought at trial only on issues which have been "carefully limited and refined" thus contributing to the overall objective for WPP to aim to achieve settlement of matters without trial where possible. The case also confirms that the product of those discussions, the joint statement (whether interim or final), does not benefit from WPP particularly on the basis that the joint statement is a document produced at the direction and for the benefit of the court and is produced pursuant to an overriding duty to the court.

46. The TCC goes on to state:

> "Any interference with the experts in their compliance with the order of the court [to prepare a joint statement] is likely to result in non-compliance with the condition laid down by the court with the result that there is no leave for the evidence of the expert to be adduced at the trial.
>
> It has been suggested in this case that the party through his solicitor is entitled to require the expert to take instructions from the client before signing any joint statement and to make no agreement unless specifically authorised to do so. …
>
> Before the court will allow the evidence to be adduced, it is to be refined *by the experts* as far as possible. It is not for the parties to tell the experts what opinions they are allowed to hold. The duty owed by the experts to the court is to express in their joint statement and in their reports to the court the views which they themselves honestly hold. It is well understood that after giving his initial privileged advice to the party to the litigation an expert may honestly change his opinion either as a result of further research and thought or as a result of discussions with other experts. If he does so change his mind, he should record that change of mind either in the joint statement or in his report or, if necessary, in a supplemental report, bearing in mind that those documents will eventually become the basis of his sworn testimony. …

> The party to the litigation cannot properly tell the expert what evidence he is to give under oath in court, nor can he tell the expert what opinion to express in documents produced by him as a condition of the party being allowed to adduce that evidence. …
>
> Some confusion of thought may arise when, as in the present case, the expert is a quantity surveyor given the task of expressing opinions about the amount of the sums claimed. However, just as with other experts, when they meet at an experts' meeting ordered by the court, unless they receive express instructions giving them special additional authority, they are not aiming at reaching agreements binding on the parties. Their objective is to express opinions, agreed if possible, as to the value of work done or not done, or of defective work, or the value of a freehold or whatever is in issue. Any agreements will be admissible in evidence but not as agreements binding the parties. Sometimes, the parties agree, either before or after the experts' meetings, that any agreements made by the experts will be binding on the parties, but that is a matter separate from the fact that the joint statement of the experts made after the experts' meeting is open but not binding."

47. The basic provision, as is apparent from the provisions of the CPR (35.12(4)), PD (paragraph 9.2) and guidance (paragraph 72) and as confirmed in *Robin Ellis* is unquestionably that the discussions between experts and the various drafts of a joint statement are subject to WPP. The finally agreed joint statement is not. As with the individual expert reports the joint statement ultimately becomes part of the sworn testimony of the experts but what led to whatever is ultimately agreed or not is not a matter which can, prima facie, be referenced at trail.

48. However, it is clear that public policy requiring WPP can be overridden and otherwise excepted where a countervailing public policy arises, or justice otherwise dictates. Mr Thornhill QC identified two possible bases on which WPP should be overridden in the present matter:

(1) What he referred to as the Family Housing Association exception – in essence the ability to reference WPP material in an interlocutory application where the purpose for which the WPP material was to be used was something other than as evidence of the content of the discussion.

(2) The "unambiguous impropriety" exception.

The Family Housing exception

49. In *Family Housing Association (Manchester) Ltd v Michael Hyde and Partners et al* [1993] 1 WLR 354 the housing association had commenced an action for negligence and breach of contract. The defendants sought to strike out the claim for want of prospection pursuant to which the housing association filed affidavit evidence which included details of WPP correspondence explaining the rationale for the delay in prosecuting the claim. The defendants sought a determination that the WPP correspondence was inadmissible.

50. The Court of Appeal determined that the WPP material was admissible in the application for strike out. The Court considered that the public policy underlying WPP would not be inhibited by the disclosure of settlement discussions on an application for strike out as, to determine that application justly, a clear understanding of the conduct of the parties giving rise to the delay was essential. Within the confines of the strike out application the content of the admissions/basis of settlement was not relevant and neither party would be prejudiced by such admissions. A distinction was therefore to be drawn between evidence of a course of conduct between the parties relevant to the strike out application, and the terms and content of any

admission or settlement offer which would have a serious risk of prejudicing the outcome of any subsequent trial of the issue on negligence in respect of which the WPP material would be inadmissible.

51. Mr Tolley QC on behalf of HMRC submitted that Family Housing did not create a recognised exception to the WPP principle. He contended that it had been questioned in subsequent case law; citing, in particular, *Somatra Ltd v Sinclair Roche & Temperley (A firm)* [2000] 1 WLR 2453.

52. In *Somatra* the Court of Appeal considered the extent to which the use by one party of WPP material in seeking to obtain a Mareva injunction had the effect of waiving the WPP in the material when it came to trail and the other party sought to rely on it. The focus of the court in determining this issue was to achieve a just result. The Court determined that as the defendant at trial had successfully sought to admit the WPP material for the purposes of the imposition of the Mareva injunction, use of the same material by Somatra would be admissible in connection with the substantive issue at trial on the basis that "no party which has taken part in without prejudice discussions should be entitled to use them to his advantage on the merits of the case in one contest, but then assert a right to prevent its opponent from doping so on the merits at trial".

53. Mr Thornhill QC contended that the extent to which *Somatra* constrained the exception was limited. In this regard he referred to *Phipson on Evidence* Ninetieth edn. Para 24-30. This reference indicates that *Somatra* simply explains *Family Housing* as providing for the admissibility of WPP communications in circumstances where their admission is for the purpose of evidencing the admission itself and not of the content of that admission.

54. On behalf of Wired it was contended that the Family Housing exception applied in the present case because the purpose for which disclosure was sought was limited. The Appellants accept that the position which Mr Brice understood had been agreed with Mr Orrock and from which Mr Orrock purportedly resiled cannot be relied upon at trial (CPR 35.12(5)). It is stated that the purpose of the application is to evidence that Mr Orrock has, contrary to the overriding duty of the expert to the court as set out in CPR 35.3 (and by reference to paragraphs 2.1, 2.2, 9.4 and 9.5 of the PD and paragraphs 11 and 65 of the guidance) been impermissibly influenced by his instructing solicitor/client such that his evidence is unreliable or should be given less weight.

55. As set out below the Tribunal is extremely concerned as to the conduct of both HMRC's instructing solicitor and Mr Orrock in this matter. However, in the Tribunal's view the Family Housing exception cannot apply.

56. As Mr Tolley QC pointed out, but for Covid, the present application would have been heard as part of the substantive listed hearing. Whilst strictly the application is an interlocutory one its focus is ultimately to rely on the material disclosed at trial if it substantiates the Appellants' concern of undue influence. It is the fact and content of the admissions allegedly made and reversed on which the Appellants wish to rely in order to limit the weight placed on Mr Orrock's evidence at the substantive hearing. Mr Thornhill QC's assertions to the contrary cannot be accepted.

Unambiguous impropriety exception

57. The second exception identified is the unambiguous impropriety exception.

58. In *Unilever* the Court of Appeal confirmed that WPP material will be admissible if the exclusion of the evidence "would act as a cloak for perjury, blackmail or other "unambiguous impropriety"" and should be "applied only in the clearest cases of abuse of a privileged occasion".

59. The scope of the exception is highlighted and considered in later case law, reviewed in the judgment of the Employment Appeal Tribunal in *BNP Paribas v Mrs A Mezzotero* [2004] 1 WLR 741900. That case concerned an allegation of sex discrimination. The complainant had raised a grievance following her maternity leave. In a without prejudice meeting concerning the grievance, termination of employment had been discussed. The employer contended that the alleged discrimination had arisen within the context of a without prejudice meeting and was therefore inadmissible. The Appeal Tribunal admitted the evidence overriding the WPP on the basis that the very purpose of the Sex Discrimination Act would be undermined if employers were permitted to abuse the status of without prejudice meetings and communications disabling legitimate challenge to discrimination.

60. The unambiguous impropriety exception was also considered in *Savings & Investment Bank Ltd (in liquidation) v Fincken* [2003] EWCA 1630. The case concerned proceedings for recovery of a debt which were settled pursuant to a deed that contained a contractual warranty that the defendant's assets exceeding £5,000 had been disclosed in his affidavit of means. In a subsequent action to set aside the settlement the plaintiff sought to rely on an admission in a without prejudice meeting that further undisclosed assets were held by the defendant. The application relied on the unambiguous impropriety exception.

61. Rix LJ summarises the authorities on the application of the unambiguous impropriety exception:

> (1) Identifying the public policy underlying WPP as set out in *Cutts v Head* [1984] Ch 209 290: to encourage fully frank negotiations without fear that such negotiations are relied on at trial on the question of liability.
>
> (2) *Hardwick Jersey International Ltd v Caplan* The Times 11 March 1988: confirming that WPP did not extend to an attempt under the guise of a WPP negotiation to cloak a crime or fraud.
>
> (3) Similarly, in *Underwood v Cox* (1912) 4 DLR and *Greenwood v Fitts* (1961) DLR (2d) 260, threats made in without prejudice meetings were denied WPP.
>
> (4) Although not concerned with the unambiguous impropriety exception Rix LJ considered that *Rush v Thompkins Ltd v Greater London Council* [1989] AC 1280 emphasised the importance of the breadth of the public policy justifying WPP, acknowledging that the exceptions being applied "where the justice of the case requires it".
>
> (5) In *Forster v Friedland* (unreported) the Court of Appeal had drawn a distinction between criminal or fraudulent activity (including threats of perjury or bribing witnesses) and "colourful or even exaggerated language". The unambiguous impropriety exception applying to the former but not the latter.
>
> (6) That the exception is appropriate in "only the very clearest of cases" was confirmed by the Court of Appel in *Fazil-Alizadeh v Nikbin* (unreported) on the basis that WPP was a "highly beneficial rule" which must be "most scrupulously and jealously protected". Thus requiring "rigorous scrutiny" of all claims to admit WPP communications.
>
> (7) Quoting from *Unilever plc v The Proctor & Gamble Co* Rix LJ restated the requirement that the whole of WPP negotiations are to be protected and not only the identifiable admissions in order that the participants of such negotiations do not need to "constantly monitor their every sentence".

(8) By reference to *Merrill Lynch, Pierce Fenner & Smith Inc v Raffa* The Times 14 June 2002 it was again emphasised that the exception is applied in situations where the WPP negotiations are used as a cloak for fraudulent or dishonest behaviour.

(9) In *Berry Trade Ltd v Moussavi (No 2)* [2003] EWCA 715 the evidence on which reliance was sought concerned an alleged admission which was effectively denied as having even been made within the WPP negotiations. Unlike the cases references above, there was no clarity as to the impropriety of the alleged admission. In *Berry* the Court of Appeal determined that to extend the unambiguous impropriety exception to such a circumstance would "weaken significantly the requirement of unambiguous impropriety and the need for a very clear case of abuse of the privileged occasion". Further it was considered that if the exception were to apply in the circumstances in *Berry* that it would essentially apply to "any case where an admission, inconsistent with some pleading or sworn assertion, is alleged to have been made."

62. Having reviewed the authorities Rix LJ concluded that to apply the exception in a case where there was any real ambiguity of impropriety or to require the ambiguity to be resolved by a requirement for disclosure ran the risk that the exception to the rule displacing the WPP rule merely by begging the question. Rix LJ confirmed that only in the case of a proven impropriety in which the privilege itself is abused would the exception apply such that WPP is to be sacrificed only in "truly exceptional and needy circumstances".

63. However, Rix LJ also expressed the view that it was "distasteful" for a court to avert its eyes from an admission which appeared to indicate that a deponent had lied in a sworn statement but concluded that "the tension between the two powerful public interests, it seems to me that that in favour of the protection of the privilege of without prejudice discussions holds sway – unless the privilege itself is abused on the occasion of its exercise".

64. Mr Thornhill QC, on behalf of Wired, submitted by reference to the emails exchanged between Mr Orrock and Mr Brice there was, at the very least, prima facie evidence of a grave impropriety. Such impropriety being the influence effectively imposed on Mr Orrock by those instructing him to effectively reverse what an accepted position which was so fundamental to the issue to be determined in the appeal was a very clear case of unambiguous impropriety. He submitted that were Mr Orrock's acceptance that Mr Brice's position was a reasonable position under GAAP, albeit one that Mr Orrock did not accept as correct, in the form of the draft returned by Mr Orrock by email on 31 October 2019 would have been very significant as regards the dispute in the appeal. Mr Thornhill QC contended that was so even in the event that HMRC did not consider themselves bound by the agreement.

65. Mr Thornhill QC contended that and that HMRC's attempt to withhold the evidence of communications between Mr Orrock and the solicitor on the basis that the circumstances in which the Appellant became aware of the facts of the possible impropriety by claiming WPP was precisely the nature of abusive use of WPP the exception was aimed to prevent.

66. On behalf of HMRC Mr Tolley QC submitted that the scope of the unambiguous impropriety was limited to situations, amply evidenced in the *BNP* case in which it was the context of the WPP interaction which was unambiguously abused. In his submission any other interpretation would impermissibly broaden the scope of what is and should be a narrow exception.

67. Further, Mr Tolley QC contended that in any event, on the face of the email exchanges themselves, when considered in the context of Mr Orrock's report, any alleged interference with Mr Orrock's evidence was misplaced as Mr Orrock's evidence had consistently and coherently been that he did not consider Wired's financial statements for 2015 to have been prepared in accordance with UK GAAP on the basis that the accounts should have recognised

an asset as the effect of the arrangements was that the company transferred an asset to the directors and in return the directors transferred an asset of equivalent value to the trust with the consequence that the substance was that there was a transfer of an asset from the company to the trust.

68. As is clear from the submissions made on behalf of Wired the alleged unambiguous impropriety in the present appeal is the impermissible interference by HMRC's instructing solicitor in connection with the purported agreement reached between Mr Brice and Mr Orrock at their meeting and the amendment of the draft joint statement.

69. In this regard the case of *BDW Trading Ltd v Integral Geotechnique (Wales) Ltd* [2018] EWHC 1915 (TCC) is one of some importance. The case was one concerning professional negligence. An issue arose in the hearing of the matter as to the respective roles of one of the experts and the legal advisor. It is apparent from the case report that one of the experts had sought input from their client's solicitor on the substantive content of the joint statement.

70. In addition to the provisions of the CPR and PD referenced above the court referred to the TCC guide for experts para 13.6.3 of which states:

> "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."

71. The court identified that the TCC guide was consistent with paragraph 9 of the Practice Direction cited above. The court went on to state at paragraph 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.

72. However, on the material before it the court determined that the expert in question had not, as a matter of fact, modified the joint statement in any significant way of substance as a consequence of the interaction with the solicitors.

73. The commentary to the White Book Rule 35.12 reframes slightly the guidance provided in *BDW*:

> "It is not for the parties to tell the experts what opinions they are allowed to hold. Interference of this sort by the parties with the experts in their complying with the directions given by the court may amount to a breach of the condition of the grant of permission with the result that permission to adduce the expert's evidence may trial may be refused … Generally applicable guidance on the approach to be taken in this regard was given in *BDW Trading Ltd v Integral Geotechnique (Wales) Ltd* [2018] EWHC 1915 (TCC). At para 18, guidance was given on the approach to the preparation of joint statements: (i) while an expert may provide a copy of a draft statement to solicitors, the expert should not do so to solicit comments or suggestions on the content of the draft; (ii) a solicitor provided with a copy of a draft joint statement should not proffer any comments or suggestions as to content except where there are serious concerns that the court may fail to understand the contents or be misled by them. Failure to adopt this approach is a "serious transgression".
>
> Furthermore, and exceptionally, it may be apparent to the parties or their lawyers that the experts' views set out in the joint statement are based on material misunderstanding of law or fact. In such a situation this should be drawn to the experts' attention so they may consider the point before trial: that this step has been taken must be made clear to all parties and the trial judge. Such a step should not be used by way of an inappropriate attempt to reopen the experts' discussions by a party dissatisfied with its results; the court should take steps to "firmly discourage" such abusive behaviour. While this guidance concerned the application of the approach set out in para 13.6.3 int eh Technology and Construction Court Guide, it is of general utility and applicability.

74. The Commentary confirms the policy objective of ensuring that the experts' discussions remain subject to WPP to facilitate and encourage open discussion between them with a view to narrowing the dispute where possible.

75. As regards Rule 35.12(5) the Commentary provides interesting perspective: the commentary acknowledges that the rule provides that agreement reached by the experts should not bind the parties unless they expressly agree to be bound the commentary continues:

> "In practice, however, it could be very difficult for a party dissatisfied with an agreement reached at an experts' discussion, to persuade the court that this agreement should, in effect, be set aside unless the party's expert had clearly stepped outside their expertise or brief, or otherwise had shown themselves to be incompetent."

76. In the context of the unambiguous impropriety exceptions two critical issues arise in the context of this application: is there prima facie evidence of an impropriety and if so, is it one which justifies the application of the exception?

Is there evidence of an impropriety?

77. At the heart of this issue is the need for experts to be independent, to form their own view completely uninfluenced by those instructing them and to provide that impartial view to the court or tribunal to whom their overriding duty is owed.

78. That this is the position is made abundantly clear through rule 35 CPR and by reference to the PD and associated guidance to which Mr Orrock was required to have regard as provided for in the directions of Judge Kempster:

(1) CPR 35.3: (1) It is the duty of experts to help the court on matters within their expertise; (2) This duty overrides any obligation of the person from whom experts have received instruction or by whom they are paid

(2) PD:

(a) 2.1 Expert evidence should be the ***independent product*** of the expert uninfluenced by the pressures of litigation; (emphasis added)

(b) 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. (emphasis added)

(c) 9.4 and 9.5 limit the involvement of solicitors and clients in the joint discussion and preparation of the joint report

(d) 9.7 - Experts must give their own opinions to assist the court and ***do not require the authority of the parties to sign a joint statement***. (emphasis added)

(3) Guidance:

(a) Paragraph 11 - Experts must provide opinions that are ***independent, regardless of the pressures of litigation***. A useful test of 'independence' is that the expert would express the same opinion if given the same instructions by another party. Experts should not take it upon themselves to promote the point of view of the party instructing them or engage in the role of advocates or mediators. (emphasis added)

(b) Paragraph 65 - Experts ***should not be asked to amend, expand or alter any parts of reports in a manner which distorts their true opinion***, but may be invited to do so to ensure accuracy, clarity, internal consistency, completeness and relevance to the issues. Although experts should generally follow the recommendations of solicitors with regard to the form of reports, they should form their ***own independent views on the opinions and contents of their reports*** and not include any suggestions that do not accord with their views. (emphasis added)

(4) White book: ***It is not for the parties to tell the experts what opinions they are allowed to hold***. ***Interference*** of this sort by the parties with the experts in their complying with the directions given by the court may amount to a breach of the condition of the grant of permission with the result that permission to adduce the expert's evidence may trial may be refused. … ***while an expert may provide a copy of a draft statement to solicitors, the expert should not do so to solicit comments or suggestions on the content of the draft***. (emphasis added)

79. On the face of the email exchanges between Mr Orrock and Mr Brice, Mr Orrock unquestionably provided the solicitor with a copy of the joint report in circumstances in which the solicitor questioned the terms of paragraph 4.2.1 and consequent upon exchanges between Mr Orrock and the solicitor changes were made to the statement.

80. Mr Thornhill QC describes what is apparent from the information that is currently available as evidence of a clear and very serious transgression and therefore an impropriety.

81. Mr Tolley QC says those changes are not material and, in any event, fall within the circumstances described in *BDW* as exceptional so as only to address a serious concern that the Tribunal may have failed to understand the contents of the statement or be misled by them.

82. The Tribunal has carefully reviewed the email exchanges, the various drafts and the terms of Mr Orrock's expert report. Particular emphasis has been placed on the explanation given by Mr Orrock for the changes.

83. On the basis of this review and in light of the imperative that experts be independent the Tribunal considers 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. Mr Orrock's instructing client/solicitor apparently appreciated the significance of the concession implicit in the language originally proposed by Mr Brice and largely accepted by Mr Orrock (at least by reference to his limited changes to that draft prior to the involvement of the solicitor).

84. The 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.

Does the unambiguous impropriety exception therefore apply?

85. The Tribunal has set out at some length above a review of the case law on the unambiguous impropriety exception.

86. Based on a careful consideration of that case law the Tribunal concludes that its scope is narrow. The public policy underpinning WPP is one of the inherent foundations of our system of justice and should be overridden only in exceptional circumstances and where doing so is required to ensure justice can be done.

87. In this context the Tribunal determines that the unambiguous impropriety exception applies where the act of impropriety is a conscious use of WPP discussions for an abusive purpose. WPP will therefore be overridden where a WPP meeting or negotiation is used to threaten or, as in the case of *BNP Paribas,* where the meeting itself was the forum in which the impermissible behaviour was played out so as to do so in circumstances in which it was known that the behaviour would be shielded.

88. By reference to the review of the email exchanges between Mr Brice and Mr Orrock the Tribunal is unable and unwilling to determine that Mr Orrock deliberately behaved in a way that abused the WPP nature of the discussions. It was, in the Tribunal's view permissible to share the joint statement with the solicitor at least for information purposes. What then followed was, as stated above, on its face and without knowledge of the detail, improper but after much consideration the Tribunal cannot conclude that it was, in and of itself, abusive of WPP.

89. The Tribunal has also considered whether HMRC's objection to the application could amount to the abuse of WPP. It is somewhat bemusing to the Tribunal that if the interactions between the solicitor and Mr Orrock were entirely innocent and that disclosure of those interactions would reveal such a position what is HMRC's rationale for so fiercely resisting the application? But in the end that conjecture is irrelevant. On the basis that there was no abuse of WPP in the context of the exchange between Mr Orrock and Mr Brice the Tribunal has concluded that there cannot then be an abuse later when WPP is invoked.

90. There is also a question as to whether it can be said that the impropriety is unambiguous. It appears to the Tribunal that this is somewhat catch 22. Mr Toolley QC, in reliance on *Finken* contended that a refusal by HMRC to provide any explanation cannot and should not be used against them as to provide an explanation effectively defeats the purpose of resisting the application in the first place. In the circumstances of *Finken* the Tribunal agrees that a refusal

to self-incriminate cannot be used against the party resisting disclosure. However, in the present case the material available gives rise to a perception of impropriety. As is the very nature of a perception, it cannot be unambiguous because it is based on incomplete information. Where filling the gaps in the information lies in the hands of the party benefitting from the ambiguity it is more challenging to conclude that no adverse inference should be drawn from a failure to complete the information set.

91. In the end however, that particular conundrum was not one that it was necessary for this Tribunal to resolve as it would not remove for the Appellant the obstacle that WPP presents.

92. For these reasons the Tribunal concludes that the unambiguous impropriety exception does not apply.

MATERIAL INSTRUCTIONS

93. In the alternative Mr Thornhill QC contends that if one of the general exceptions does not apply Wired are nevertheless entitled to access the material which is the subject of this application on the grounds that the exchanges between Mr Orrock and his instructing solicitor were instructions, the material substance of which has not been disclosed.

94. In response Mr Tolley QC contends that such instructions are subject to litigation privilege and protected from disclosure on the basis that Mr Orrock's report sets in full the instructions received prior to the report and that there was no obligation for further disclosure.

Instructions to experts and litigation privilege

95. CPR 35.10 (3) and (4) together provide that an expert must include within their report a summary of their material instructions but that to the extent that they have done so there is no requirement that such documents the be provided by way of disclosure in the proceedings. Only where there are reasonable grounds for considering that the statement of instructions is inaccurate or incomplete will disclosure be ordered of the documents in which the instructions are given.

96. In this context it was determined by the Court of Appeal in *Lucas v Barking, Havering & Redbridge NHS Trust* [2004] 1 WLR 220 that the word "instruction" is to be given a wide meaning which will encompass all material supplied by the instructing party to the expert on which the expert is being asked to advise. However, the court also confirmed that the requirement of CPR 35.10(3) is limited to "material" instructions with the consequence that it is not necessary for an expert to fully set out the detail of all instructions and information provided and a failure to do so does not therefore result in a right for the other party to seek disclosure or be permitted to question the expert at trial on the content of the documents provided to the expert. What is required of the statement of material instructions is that they are sufficient such that the "imperative of transparency" is met by broadly ensuring that the factual basis on which the report is prepared is apparent. Laws LJ commented:

> "43. … I think it is a premise of the arrangements constituted by rule 35.10(3) and (4) that in the ordinary way the expert is to be trusted to comply with 35.10(3) and the effect of the rule 35.10(4) restrictions is that the party on the other side may not as a matter of course call for disclosure of documents constituting the experts instructions as a check to see that rule 35.10(3) has been fulfilled. There must be some concrete fact giving rise to "reasonable grounds" within the closing words of rile 35.10(4). It is unsurprising that the expert is thus to be trusted: it is a piece of his overriding duty to help the court (CPR r35.3). Overall, rule 35.10(4) in my view strikes an important balance between on the one hand the protection of the party whose privilege is lost, and on the other the vindication of rule 35.10(3) where there is a real question mark as to its fulfilment."

97. *Jackson v Marley Davenport Ltd* [2004] 1 WLR 2926 confirms that the exception provided for in CPR 35.10(3) is limited. The relationship between a party, its representatives and an expert are generally subject to litigation privilege. CPR 35.10(3) excludes from privilege the instructions given to an expert to prepare a report which is subsequently to be relied upon in court with the permission of the court. However, that exclusion is limited (as set out above) to a requirement that material instructions be set out in the report itself and if there are reasonable grounds to conclude that the report is incomplete or inaccurate as to those material instructions then, and only then, will the underlying communications be admissible and/or the subject of scrutiny by cross examination of the expert.

98. The point at which the communications between a party and its appointed expert becomes one that falls within the scope of CPR 35.10(3) and therefore outside the scope of litigation privilege was also considered in *Talithia Mack v Doctor Elaine Clarke* [2017] EWHC 113 (QB). The case concerned the question of disclosure of earlier reports/drafts of experts. The court considered:

> "16. … Parties and their experts have to have a period during which the views of the experts are established, probed, discussed, questioned, modified, concluded without fear that that process will be opened up to scrutiny of the opposing party. It would be counter-productive and retrogressive … if the development of expert opinions were inhibited in that way without very good reason. I do not think that the timely withdrawal of an admission (if such it be) amounts to such a reason. Further, (and at the risk of making essentially the same point in a different way), a practice of requiring disclosure of early drafts of experts' reports in this situation would not promote the aim of encouraging proper concessions. On the contrary, parties would be wary of making concessions at all, or of making them before their experts had produced final and definitive reports. …"

99. With regard to the implication for disclosure in the event that there are reasonable grounds to conclude that the statement of material instructions in the expert's report are incomplete or inaccurate the Appellant also relied on the case summary for *Salt v Consignia plc* [2002] CLY 420. By reference to the summary provided it was submitted that where it is concluded that with regard to any conclusion that the report was relevantly inaccurate or incomplete for failure to provide the substance of material instruction disclosure of the document evidencing instruction or information would be appropriate in accordance with CPR 35.10(3) and (4).

100. In the context of the present application the focus of attention has been on instructions given after the preparation and submission of the individual expert reports.

101. The CPR, practice direction, guidance and case law are essentially silent on the disclosure of instructions which arise post submission of the individual reports. Mr Thornhill QC submits that the reason for this is simple, post submission of the report all exchanges between a party and their expert must be made on an open basis to both experts. He references the provisions of paragraph 9.8 of the PD and paragraphs 55 and 65 of the guidance. He also places particular reliance on the White Book commentary emphasising the plurality of experts:

> "Furthermore, and exceptionally, it may be apparent to the parties or their lawyers that the experts' views set out in the joint statement are based on material misunderstanding of law or fact. In such a situation this should be drawn to the experts' attention so they may consider the point before trial: that this step has been taken must be made clear to all parties and the trial judge. Such a step should not be used by way of an inappropriate attempt to reopen the experts' discussions by a party dissatisfied with its results; the court should take steps to "firmly discourage" such abusive behaviour. While this guidance

> concerned the application of the approach set out in para 13.6.3 int eh Technology and Construction Court Guide, it is of general utility and applicability."

102. The Tribunal sees considerable force in this submission as it underpins the need for there to be complete openness between the experts as they engage with one another in connection with the joint statement. However, the Tribunal has concluded that the White Book commentary must be read in the context of the WPP nature of the dialogue between the experts up to the point at which the joint statement is agreed. It is the Tribunal's view that the paragraph set out immediately above applies once the joint statement is finalised because it is only at that point that the document is an open communication available to the court. The language and tenor of the section referenced clearly relates to a finalised joint statement which, if based on a misunderstanding, could lead to the court being misled.

103. The Tribunal therefore rejects the submission that all communications between the instructing solicitor and an expert whilst the experts are agreeing the joint statement are open.

104. The fact is that the relevant rules and practices are silent on the status of communications between solicitor/client and the expert during the preparation and discussion of a joint statement because of the simple fact that such communications are not generally permitted.

105. Paragraph 9 of the PD prescribes in some detail that clients and solicitors should not normally be part of the discussions between experts (not just meetings) and that any contribution should be limited to advice on the law. The joint meeting and discussions are subject to WPP so as to permit a free flowing dialogue between the experts acting independently of those instructing them with a view to, at the very least, narrowing the issued between them with a view to providing the greatest level of assistance to the receiving court or tribunal on technical matters outside the sphere of expertise of the court and on which it has therefore sought expert opinion.

106. That then leads on to the need to consider whether a failure to disclose the "off-the-record" instructions apparently given in relation to the draft joint statement represent material instructions the substance of which should have been disclosed by Mr Orrock and if so whether the substance was disclosed by reference to the exchange of emails between Mr Orrock and Mr Brice.

107. The terms of the CPR, PD and guidance essentially confirm that instructions to experts are not subject to privilege in the normal way but only where the court or tribunal considers that there are reasonable grounds for believing that the substance of the instructions has not been stated in the report, by way of annex as appropriate, the full content of those instruction will not be required to be disclosed and, more relevant in the present case, the expert shall not be cross examined on them.

108. The purpose of the rule as articulated in paragraph 55 of the guidance and the White Book commentary is to ensure transparency of the instructions received by the expert. By reference to that underlying ethos it is right that the substance of the instructions should have been bought to the Appellant's attention within the context of the WPP discussion.

109. Mr Orrock's emails to Mr Brice made Mr Brice and those instructing him aware that Mr Orrock had shared the report with the solicitor, that the solicitor had raised comments and concerns with the drafting and that Mr Orrock's position on the drafting was changed as a consequence of those instructions. The basis on which it was stated that the instructions had been given were that there was a perceived ambiguity. By reference to the terms of the emails the substance of the instructions had therefore been shared by Mr Orrock with Mr Brice and those instructing him. This critical issue here is not that the Appellants were in fact unaware

of the substance of material instructions but rather that they question the integrity of the articulation of substance because of the very significant potential impact of the drafting changes on the substantive issues.

110. It is unquestionably the case that by reference to the terms of the reports, the communication with the Tribunal initially to the effect that a joint statement could not be agreed and subsequently to the agreement of a joint statement the substance the instructions given by HMRC solicitors to Mr Orrock is not and will not be transparent to the Tribunal hearing the substantive appeal. However, for the reasons stated above that is because those instructions were given in the context of WPP discussions between the experts pursuant to which a final joint statement has now been agreed. As with all WPP communications there was disclosure of the substance of the instructions between the parties but behind the curtain requiring disclosure

111. For the reasons articulated in paragraphs [47], [55] – [56] and [77] – [90] the Tribunal has concluded that there is no basis on which to lift the protection provided by WPP such that the Appellants are entitled to further disclosure with a view to seeking to establish the integrity of the substance of the material instructions with a view, as relevant, using that disclosure to undermine the independence and credibility of Mr Orrock by reference to the interventions of HMRC's solicitor and/policy client.

112. The Tribunal therefore refuses the application for disclosure of the relevant communications between HMRC solicitors and Mr Orrock and/or between either of those parties and their instructing client.

113. Ultimately, the Appellants will have their opportunity to cross examine Mr Orrock on the substance of his report in light of the terms of the final joint statement by reference to the conflicting evidence given by Mr Brice. The Tribunal will then determine the GAAP Issue by reference to such evidence.

Failure to disclose substance of instructions on factual witness statements

114. This application has identified that Mr Orrock's report did not, in another regard, disclose the substance of his material instructions. The email exchange with the Tribunal, in response to the request for the appendices to Mr Brice's expert report, revealed that all three witness statements were referenced in the appendix relating to either the instructions received, or the documents considered by Mr Brice. HMRC have confirmed that all three documents were available to Mr Orrock but that they are not referenced at all in his report.

115. Those witness statements are clearly highly material in view of what the Tribunal understands to be a position agreed between the experts, namely that the arrangement under consideration were not a standard EBT.

116. The Appellant has not made an application to cross examine Mr Orrock as to the direct impact and relevance on his opinion of those reports and which they allege led to his accepting that the treatment adopted by Wired was one of the reasonable interpretations of UK GAPP. His failure to disclose that the statements were available to him in the preparation of his statement would, in the view of the Tribunal permit the Appellants to cross examine Mr Orrock on the relevance and use of the statements.

DISPOSITION

117. For the reasons stated above the application is dismissed.

EXPRESSION OF THE TRIBUNAL'S CONCERN

118. The circumstances giving rise to this application are cause for considerable concern to the Tribunal.

119. Mr Tolley QC made the observation during the hearing that HMRC are in an invidious position when expert accounting evidence is required to determine complex tax appeals. They cannot simply appoint expert accountants employed in practice because of the apparent or actual conflict of interest which may arise between the firm employing the accountant and their clients and the receipt of instructions from HMRC.

120. The Tribunal has historically accepted this difficulty as reason to accept that HMRC will therefore appoint experts employed by HMRC. It is essentially considered to be the lesser of two evils.

121. However, in the circumstances, but placing no greater onus on such experts or those instructing them, it is absolutely imperative that the independence of the expert is preserved, and that independence is seen to be preserved.

122. By reference to the material seen by the Tribunal, and as articulated in the substance of this judgment, there is evidence of, at the very least, potential inappropriate interference with the independent evidence of an expert witness. It may be the case that were the instructions to be reviewed that it would transpire that there was, in fact, no actual inappropriate interference but the perception given is that there was a transgression. In the terms articulated in *BDW* a serious transgression.

123. Such a perception is seriously prejudicial to HMRC's position in cases such as these and should be avoided at all costs.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

124. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

AMANDA BROWN

TRIBUNAL JUDGE

RELEASE DATE: 8 JULY 2020