Neutral Citation Number: [2022] EWHC 2226 (TCC)

Case No: HT-2021-BRS-000002

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 25 August 2022

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

- -

Between :

GARY PICKETT	**Claimant**
- and -	
DAVID BALKIND	**Defendant**

- -
- -

Daniel Crowley (instructed by **Womble Bond Dickinson LLP**) for the **Claimant**
Suzanne Chalmers (instructed by **DAC Beachcroft LLP**) for the **Defendant**

Hearing date: 29 July 2022

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

This judgment will be handed down by the Judge remotely by circulation to the parties or representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 am on Thursday 25 August 2022.

HHJ Paul Matthews :

Introduction

1. This is my judgment on applications brought under two application notices. The first in time is dated 14 June 2022, and was issued by the claimant against the defendant. The other is dated 8 July 2022, and was issued by the defendant against the claimant. It is in fact in two parts, so that in total I have three applications to resolve. There is also a third application notice, dated 20 July 2022, also issued by the claimant against the defendant. However, this application has not so far been argued before me, as I decided that I would give judgment on the other applications first, in case that judgment significantly changed the situation in which the last application arose, or made it redundant.

2. These applications arise in the context of a claim commenced by claim form issued on 23 February 2021. This claims damages for nuisance and negligence arising out of damage to the claimant's residential property at 10 Oak Close, Sutton, Surrey, said to have been caused by the roots of an oak tree growing in the garden of the defendant's property, 12 Oak Close. In other words, this is a tree root subsidence claim. The schedule of loss attached to the particulars of claim, dated 18 May 2021, claims some £356, 279.61. The two properties at 10 and 12 Oak Close are not in fact contiguous. A curious feature of the case is that the intermediate property, known as 11 Oak Close, appears not to have suffered any damage.

3. An amended defence was served on 18 August 2021. Each side made a request for further information of the other, the defendant's response being served on 18 August 2021 and the claimants on 9 December 2021. On 22 October 2021 HHJ Russen QC held a costs and case management conference at which he gave directions to trial. These included a direction giving permission for expert evidence on each side into separate fields, from an arboriculturist and a structural engineer. In accordance with CPR rule 35.12(3), joint statements of the parties' respective experts were to be filed by 25 April 2022, and individual final reports by 16 May 2022. The trial itself was directed to begin on the first available date after 1 July 2022, with a time estimate of four days. It was later fixed to begin on 11 July 2022. In fact, as will be seen, it was later adjourned, and is due to take place in the autumn.

The expert evidence

4. Expert evidence was duly obtained on both sides. The joint statement of the expert structural engineers retained by the parties (Gerry Cutting for the claimant and Timothy Pither for the defendant) is in fact dated 18 May 2022. That of the parties' expert arboriculturists (Simon Pryce for the claimant and Kieron Hart for the defendant) is dated 19 May 2022. The claimant served an expert arboricultural report dated 12 June 2022 from Mr Pryce, and an expert structural engineering report dated 9 June 2022 from Mr Cutting. It is relevant to note that Mr Cutting's firm is called "Prior Associates". The defendant served an expert arboricultural report dated 13 June 2022 from Mr Hart, and an expert structural engineering report dated 13 June 2022 from Mr Pither.

5. For the purposes of this judgment I need to set out a number of passages from the expert evidence. First there is paragraph 9.6 of the joint statement of Mr Pryce and Mr Hart dated 19 May 2022. This is as follows:

> "**Mr Pryce** notes that the size of the Defendant's Oak and distance from no.10 indicated that damage was reasonably foreseeable from the start and this was confirmed by the finding in 2011 that the foundations were much shallower than current requirements for building that distance from an Oak. At the time the absence of damage in no.11, between no.10 and the Oak, was evidently given more weight than it warranted, despite there being no firm information to suggest that the foundations were deep enough to prevent root spread towards no.10. The Prior Associates report comments at 4.7.3.2 that a sand layer found in one of the bore holes (BH1, March 2012) could be extensive enough to provide bearing for the foundation closer to the tree."

6. Secondly, there is paragraph 3.9(2) of Mr Pryce's report dated 12 June 2022:

> "If no.11 had not been underpinned the original foundation, presumably similar in depth to that of no.10, would offer little resistance to root spread. In that event no.11 would also be vulnerable to the effects of the Defendant's tree, but the site investigation found variations in soil conditions which would make that less likely. The Prior Associates report comments at 4.7.3.2 that the sand layer found in BH1 of March 2012 could be extensive enough to provide bearing for the foundation closer to the tree. That comment referred to no.10, but the borehole concerned was close to the boundary between the properties so, if the layer extends under no.11 as well, that would make it more resistant to movement. Sand does not shrink and swell like clay, although the soil sample from 0.8m in BH1 had a plasticity index of 46% indicating high shrinkage potential and 100% of it passed through a 425 micron sieve, indicating pure clay. However I have known cases where localised layers of sand in clay reduced the incidence and severity of damage significantly."

7. Thirdly, Mr Cutting's Report relevantly provides as follows:

> "1.2. This report considers the evidence produced by others and additional evidence gathered by me to give an opinion on expert engineering issues that arise in this case.
>
> […]
>
> 1.4. My instructions are from Womble Bond Dickinson LLP acting for Mr Gary Pickett and his insurers Lloyds Banking Group. These instructions are in connection with a dispute with Mr David Balkind relating to damage, including whether an Oak tree previously owned by Mr Balkind is responsible for damage to Mr Pickett's property. The Oak is referred to as T13 throughout the report and in evidence produced by others.
>
> 1.5. On the 7th March 2022, I had a virtual meeting with Tim Pither, the structural engineer for the Defendant, and we subsequently agreed a joint statement dated 18 May 2022.

> […]
>
> 2.1. My instructions are to give an opinion on the expert engineering issues that arise in this case.
>
> 3.1. The property was visited by me … on the 23rd June 2018.
>
> 3.2. I have reviewed the relevant disclosure given by the parties in the case and the lay witness statements that have been exchanged by the parties.
>
> 3.3 The British Geological Survey records available online had been reviewed by me, and I have considered the interpretation for foundation depths given by the current edition of NHBC Chapter 4.2 …
>
> 4. [Basic facts concerning the damaged property and the trees surrounding it]
>
> 5. [Details of damage to the property and repairs]
>
> 6. [Details of site investigations and ground conditions]
>
> 7. [Details of tree roots and DNA testing]
>
> 8. [Details of crack and level monitoring]
>
> 9.1. A report was prepared on behalf of a previous owners of No 12 by Martin Dobson Associates dated 24th September 2012. [Further details of this report.]
>
> […]"

8. Fourthly, Mr Pither's Report relevantly provides as follows:

> "2.1. This report follows the written instruction by DAC Beachcroft solicitors to prepare a report for litigation purposes, compliant with Part 35 of the Civil Procedure Rules (CPR) and Practice Direction 35 on the engineering aspects of this claim.
>
> 3.1. I inspected the property on 17th September 2019.
>
> 3.2. [Details of inspection.]
>
> 3.3. [Details of inspection.]
>
> […]
>
> 3.6. I confirm that I have been provided with various pleadings, witness statements and a number of papers containing various reports, correspondence and schedules of works relating to this matter and to assist my understanding of the case. Various papers will be referred to within the report and where relevant a copy included within the Appendices.
>
> 4-9. [Chronological abstract, referring to subs net UK investigations in 2012, soil analysis results marital Thompson arboriculture report May 2012, crack

monitoring and level monitoring, site investigations October 2015, further arboriculture report July 2016 bore holes dug June 2018]

[…]"

Relevant procedural rules

9. CPR rule 31.14 provides as follows:

"(1) A party may inspect a document mentioned in –

(a) a statement of case;

(b) a witness statement;

(c) a witness summary; or

(d) an affidavit.

[…]

(2) Subject to rule 35.10(4), a party may apply for an order for inspection of any document mentioned in an expert's report which has not already been disclosed in the proceedings.

(Rule 35.10(4) makes provision in relation to instructions referred to in an expert's report)"

10. CPR rule 35.2 provides as follows:

"(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."

11. CPR rule 35.10 provides as follows:

"(1) An expert's report must comply with the requirements set out in Practice Direction 35.

(2) At the end of an expert's report there must be a statement that the expert understands and has complied with their duty to the court.

(3) The expert's report must state the substance of all material instructions, whether written or oral, on the basis of which the report was written.

(4) The instructions referred to in paragraph (3) shall not be privileged against disclosure but the court will not, in relation to those instructions –

(a) order disclosure of any specific document; or

(b) permit any questioning in court, other than by the party who instructed the expert,

> unless it is satisfied that there are reasonable grounds to consider the statement of instructions given under paragraph (3) to be inaccurate or incomplete."

12. CPR rule 35.11 provides:

> "Where a party has disclosed an expert's report, any party may use that expert's report as evidence at the trial."

13. CPR rule 35.13 provides:

> "A party who fails to disclose an expert's report may not use the report at the trial or call the expert to give evidence orally unless the court gives permission."

14. CPR Part 35 Practice Direction provides in part:

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

15. This is elaborated upon, in respect of experts' joint statements, by the TCC Guide, which provides, amongst other things:

> "13.6.3. Whilst the parties' legal advisors may assist in identifying issues which the statement should address, those legal advisors must not be involved in either negotiating or drafting the experts' joint statement. Legal advisors 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."

I note in passing that similar provision is made by the Chancery Guide 2022, paras 9.32-9.33.

Procedure

16. On 9 May 2022 the claimant's solicitors informed the defendant's solicitors that Mr Cutting would not be available to give evidence at the trial as listed, as he would be undergoing surgery on 13 July 2022. Accordingly, the defendant was asked to consent to an adjournment of the trial. The defendant asked to see a draft application for this purpose. On 26 May 2022 the claimant's solicitors sent the defendant's solicitors a draft application for an adjournment, supported by a draft (unsigned) witness statement from the claimant's solicitor, Christian Charlesworth. This draft witness statement referred in its body to a letter to the solicitors from Mr Cutting dated 3 May 2022, a copy of which was intended to be exhibited to the statement when made. An *unredacted* copy of this letter was sent with the draft witness statement. The text of the draft witness statement in part read as follows:

> "11. On 3 May 2022 Mr Cutting wrote to me to say that he has been advised by his doctor that he will need to undergo eye surgery and has been given the date of 13 June 2022 for this procedure to be carried out. He added that due to the recovery period, he would not be able to attend the court to give evidence over the current trial dates, 12 15 July 2022., Attached hereto marked Exhibit [CC2] is a copy of Mr Cutting's letter."

Mr Cutting's letter

17. The substance of the letter as sent is as follows:

> "I have been through Daniel's comments on the Joint Statement and have made just a couple of minor changes where I was unable to be as definite as his wording.
>
> Attached is a word doc for your/Daniel's comment.
>
> The only area where I have not dealt the suggestions/requests from Daniel is Clause 1.7, Daniel asked how desiccated, looking I assume for a figure. The desiccation of clay is open to substantially different interpretations. There is no clear level of desiccation shown by the testing and further this testing was carried out in March when you would expect desiccation to be the lower. I am not happy to put a figure in here. There may be some desiccation at 1.6 to 1.8 metres below ground level, possibly 2 or 3 %. However, if we start down this course of discussion, the Defendant might argue that taking the tree down would cause this zone to rehydrate and in turn create heave damage on the property, hence be better to keep the tree. That is not a particularly sound argument because there is not a large amount of desiccation, but it would however open up a whole new area of discussion where definite answers are difficult if not impossible to come by.
>
> Please note that I have given a completely new and separate proof for T13 in para 1.10. I hope you agree that this explains the lack of roots from any tree bar T13 thus dismissing many of the arguments from the defendant including those from Martin Dobson Ass. I will expand this methodology in my report, [comma in original]
>
> I am afraid I will not be able to attend Court in July. I was unavailable at the end of last week as I was seen by an eye consultant. I need an operation to hopefully restore full vision to my left eye. This is booked for the 13th June. I would hope to complete my report for you before that date. However, after the operation I will not be able to drive for probably 6 weeks and will not be able to read properly for in excess of 4 weeks. Further, I will have to take precautions to avoid infection after the operation.
>
> I have discussed my Opinion with one of my colleagues here at length and he is of the same view as I. He could attend Court with you if that would help."

I should add that it was confirmed to me at the hearing that the references to "Daniel" were references to Mr Daniel Crowley, counsel for the claimant.

The application to adjourn

18. On 31 May 2022 the defendant's solicitors told the claimant's solicitors that they had no instructions either to agree to or oppose the application to adjourn. Therefore, on 1 June 2022 the claimant's solicitors filed an application notice at court by CE-File, seeking an adjournment of the trial. The notice was supported by the witness statement (now signed) of Mr Charlesworth dated 31 May 2022, in the same terms as

the draft, exhibiting the letter from Mr Cutting of 3 May 2022. The defendant's solicitors were able to, and did, access these documents on CE-File. On 6 June 2022, the court informed the parties that that application would be dealt with at the pre-trial review, to be held on 15 June 2022. A sealed copy of the application notice was returned to both sides.

19. On 7 June 2022 the defendant's solicitor Charles Brine wrote by email to the claimant's solicitors as follows:

> "We are concerned with comments made by Mr Cutting in his letter to you of 3 May 2022. Mr Cutting states:
>
> > '*I have been through Daniel's comments on the Joint Statement and have made just a couple of minor changes where I was unable to be as definite as his wording*'
>
> I refer you to the TCC Guidance at 13.6.3:
>
> > '13.6.3 Whilst the parties' legal advisors may assist in identifying issues which the statement should address, those legal advisors must not be involved in either negotiating or drafting the experts' joint statement. Legal advisors 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.'
>
> We are concerned that your client has breached the guidance at paragraph 13.6.3 in that it appears a Daniel (Mr Crowley?) was involved in drafting the experts' joint statement. I refer you to *BDW Trading Limited v Integral Geotechnique (Wales) Ltd* [2018] EWHC 1915 (TCC). Please may I have an explanation as to the interventions made on behalf of your client and how this may have affected the joint statement.
>
> Please will you also confirm whether your client was involved in drafting amendments to the joint report of the arborists.
>
> In respect of your expert engineer's availability for trial, your application indicates Mr Cutting shall be available from 11 July (4 weeks from 13 June) but that a further 2 weeks is required for an eye test and glasses to be obtained. We are concerned that the comment on the further 2 weeks does not come from a medical source but appears to be a colleague of Mr Cutting. Is there any medical opinion to support Mr Cutting not being available for 2 weeks? Can the court not accommodate an expert who has poor visibility?"

20. I assume that the reference in that email to *BDW Trading Limited v Integral Geotechnique (Wales) Ltd* [2018] EWHC 1915 (TCC) is a reference to para 18 of the judgment, where HHJ Stephen Davies says:

> "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."

The assertion of privilege and the new application

21. The next day, 8 June 2022, claimant's solicitors sent an email to the defendant's solicitors asserting for the first time that material in the letter from Mr Cutting was privileged. That email reads as follows:

> "Thank you for your email.
>
> Mr Cutting's letter to me dated 3 May 2022 referred to in your email below contains material which is privileged and has been disclosed inadvertently by obvious mistake. Any attempt by your client to rely on its contents will be strenuously resisted. Without prejudice to that, and in any event, we do not accept your assertion that paragraph 13.6.3 of the TCC Guidance has been breached.
>
> We will re-file our application shortly without the privileged material. Please can you delete/destroy all copies you have of the letter concerned and confirm to us that you have done so.
>
> Regarding Mr Cutting's eye operation, we will ask his treating surgeon for a further letter confirming the extent of his post-operation recovery period."

22. On 9 June 2022, the claimant's solicitors filed a new application notice for an adjournment and new witness statement with the court by CE-File. This omitted the reference to the letter from Mr Cutting dated 3 May, and did not exhibit it. The original application notice, witness statement and exhibit are however still on the electronic court file, although marked private, so that the parties can no longer see them. The decision to mark them "private", and thus restrict access, seems to have been taken by court staff, without reference to a judge.

23. On 10 June 2022, the defendant's solicitors replied to the claimant's solicitors by email, in the following terms, so far as relevant:

> "My client does not accept that the letter contained in your application made on 1st June was privileged and we intend to raise this matter at the PTR hearing. Your signed witness statement explicitly referred to the letter and it was included in the exhibit. The letter was used to support your application for an adjournment."

The application for an injunction

24. On 14 June 2022 the claimant issued a further application notice seeking an injunction to restrain the defendant from using the original witness statement by Mr Charlesworth and the letter exhibited from Mr Cutting.

25. This was supported by a further witness statement from Mr Charlesworth, dated 14 June 2022. This recited the circumstances in which the unredacted letter of Mr Cutting was referred to in the earlier witness statement and exhibited to it. In part it says as follows:

> "12. On 3 May 2022, Mr Cutting wrote to me explaining that he will need to undergo eye surgery under general anaesthetic and has been given the date of 13 June 2022 for this procedure to be carried out. He further explained that he will not be able to read properly for in excess of 4 weeks. Attached hereto marked Exhibit **CC2** is a copy of the letter from Mr Cutting.
>
> 13. The first part of Mr Cutting's letter to me of 3 May 2022 explaining about his need to undergo eye surgery included his comments in respect of an aide memoire my firm had sent him in connection with the preparation of the expert's joint statement in these proceedings.
>
> 14. On 6 May 2022 I received an email from Mr Cutting's secretary, Julie Warren, attaching a copy of a letter to Mr Cutting from his consultant ophthalmic surgeon, Mr C G Stephenson dated 6 May 2022 confirming that Mr Cutting will be required to apply eye medications for 4 weeks after the surgery and will be medically unfit to give evidence for at least 1 month after the date of the surgery. Attached hereto marked Exhibit [**CC3**] is a copy of the letter from Mr C G Stephenson referred to.
>
> 15. On 25 May 2022 Tom Cutting of Prior Associates sent my assistant, Ms Grace Billings, a letter explaining that once the recovery period is complete, Mr Cutting requires an eye test and new glasses to be able to attend and give evidence in court. Until he has acquired his glasses his vision will be greatly impaired and he will not be able to read. Mr Cutting estimates a further two weeks after the initial recovery period for the purpose of obtaining the glasses. Attached hereto marked Exhibit [**CC4**] is a copy of a letter from Tom Cutting of Prior Associates dated 25 May 2022 referred to.
>
> 16. In light of the circumstances as set out above, I prepared an application to the Court asking that the court agree to adjourn the current trial dates to a time when Mr Cutting is fully recovered from his eye surgery and in a position to provide evidence in court, specifically, no sooner than 25 July 2022.

> 17. I filed the application and served it on the Defendant's solicitors on 31 May 2022. A sealed copy of the application notice and my witness statement dated 31 May 2022 in support is attached hereto marked Exhibit **CC5.**
>
> 18. Unfortunately, and in error, when preparing my witness statement in support of the application to adjourn the trial I included as Exhibit CC2 to that statement a complete and unredacted copy of Mr Cutting's letter to me of 3 May 2022. The letter was privileged and I did not intend to waive privilege of the section of the letter which did not concern Mr Cutting's medical condition. My inclusion of a complete copy of the letter without redaction was an inadvertent and obvious error."

26. The defendant filed a witness statement of his solicitor, Charles Brine, dated 8 July 2022, which was in part made in opposition to the claimant's injunction application notice. This witness statement relevantly says as follows:

> "15. On 26 May 2022, following our telephone conversation, Grace Billings sent me an email with a copy of the draft application [for an adjournment of the trial] and unsigned witness statement of Christian Charlesworth of WBD requesting the Court adjourn the trial listed for 11 July 2022. A copy of the email, application and unsigned witness statement is exhibited at **CXB2 pages 12 to 41**.
>
> 16. I reviewed the draft paperwork and noted Mr Charlesworth had, at paragraph 11 of the unsigned witness statement, stated he had been advised by Mr Cutting on 3rd May 2022 by letter that he would not be available for trial (**CXB2 page 20**). Mr Charlesworth exhibited a copy of the letter in the exhibit to his witness statement (**CXB2 page 37**).
>
> 17. I did not consider that the Claimant had inadvertently sent me any privileged material. The letter exhibited to the witness statement was specifically referred to by Mr Charlesworth at paragraph 11. The paperwork was sent to me at my request so that my client could consider the merits of the Claimant's application to adjourn the trial. The Claimant ought to have appreciated the paperwork would be provided to my client for that purpose. I believed that the Claimant intended to rely on the letter in the form it was sent to me due to the conduct of his solicitors.
>
> 18. I had no reason to doubt that the draft witness statement and exhibit were prepared and reviewed by Mr Charlesworth, who is described as a Legal Director and who had conduct of the matter on behalf of WBD and the Claimant.
>
> 19. The documents were sent to me by Grace Billings, a paralegal and Mr Charlesworth was copied into the email. I would expect that Mr Charlesworth approved the email and attachments being sent and was aware that they had been sent to me on 26 May 2022.
>
> […]
>
> 44. Mr Cutting's letter to WBT attracted legal professional privilege until that privilege was waived on behalf of the Claimant. … "

27. Mr Charlesworth made a further witness statement dated 20 July 2022, in which he stated that:

> "4. I make this supplemental witness statement to clarify and correct matters in my first witness statement.
>
> 5. I consider it necessary to clarify that my original error was to include as Exhibit CC2 to my draft unsigned witness statement in support of the Claimant's application to adjourn the trial, a complete and unredacted copy of Mr Cutting's letter to me of 3 May 2022.
>
> 6. A copy of the Claimant's draft application, draft unsigned witness statement and the exhibits in support (which included, in error, an unredacted copy of the letter from Gerry Cutting Prior Associates dated 3 May 2022) was sent to the Defendant by email from Grace Billings dated 26 May 2022.
>
> 7. My error was then carried through to the filed application.
>
> 8. I also wish to correct paragraph 17 of my witness statement filed in support of the Claimant's application for an injunction dated 14 June 2022 in which I stated that the Claimant's original application to adjourn the trial was both filed at court and served on the Defendant on 31 May 2022. In fact, whilst the Claimant's application was filed with the Court on 31 May 2022, the application was not served on the Defendant. The Defendant was informed that the application had been filed on the following day, 1 June 2022, by email (see p43 of CXB2)."

The pre-trial review

28. On 15 June 2022, HHJ Russen QC held the pre-trial review in this matter. By his order, he adjourned the trial, and transferred to me the claimant's application dated 14 June 2022 and any cross-application by the defendant pursuant to CPR 35.10(4). He did this at the request of the parties in order that he, as the intended trial judge, should not be involved in deciding whether the letter from Mr Cutting dated 3 May 2022 should or should not be admissible in evidence at the trial.

The defendant's cross-application

29. On 8 July 2022, the defendant issued the expected cross-application. However, it sought two quite different orders. First of all, it sought an order under CPR rule 35.10(4), based on Mr Cutting's letter, asking for (1) the production

> "for inspection by the Defendant a copy of the written instructions/comments/aide memoire provided to Mr Cutting by [the claimant's solicitors] for the purpose of the preparation of the Joint Statement of the engineers dated 18 May 2022",

(2) permission

> "to cross-examine the Claimant's experts at trial as to the preparation of their joint statements and the completeness of their statements of their instructions",

and (3) permission

> "to deploy in evidence at trial the letter from Mr Cutting to [the claimant's solicitors] dated 3 May 2022".

30. Secondly, the defendant sought an order under CPR rule 31.14(2) that the claimant should

> "produce for inspection by the Defendant a copy of the Prior Associates report referred to by Mr Pryce in paragraph 3.9(2) of the joint statement of the arboriculturalists dated 19 May 2022 and paragraph 9.6 of his report dated 12 June 2022."

In fact, I think the paragraph numbers have become reversed, and it should read "paragraph 9.6 of the joint statement of the arboriculturalists dated 19 May 2022 and paragraph 3.9(2) of his report dated 12 June 2022." But no point is taken on that. The witness statement of Mr Brine, the defendant's solicitor, dated 8 July 2022 and referred to above, was also made in support of this application.

31. Lastly, and to complete the narrative, on 22 July 2022 the claimant issued a further application notice seeking permission to put in evidence at the trial a supplemental expert report of Mr Pryce dated 5 July 2022. This witness statement would essentially replace the original report of 12 June 2022, which refers paragraph 3.9(2) to a "Prior Associates" report which had not been disclosed. This application is supported by a further witness statement of Mr Charlesworth dated 20 July 2022. As I have already said, this application notice was not argued before me, as I decided it would be better to wait until my judgment on the first two application notices was available, so that the parties could take that into account.

The claimant's application for an injunction

Evidence

32. I begin with the claimant's application for an injunction against the defendant to restrain the use of the letter of Mr Cutting dated 3 May 2022. I bear in mind that, on this application, all the evidence was given in the form of witness statements, and there was no cross-examination sought or ordered. In *Coyne v DRC Distribution Ltd* [2008] EWCA Civ 488, Rimer LJ (with whom Ward and Jacob LJJ agreed) said:

> "58. As regards the need for oral evidence, Mr Ashworth reminded us that it is well-settled practice that if a court finds itself faced with conflicting statements on affidavit evidence, it is usually in no position to resolve them, and to make findings as to the disputed facts, without first having the benefit of the cross-examination of the witnesses. Nor will it ordinarily attempt to do so. The basic principle is that, until there has been such cross-examination, it is ordinarily not possible for the court to disbelieve the word of the witness in his affidavit and it will not do so. This is not an inflexible principle: it may in certain circumstances be open to the court to reject an untested piece of such evidence on the basis that it is manifestly incredible, either because it is inherently so or because it is shown to be so by other facts that are admitted or by reliable documents. Mr Ashworth referred us in support to *Re Hopes (Heathrow) Ltd, Secretary of State for Trade and Industry v. Dyer and others* [2001] 1 BCLC 575, at 581 to 582 (Neuberger J). He also referred us to paragraphs 17 and 18 of the judgment of Mummery LJ in

> *Doncaster Pharmaceuticals Group Ltd and Others v. The Bolton Pharmaceutical Company 100 Ltd* [2006] EWCA Civ 661, which provides a reminder of the caution the court should exercise in granting summary judgment in cases in which there are conflicts of fact which have to be resolved before judgment can be given. Mr Ashworth said that these principles apply equally to the case in which the evidence is given by witness statement rather than by affidavit, and I agree."

Of course, that does not mean that such written evidence is conclusive: *Sofer v Swissindependent Trustees SA* [2020] EWCA Civ 699, [55], [58].

33. In the present case, I proceed on the basis that Mr Charlesworth's evidence that "The letter was privileged and I did not intend to waive privilege of the section of the letter which did not concern Mr Cutting's medical condition", and that "My inclusion of a complete copy of the letter without redaction was an inadvertent and obvious error" is (so far as it contains statements of fact) not incredible, and I cannot simply disbelieve it. Moreover, there being no evidence to the contrary, I accept that that is what Mr Charlesworth thought at the time. On the other hand, there is Mr Brine's evidence that he "did not consider that the Claimant had inadvertently sent me any privileged material" and that he "believed that the Claimant intended to rely on the letter in the form it was sent to [him] due to the conduct of his solicitors".

34. Mr Crowley attacks this evidence as not credible. I do not agree. As Clarke LJ said in the Court of Appeal in the *Al-Fayed* case (to which I shall come shortly),

> "A solicitor considering documents made available by the other party to litigation owes no duty of care to that party and is in general entitled to assume that any privilege which might otherwise have been claimed for such documents has been waived."

35. In my judgment it is not the case that the only possible explanation for sending the letter in unredacted form was a mistake by the claimant's solicitor. The solicitor might have thought, for example, that it did not matter whether privilege was waived or not, or that the letter would have more weight unredacted, and that privilege ought to be waived. I consider that Mr Brine's evidence is not incredible. There is no evidence to counter it, and indeed for present purposes I accept it. So this is a case where the claimant's solicitor has sent an unredacted letter in error, but the defendant's solicitor in receiving it does not think there is any error. Moreover, in my judgment, the error was not "obvious" such that a reasonable solicitor would have realised that there had been an error. In addition, Mr Brine then relied on the unredacted letter in order to pursue a concern, which I consider to have been entirely legitimate and proper, that a breach of the TCC Guide had taken place. Mr Charlesworth adds fuel to the fire by referring in his witness statement of 14 June 2022 (at [13]) to an "aide memoire" sent by the lawyers to Mr Cutting.

Legal principles

36. On behalf of the claimant, Mr Crowley says, first that the letter from Mr Cutting to the claimant's solicitor was privileged, and that the evidence shows that the inclusion of the complete copy of the letter without redaction was inadvertent and an obvious error. As I have just said, he also says that Mr Brine's evidence, contained in his witness statement of 8 July 2022, was not credible. He relies on the jurisdiction of the

court to restrain by injunction the use of documents and information contained in documents disclosed inadvertently and/or in obvious error.

37. He refers in particular to the principles set out in *Al Fayed v Commissioner of Police of the Metropolis* [2002] EWCA Civ 780. That was a case where two opinions of counsel had been made available to the appellants by the solicitor for the respondents (other than the third respondent) when they gave inspection of documents under CPR Part 31 in that claim. The judge at first instance had ordered that these opinions be returned to the respondents, and the appellants appealed.

38. Clarke LJ, giving the judgment of the Court of Appeal (Lord Phillips MR, Robert Walker LJ and himself), said:

> "13. The relevant question in this appeal is in what circumstances a party who has inspected copy documents which were subject to LPP or PII, but which have been voluntarily, but mistakenly, sent to him for inspection must return them or may be restrained from using them in the litigation in which they were disclosed. There have been a number of cases in which this problem has arisen in comparatively recent times, including several before the advent of the CPR and at least one since the CPR came into force. They have all considered the circumstances in which an injunction might be granted to order the return of the documents or to restrain their use.
>
> 14. Rule 31.20 provides:
>
> > 'Where a party inadvertently allows a privileged document to be inspected, the party who has inspected the document may use it or its contents only with the permission of the court.'
>
> So far as we are aware, until now no-one has suggested that different principles apply to the operation of that rule from those applicable to the question what, if any, injunction should be granted.
>
> […]
>
> 16. In our judgment the following principles can be derived from those cases:
>
> > i) A party giving inspection of documents must decide before doing so what privileged documents he wishes to allow the other party to see and what he does not.
> >
> > ii) Although the privilege is that of the client and not the solicitor, a party clothes his solicitor with ostensible authority (if not implied or express authority) to waive privilege in respect of relevant documents.
> >
> > iii) A solicitor considering documents made available by the other party to litigation owes no duty of care to that party and is in general entitled to assume that any privilege which might otherwise have been claimed for such documents has been waived.
> >
> > iv) In these circumstances, where a party has given inspection of documents, including privileged documents which he has allowed the other

party to inspect by mistake, it will in general be too late for him to claim privilege in order to attempt to correct the mistake by obtaining injunctive relief.

v) However, the court has jurisdiction to intervene to prevent the use of documents made available for inspection by mistake where justice requires, as for example in the case of inspection procured by fraud.

vi) In the absence of fraud, all will depend upon the circumstances, but the court may grant an injunction if the documents have been made available for inspection as a result of an obvious mistake.

vii) A mistake is likely to be held to be obvious and an injunction granted where the documents are received by a solicitor and:

a) the solicitor appreciates that a mistake has been made before making some use of the documents; or

b) it would be obvious to a reasonable solicitor in his position that a mistake has been made;

and, in either case, there are no other circumstances which would make it unjust or inequitable to grant relief.

viii) Where a solicitor gives detailed consideration to the question whether the documents have been made available for inspection by mistake and honestly concludes that they have not, that fact will be a relevant (and in many cases an important) pointer to the conclusion that it would not be obvious to the reasonable solicitor that a mistake had been made, but is not conclusive; the decision remains a matter for the court.

ix) In both the cases identified in vii) a) and b) above there are many circumstances in which it may nevertheless be held to be inequitable or unjust to grant relief, but all will depend upon the particular circumstances.

x) Since the court is exercising an equitable jurisdiction, there are no rigid rules."

39. I may say that this was not the first case of this kind. I was also referred to the decision of Sir Nicolas Brown-Wilkinson V-C in *English & American Insurance Co Ltd v Herbert Smith* [1988] FSR 232. The papers of counsel for the plaintiff (which were privileged) were sent in error to the defendant solicitors, who were the solicitors for the other side in the case. Eventually they told their clients, were instructed to read the papers, read the papers and informed their clients of what they had seen. The plaintiff sought an injunction to restrain use of the information derived from the privileged documents. There was no suggestion that the defendant solicitors had done anything positive. They had merely received the documents. The judge nevertheless granted the injunction, on the basis that an injunction could be granted against a stranger who had come innocently into the possession of confidential information to which he was not entitled, which would extend to any use that might be made in pleading proceedings.

40. But I need not dwell on that case. I accept and indeed am bound by this statement of the relevant principles set out by the Court of Appeal in the *Al Fayed* case. Of course, they must not be construed as if they were a statute: *BTI 2014 LLC v Sequana SA* [2019] Bus LR 2178, [220]. I accept that the present is not a case in which the relevant document (Mr Cutting's letter) has been made available on *inspection of documents* under CPR Part 31. Instead, it was sent to the other side in support of an intended application for an adjournment of the trial. So, rule 31.20 does not in terms apply. But Ms Chalmers for the defendant did not suggest that the principles set out by Clarke LJ were not the correct ones to apply, even if rule 31.20 did not apply.

41. So far as those principles are concerned, Mr Crowley submitted that Clarke LJ made clear that the court had power to grant an injunction if the document concerned was *in fact* disclosed in error, *regardless* of the attitude of the recipient. I am not sure about that. Clarke LJ made clear that the starting point was that, once the privileged document was shown to the other side, it was too late to claim privilege in order to attempt to correct the mistake by obtaining injunctive relief: see [16](iv) of his judgment. I accept that he did not make clear whether this was because the privilege had gone, by waiver, or whether there was some other principle in play.

42. Clarke LJ did then make clear that the court had power to intervene to prevent the use of documents made available for inspection by mistake "where justice requires". But this expression does not mean a free-for-all, untrammelled by principle. The judge went on to say that that certainly included cases where inspection was procured by fraud, and also inspection as a result of "an obvious mistake": see [16](v), (vi) of his judgment. Otherwise, as Clarke LJ said, it would "depend upon the circumstances".

43. But I cannot see a proper basis for granting an injunction to restrain a party from using otherwise confidential information in the document mistakenly disclosed, unless *either* that party has done (or not done) something, and that act (or omission) affects its conscience, *or* (perhaps) has not yet suffered any prejudice by acting in reliance on it. Moreover, as Clarke LJ indicates at the end of principle (vii) and also in principle (ix), there may be cases where, even though an injunction would otherwise lie, none should be granted. One example would be where there is a public policy reason for *not* granting one, for example because the document discloses a breach of the law that otherwise would not have not have come to light (compare the principle that there is no confidence in iniquity: see *eg AG v The Observer Ltd* [1990] 1 AC 109, 282-83).

44. Something positive which would affect the recipient's conscience would be the realisation that the information was confidential and a mistake had occurred. Something negative which *might* affect its conscience would be that the mistake was obvious, so that *either* the statement of the recipient that it did not realise a mistake had occurred ceased to be credible, or it was unreasonable for the party to rely on the mistake. Where the mistake was *not* obvious, however, it still might be possible for the disclosing party to withdraw the document, and if necessary obtain an injunction to restrain its use, provided that the innocent party had not in the meantime innocently relied on it to its detriment. This latter case would be a kind of estoppel.

45. Finally, there is the case where there is otherwise a case for an injunction, but the document concerned reveals some wrong by the disclosing party such that an injunction ought not to be granted, so that the wrong may be righted. In some cases we may say that the document discloses 'iniquity', and there can be no confidence in

iniquity. But the use of that old-fashioned, now somewhat pejorative word suggests that the wrong disclosed must amount to a serious crime, or at least a serious tort. I prefer to think in terms of whether in such circumstances it would be unconscionable for the recipient in the circumstances to seek to rely on the document to protect its (or possibly the public's or a third party's) interests. If it would not be unconscionable, then it would not be appropriate to grant an injunction.

Application of principles to this case

46. In considering this case, I begin with the question whether the letter from Mr Cutting to the claimant's solicitor was privileged. Mr Crowley says it was. The test for a privileged communication such as this is whether it is confidential and made between a lawyer and a third party for the sole or dominant purpose of the existing litigation: *Three Rivers District Council v Bank of England (No 6)* [2005] 1 AC 610, [102]. Here there was no reason for Mr Cutting to write to the solicitor but for the litigation, and some of what he wrote had the necessary quality of confidence. However, in the first four substantive paragraphs of his letter, Mr Cutting reveals that he has received comments and suggestions for his evidence from the claimant's lawyers. This is potentially a serious breach of para 13.6.3 of the TCC Guidance, quoted above. I have seen nothing to show that there are "exceptional circumstances where there are serious concerns that the court may misunderstand or be misled by the terms of that joint statement." I accept that the remainder of the letter is *prima facie* confidential (though paradoxically it is the very part in which privilege would be likely to be waived).

47. Accordingly, on the whole I am doubtful the first four paragraphs of Mr Cutting's letter could qualify as a privileged communication. If however they were privileged, the question is whether that privilege survives the sending of the letter in unredacted form to the other side. Clarke LJ refers to this as the question whether privilege has been waived, and that is the process involved. But it is intimately tied up with whether an injunction will be granted to restrain its use. If it will, then – as a general proposition – privilege is not waived. If it will not, then privilege has usually been waived.

48. There is no doubt that the letter was intended to be sent, in order to support the statement in the solicitor's witness statement that Mr Cutting would be unable to attend the trial in July to give evidence. It need not have been sent, but it was. There is no doubt that it provided powerful support for the witness statement. Ms Chalmers, for the defendant, says that this act waived any privilege there might be, in the whole letter. Mr Crowley, for the claimant, says that it did not. He accepts that privilege was waived (as it was intended to be waived) in the final two paragraphs, but not the remainder.

49. I have already held that (i) Mr Charlesworth made an error in sending the letter unredacted, but (ii) Mr Brine did not realise the error, and (iii) neither was it obvious. It is also the case that the first four paragraphs revealed a potentially serious breach of the TCC Guide, which the defendant raised immediately with the claimant, but to which there was no satisfactory response. It would promote a sense of injustice in the defendant to leave that concern hanging, unanswered. Even without that reliance by the defendant on the letter to raise his concerns, I do not consider that it would be right to grant an injunction restraining the use of the information in the letter

(including the first four paragraphs). But that concern and reliance, and the risk of the sense of injustice, go to strengthen my conclusion.

Waiver of privilege

50. As to waiver, I was referred to a number of authorities. The first in time was *Nea Karteria Maritime Co Ltd v Atlantic & Great Lakes Steamship Corporation (No 2)* [1981] Com LR 138. Although I was not shown a copy of the report by counsel in this case, I had read it for other cases, and I read it again before writing this judgment. In this case shipowners claimed damages from time charterers and shippers of coal in respect of loss suffered by an explosion on board, said to have been caused by the ignition of the mixture of coal gas and air emanating from the coal. An important question was whether the crew had been smoking. At the trial a seaman gave evidence for the plaintiffs that a match had been struck. A boatswain gave evidence for the defendants that there had been no smoking. Each had in 1975 given a statement consistent with his evidence. But the seaman had also given a statement in answer to questions from the plaintiffs' lawyer in 1978, in which he gave a different account, and in cross-examination by the second defendant he was asked about the discrepancy. The 1978 statement referred to the 1975 statement of the boatswain. Having put the 1978 statement to the seaman, the second defendant claimed that any privilege in the boatswain's statement had been waived.

51. Mustill J (as he then was), said (at page 139):

> "I believe that the principle underlying the rule of practice exemplified by *Bucknell v. British Transport Commission* [1956] 1 Q.B. 187 is that where a party is deploying in court material which would otherwise be privileged, the opposite party and the court must have an opportunity of satisfying themselves that what the party has chosen to release from privilege represents the whole of the material relevant to the issue in question. To allow an individual item to be plucked out of context would be to risk injustice through its real weight or meaning being misunderstood. …
>
> In these circumstances, I consider that the court must ask itself whether the plaintiffs have made use of the boatswain's statement before the face of the court. Plainly they did not do so when they put it to the seaman in 1975, for this was on a privileged occasion. Nor in my view did they make the boatswain's statement part of the material in the action when they cross-examine to the seaman on Paras 14 and 15 of his statement dated 1 November 1978. What the plaintiffs were taxing him with was not the previous statement of the boatswain, but his own previous statement; and the fact that this statement took the shape of an assent to something previously said by the boatswain does not mean that the boatswain's statement is thereby made part of the material which the plaintiffs were asking the court to take into account. It is the assent which matters, not the source of the material to which assent was given.
>
> This being so, I consider the plaintiffs have not waived privilege in respect of any part of the boatswain's statement."

52. The next case was *Derby & Co Ltd v Weldon (No 10)* [1991] 1 WLR 660. Shortly after a long trial began in the action, the plaintiffs sought injunctive relief against the

defendants in respect of (i) privileged documents included in error in the trial bundle, and (ii) copies of tape-recordings of privileged conversations (and transcripts thereof), relating to matters arising during the interlocutory proceedings and now in issue at trial, sent before the trial to the defendants by private investigators ("Network") engaged by the plaintiffs, believing that the defendants could compel their production at the hearing. Vinelott J (who was not the trial judge) refused the injunction as to (i), because the defendants had had no reason to suppose that there had been any mistake in including the documents in the trial bundle, and were entitled to assume that the plaintiffs intended to rely on them, whether privileged or not. Any privilege had been waived.

53. As to (ii) (the tape-recordings), the context is of some importance. The recordings had been openly and deliberately made some years earlier as part of a briefing by the plaintiffs of the investigators, whose job was to look into the affairs of certain debtors of the plaintiffs and what assets they had available for recovery in litigation. By the time of the claim brought against the defendants, an issue had arisen as to whether the plaintiffs were aware that the first and second defendants had minority shareholdings in Network, and whether the investigators' instructions extended to investigating those two defendants as well. The issue was discussed in the plaintiffs' opening to the trial judge. The defendants wished to rely on the recordings for various reasons, including to show that the plaintiffs were aware of the defendants' shareholdings in the investigators, and as material relevant to the question whether the plaintiffs had suspicions about the first defendant.

54. At the outset of the proceedings against the defendants, the plaintiffs had applied for a freezing (then called "*Mareva*") injunction. In the course of these interlocutory proceedings, the defendants put in evidence from the investigators as to the knowledge of the plaintiffs and the scope of the investigators' role. The plaintiffs put in affidavits refuting the investigators' evidence. The conversations the subject of the recordings were not however referred to. Then, at trial, the plaintiffs' counsel, Michael Lyndon-Stanford QC, put the same matters in issue before the trial judge, Mummery J. Counsel read from the investigators' report, and then (as Vinelott J put it at 666H):

> "said that Mr. Baker [of the plaintiffs] was surprised at the part of the report dealing with the question whether there was evidence of dishonesty or breach of fiduciary duty because he had not given instructions to obtain such evidence, Mummery J. asked why this part of the report was included if Mr. Price's [the investigator's] instructions did not extend so far: 'Was it his idea or was the idea planted in his mind by [the first defendant]?' Mr. Lyndon-Stanford replied, 'My Lord, it is a closed book.' After some further exchange, Mr. Lyndon-Stanford observed, 'Your Lordship will hear specific evidence about that,' referring as I see it to the ambit of Network's instructions as well as to Mr. Baker's response."

55. Vinelott J rejected a submission that the plaintiffs were merely complying with their duty to give full and frank disclosure. He also referred to two earlier decisions, concerned with stating the effect of legal advice, rather than the substance, and said (at page 668E-F):

> "In both those cases what was material in the interlocutory proceedings was the fact that the plaintiff had been given advice to a particular effect and not the

> substance of the advice or the extent of the instructions given to the lawyer. In the instant case, the plaintiffs deployed Mr. Baker's and Mr. Di Donna's evidence in answer to the claims made by Mr. Comer and Mr. Price as to the knowledge of the plaintiffs and the ambit of Network's retainer. Moreover, these very matters have been brought into issue by Mr. Lyndon-Stanford."

56. He then went on (page 668F-H):

> "Mr. Purle [for the plaintiffs] submitted that, even if privilege has been waived to the extent of the evidence actually adduced in the course of the application for a *Mareva* injunction, so that the affidavit and the statement by Mr. Comer and Mr. Price can be referred to at the trial, nonetheless the plaintiffs have not waived privilege in relation to the conversations between Mr. Price and Mr. Lee, which were not specifically referred to in the interlocutory proceedings. 1 reject that submission also. The point can be tested in this way. Suppose that Mr. Comer or Mr. Price had exhibited a transcript of the tape to an affidavit in support of their claims as to the extent of the knowledge of the plaintiffs and the ambit of Network's retainer. Would the plaintiffs then have been entitled to claim privilege? It seems to me that the answer to that question must be 'No.' If that is right, the plaintiffs cannot claim privilege now."

57. The plaintiffs further submitted that, even if privilege had been waived as to part of the tape, it had not been waived as to the whole. The plaintiffs' counsel referred to the *Nea Karteria* case. As to this, Vinelott J said (at page 669C-E):

> "The question is whether, if privilege is waived in relation to part of a document or evidence by production of a tape or of part of a conversation, fairness requires that the other party should be entitled to adduce the whole of the document or evidence of the whole of the conversation to ensure that the court is not misled by seeing part of it out of context. It is I think easier to conclude that fairness does not require the disclosure of the whole of a document, that part can be sealed up, than to conclude that fairness does not require the disclosure of the whole of a conversation which, as Mr. Chambers [counsel for the first and second defendants] expressed it, is a seamless whole. The question can only be answered by a judge, happily in this case not the judge hearing the action, after he has read the whole of the document or transcript. In this case, having read the transcript, I do not think that it would be fair to withhold part of it."

The judge further held that it was not possible to sever the tape and hold that privilege in one part had been waived, but not in the other. Hence privilege had been waived in the whole.

58. The next case was *Breeze v John Stacey and Sons Ltd*, [2000] CP Rep. 77, CA. It was discussed in the *Al-Fayed* case. There the defendant's solicitor exhibited privileged correspondence to an affidavit made in support of an application for an order striking out the claim for want of prosecution. The plaintiff's solicitor made two affidavits: one referring to the privileged documents and the other stating his belief that this disclosure had been done for tactical reasons, but also that, if he thought there had been a mistake he would have returned the documents. In fact there *had* been a mistake, and the plaintiff's solicitor had not meant to exhibit the privileged documents.

59. The senior master ordered the return of the privileged documents. The judge allowed an appeal from this decision. The Court of Appeal affirmed the judge's decision. Peter Gibson LJ said:

> "There is, on the authorities, a two-stage test. First, was it evident to the solicitor receiving the privileged documents that a mistake had been made? If so, the solicitor is expected to return the documents. If it was not so evident would it have been obvious to the hypothetical reasonable solicitor that disclosure had occurred as a result of the mistake? There is clear evidence from [the claimant's solicitor] that it was not obvious to him that a mistake had been made.
>
> Mr Davies, in his first submission, submits that a number of factors should have led the judge to conclude that there had been an obvious mistake in the disclosure of the privileged documents. He lists eight such points which, he submits, cumulatively, are compelling. I shall first consider them singly in turn.
>
> The first point was the abundance of the privileged material. Mr Davies submitted that that should have made it obvious that there had been such an error. For my part, it seems to me that that abundance points the other way. This is not a case where the disclosure of documentation was so extensive that it would have been reasonable to expect the occasional mistake. The total number of pages exhibited was only some 440 of which no less than 127 were the privileged documents. In relation to the correspondence the privileged pages amounted to more than half of that part of the exhibit. In IBM Mr Justice Aldous had suggested that the larger the discovery the more likely there was to be a mistake. I agree.
>
> […]
>
> Looking at those points, which were highlighted by Mr Davies, individually and cumulatively, I am not satisfied that they show that the judge erred in concluding that it would not have been obvious to the reasonable hypothetical solicitor that a mistake had occurred. On the contrary, it seems to me that for the reasons given by the judge it was entirely reasonable to conclude, as [the claimant's solicitor] in fact did, that the decision to include the privileged material was a deliberate one. Accordingly, on the main ground of appeal I would not accept the defendant's arguments."

Clarke and Judge LJJ gave concurring judgments in which they agreed with the principles stated by Peter Gibson LJ.

60. However, Clarke LJ made two other points of importance, one very shortly highlighting the waiver of privilege, and the other about a lack of difference between mistaken supply of documents on discovery (now called disclosure) and mistaken supply on other occasions:

> "The defendant's solicitors mistakenly exhibited privileged documents to an affidavit and sent them to the plaintiff's solicitors. The effect of doing so was to waive their privilege. The general principle in this regard is stated by Lord Justice Slade, with whom Lord Justice Woolf and Sir George Waller agreed, in *Guinness Peat Limited v Fitzroy Robinson* [[1987] 1 WLR 1027] (page 1044 C) in the passage quoted by Lord Justice Peter Gibson. In that case the court was

> considering the position of documents disclosed on discovery after they had been inspected. It is, however, correctly conceded by Mr Davies that the same principles apply in the situation with which we are concerned, namely where documents have been exhibited to an affidavit and sent to the other party. To adopt the approach of Lord Justice Slade to this situation, ordinarily a party to litigation who sees a particular document or documents exhibited to the other side's affidavit or affidavits is fully entitled to assume that any privilege which might otherwise have been claimed for it or them has been waived."

61. In *Dunlop Slazenger International Ltd v Joe Bloggs Sports Ltd* [2003] EWCA Civ 901, the question was whether certain paragraphs in affidavits made on behalf of the defendant for both interlocutory and trial purposes had the effect of waiving privilege by partially disclosing privileged communications between the defendant's expert and the defendant. In a two-judge court, Waller LJ (with whom Thorpe LJ agreed) put it this way:

> "7. … What Dunlop say is that by all those paragraphs in those statements there is a partial disclosure of privileged communications between JBSL's expert and JBSL. Indeed, they say that there is reliance in those paragraphs on material that would otherwise be privileged, being the content of the communication between JBSL's expert and JBSL. Dunlop submit that as a result there has been a waiver of privilege in relation to the matters contained in those paragraphs, and about that there is no real contest. In addition, Dunlop say that the effect of a partial disclosure in reliance on part of privileged communications is that, by implication, the full version of whatever those communications were must now be disclosed."

62. Waller LJ referred to certain authorities, and concluded (at [11]) that they

> "provide for a distinction between a reference to the effect of the document and reliance on the content. Mr Croxford suggests that this is a reference case and not a deployment case.
>
> 12. In my view, this is clearly a deployment case. This is a case in which, by the terms of those paragraphs, 13 and 14 in particular, of Miss Ahmed, Miss Ahmed was seeking to refer to the contents of the information that was being supplied by the expert to her in order to seek to persuade Gibbs J to make an order that the further evidence should be allowed to be put in. It is furthermore a deployment case in a different sense. There was an attempt to put in evidence for the purpose of the trial. The evidence for the trial was again evidence of the contents of the information that was being supplied by the expert to JBSL. So there was deployment, at least at the stage when this matter was before Gibbs J, in two senses, both for the purpose of persuading Gibbs J and for the purpose of this evidence being material for the judge to consider at the trial."

63. Waller LJ then turned to consider the question whether waiver of privilege in part meant waiver of privilege in all:

> "15. To answer the question whether waiver of part of a privileged communication waives the complete information, it is that dictum of Mustill J (as he then was) which applies. A party is not entitled to cherry pick, and a party to

> whom privileged information is provided is entitled to have the full contents of what has been supplied in order to see that cherry picking is not taking place."

64. However, Waller LJ then went on to say this:

> "16. There are only two points here which might provide for a different answer. The first is that this information was deployed at an interlocutory stage, and the second is that, insofar as it was being put in witness statements, they have not yet been deployed at a trial. In relation to both aspects, what in essence the submission would come to is that at this stage a party is entitled to preserve its position and wait to see what actually happens at the trial in order to see whether that deployment takes place and whether a waiver takes place at the trial. As it seems to me, there is clear authority for the proposition that, if deployment has taken place at an interlocutory stage and waiver of the privileged material has resulted, then the cherry picking principle applied.
>
> 17. It is unnecessary to go through all the authorities. The most formidable authority was the decision of Vinelott J in *Derby v Weldon* [1991] 1 WLR 660. The most material passage runs from 767H to 668E. It comes to no more than this. If in interlocutory proceedings a party has waived privilege –– in that case that was on a Mareva injunction application –– then, that is a waiver for all purposes and the cherry picking principle applies. Whether that will always be right is a matter that I would reserve for future decisions. It is not necessary to say that that will always be right to dispose of this case. If there is to be an exception to that principle it would need to be framed in the following way. It would need to be argued that since it was only for the purpose of the interlocutory proceedings and in relation to an issue in those proceedings that the waiver had taken place the waiver was in some way limited. That was almost certainly not the position in *Derby v Weldon* since the conversations did relate to the merits of the case as a whole. In this case, again the waiver that was taking place was not taking place simply in relation to obtaining the order from Gibbs J. The waiver that was taking place was taking place by reference to statements that were to be put in as part of the evidence to go to the trial and relating to the merits at the trial. … "

65. In *Berezovsky v Abramovich* [2011] EWHC 1143 (Comm), the defendant applied for specific disclosure of a certain class of documents (recording certain interviews between the claimant's former solicitors and a third party, the claimant's former business associate, now deceased). These were originally privileged, but it was now said that the claimant had waived privilege in them, on two separate grounds. The first was that some of the class had been deployed in interlocutory proceedings to defend a summary judgment application, and collateral waiver operated to waive privilege in the whole class. Secondly, the claimant had indicated his intention to call the former solicitors to give evidence at trial. But the only purpose of doing so would be for them to give evidence of the interviews with the third party.

66. The claimant submitted that there was no collateral waiver here, because this case fell within the exception "envisaged by Waller LJ [in *Dunlop Slazenger*] at paragraph 17 of his judgment". Gloster J however rejected this submission:

> "13. … I consider that I am bound by the approach taken in *Dunlop Slazenger International Ltd* (*supra*) by Waller and Thorpe LJJ in relation to this issue. In my view, the judgments in that case make it clear that, where, as here, there has been extensive deployment in interlocutory proceedings, such as a summary judgment application, of privileged material (albeit without reference to specific documents) in order to support a party's case on the substantive merits of his claim or defence, such deployment engages the collateral waiver principle, and it is then too late for the deploying party to attempt to turn the clock back. That is the case even if, as here, the deploying party is seeking to preserve its position by asserting that it has not yet made up its mind whether to adduce the evidence, which it deployed at the summary judgment stage, at trial."

67. Nevertheless, the judge did also say this:

> "16. … Waller LJ's contemplated exception of a 'limited waiver' would appear to exclude any case where there had been deployment of the privileged material at an interlocutory stage and such deployment had related to 'the merits of the case as a whole'."

That appears to suggest that deployment at an interlocutory stage *not* relating to the merits as a whole might *not* waive privilege. This is emphasised by the judge's discussion thereafter of other authorities, in particular *Somatra Ltd v Sinclair Roche & Temperley* [2000] 1 WLR 2453, CA (a case concerning without prejudice privilege).

68. It is also supported by the following further passages in her judgment, beginning (in paragraph [20]) with propositions extracted from the Court of Appeal's decision in *Somatra Ltd v Sinclair Roche & Temperley* [2000] 1 WLR 2453, a case dealing with 'without prejudice' privilege:

> "20. … (ii) Once a party (on an interlocutory application) has opened up issues on the merits of the case, *which will form part of the very questions to be determined by the trial judge*, no party which has chosen to refer to privileged material or discussions for the purposes of that application, should be entitled use them to his advantage on the merits of the case in the interlocutory context, but then assert a right to prevent its opponent from doing so on the merits at the trial. …
>
> 21. Accordingly, in my judgment, the principle of collateral waiver is clearly engaged in the present case. In circumstances where the Claimant has deliberately chosen, in the context of the summary judgment application, to waive legal professional privilege by referring extensively to the contents of the [third party] interviews with his former solicitors, in order to support his case on the merits of his claim, it would not be just, fair, or consistent with the principles expounded in the authorities, to permit the Claimant, on the simple pretext of saying that he had not made up his mind whether to refer to such evidence at trial, to withhold disclosure of the underlying privileged materials relating to such interviews." (Emphasis supplied.)

69. In his skeleton, Mr Crowley for the claimant relies on this judgment (especially where it cites *Dunlop Slazenger* at [17]) for the proposition that

> "24. … where the deployment was solely for a limited issue arising solely in the interlocutory application and does not go to the merits of the case as a whole there is no general 'deployment'."

70. He also refers to a work for which I bear some responsibility, *Matthews and Malek on Disclosure*, 5th ed 2017, paras 16.23-16.24. These paragraphs relevantly provide (footnotes omitted for clarity):

> "**16.23** … The key word here is 'deploying'. A mere reference to a privileged document in an affidavit does not of itself amount to a waiver of privilege and this is so even if the document referred to is being relied on for some purpose, for reliance in itself is not the test. Instead, the test is whether the *contents* of the document are being relied on, rather than its *effect*. …
>
> **16.24** But the authorities take a less benevolent view where the maker refers to the document in order to persuade the court at an interlocutory stage to take a particular view of the merits of the case (e.g. an application for a freezing order, or for summary judgment). This is deployment of the privileged material which operates as a collateral waiver, and once used it is too late to turn back the clock, unless perhaps the use can be shown to be for a limited purpose at the interlocutory stage."

71. The two paragraphs distinguish between (i) mere reference to, and (ii) deployment of, the privileged material. That is the standard distinction. But they also distinguish between (iii) deployment on the *substantive merits* of the case, and (iv) deployment for a *limited interlocutory purpose*. I have accordingly looked again at the relevant authorities referred to in the footnotes in support of this second distinction. To my mind, the most important such authorities for the purposes of Mr Crowley's submission are those that I have just discussed, together with the decision of Birss J (as he then was) in *Property Alliance Group Ltd v Royal Bank of Scotland plc* [2015] EWHC 3272. In that case, the claimant (PAG) submitted that the defendant (RBS) had deployed privileged material at interlocutory stages of the litigation which went to the merits of the claim.

72. At an earlier stage in the litigation, Birss J had held ([2015] EWHC 2197 (Ch)) that the terms of the defence put in issue the basis on which certain regulatory findings had been made against the defendant. So, his order required the production to the claimant of certain otherwise privileged documents, including those now the subject of the claimant's submission on deployment. The defendant now proposed to amend its defence to *remove* the particular part of the defence which had led to that decision and order. The defendant submitted that that amendment justified a stay of the earlier order (which was in any event the subject of an interlocutory appeal). The *claimant* submitted that, even if the amendment was permitted, the privilege had *also* been waived by the defendant during the proceedings by deployment of the privileged material.

73. Birss J rejected the claimant's submission on waiver. He referred to paragraph [20] of the judgment of Gloster J in *Berezovsky v Abramovich* [2011] EWHC 1143 (Comm), and then said:

> "72. PAG's point on deployment is that at the various case management conferences in these proceedings RBS has frequently emphasised the narrow nature of the regulatory findings. PAG contends that RBS did so seeking to advance its case at the interlocutory hearings, both in general and in relation to

> disclosure, which was the main issue at these hearings. In doing so RBS has deployed the material in such a way as to waive privilege.
>
> 73. I do not accept that submission. The basis of the judgment which led to the orders for production was the pleaded case of RBS, not what happened in the proceedings. … The interlocutory stages of this case have not been concerned with the merits, they have been concerned primarily with disclosure. While the reference to the regulatory findings did, at the instigation of RBS, inform the court's orders for disclosure by providing part of the relevant context, they did no more than that. The underlying merits were not the issue. Moreover the disclosure process has now moved on."

He therefore held that the defendant had not waived privilege.

74. On re-reading all these cases, my first conclusion is that, with the exception of the last, none of them is an actual *decision* on the point. All but the last say that privilege has been waived because there has been deployment on the merits, which means that there is no need to decide the counterfactual position where there was no deployment on the merits. All that Waller LJ did in *Dunlop Slazenger* was to describe what an exception for interlocutory matters would have to look like, not to say that there actually was one. The *Property Alliance Group* decision of Birss J is however a decision that privilege had not been waived, in a purely interlocutory context. But the judge had already decided earlier in that litigation that privilege *had* been waived for other reasons, and had already ordered production of the privileged material. So the decision made no difference. In my judgment, this is not a strong authority, in particular relying as it does on *dicta* in other cases, for the proposition cited. So I consider that I should look at the matter again.

75. In the present case, the claimant has exhibited a letter from his expert in order to seek an adjournment of the trial. The claimant has not (as he could have done) merely *referred* to the letter, but has *deployed* its contents. I accept that this does not go to the merits of the whole case, but instead merely to the merits of the adjournment. Mr Charlesworth says that the first four paragraphs do not go to the merits of the adjournment. I do not think that, even if true, this in itself matters. The whole letter is deployed. It need not have been, but it was. It therefore raises the question already posed by earlier judges, in particular Waller LJ in *Dunlop Slazenger* and Gloster J in *Berezovsky*, as to whether it matters that the issue to which the disclosed privileged material goes is relevant only to interlocutory matters, or goes to the merits of issues at trial.

76. For my part, I do not think that Vinelott J distinguished between the two cases. Instead, he distinguished between the *effect* and the *contents* of what was disclosed. But it is also correct that, in his case, the disclosure in fact went to the merits of the whole case. Looking at the matter on principle, it is not easy to see why a waiver of privilege only for the purpose of interlocutory proceedings and in relation to an issue in those proceedings should mean that the waiver "was in some way limited". After all, the principle is one and indivisible: once privileged, always privileged, as Sir Nathanial Lindley MR put it in *Calcraft v Guest* [1898] 1 QB 759, 761, though of course, as he then said, that does not "mean to say that privilege cannot be waived"; and see also the recent decision of the Court of Appeal in *Addlesee v Dentons Europe LLP* [2020] Ch 243.

77. I accept that privileged information can be shared with *some* others, on a confidential basis, without yet waiving the privilege: see *eg British Coal Corporation v Dennis Rye Ltd (No 2)* [1988] 1 WLR 1113, CA (disclosing to the police for the purposes of a criminal investigation). Nevertheless, only information that is confidential *as against the opponent* can be privileged, and by disclosing the confidential information *to* that opponent, it thereby loses the quality of confidence necessary to engage the doctrine of privilege in the first place. I regret that I am unable to agree with the decision of Birss J. In my judgment, if there is a deliberate disclosure of information by a party to its opponent, even for an interlocutory purpose, it ceases to be confidential as against that party, and hence loses its privilege.

78. Moreover, I see no justification for separating out, and treating differently, the different parts of the letter in this case. As I pointed out earlier, the first four paragraphs appear to reveal a breach of the expert independence principle. To my mind those paragraphs are less worthy of protection than the remainder, but the remainder is the part which most justifies the reference to the letter in the witness statement of the solicitor. Accordingly, I conclude that privilege has been waived in the whole of the letter of 3 May 2022, and (as I have already said) no injunction should be granted to restrain use of the information contained in it.

79. I accept that this means that the tentative suggestion in the first sentence of paragraph 16.24 of *Matthews and Malek* is at least misleading, if not simply wrong. But legal authors and judges have completely different functions, as Megarry J pointed out in *Cordell v Second Clanfield Properties Ltd* [1969] 2 Ch 9, 16-17:

> "The process of authorship is entirely different from that of judicial decision. The author, no doubt, has the benefit of a broad and comprehensive survey of his chosen subject as a whole, together with a lengthy period of gestation, and intermittent opportunities for reconsideration. But he is exposed to the peril of yielding to preconceptions, and he lacks the advantage of that impact and sharpening of focus which the detailed facts of a particular case bring to the judge. Above all, he has to form his ideas without the aid of the purifying ordeal of skilled argument on the specific facts of a contested case."

And Megarry J himself, legal polymath that he was, was not the first legal author turned judge to find that he had authored something that he later could not agree with in his judicial capacity: compare *Tito v Waddell* [1977] Ch 106, 248G. I am sure I will not be the last.

The defendant's cross-applications

CPR rule 35.10(4)

80. I now turn to consider the defendant's cross-application for (1) production for inspection of "the written instructions/comments/aide memoire" provided to Mr Cutting, (2) permission to cross-examine the claimant's experts at trial, and (3) permission to deploy the letter from Mr Cutting in evidence at trial. As to point (3), this is the other side of the claimant's application for an injunction. Since the application has failed, there is no reason not to give permission to deploy the letter in evidence. I am not sure that it is actually necessary to give permission, but for the avoidance of any doubt I will do so.

81. The other two points in this application are more substantial. They depend on CPR rule 35.10(4), which I set out earlier. As Ms Chalmers says, it is sensible to deal with these issues now, so that the parties know where they are in advance, rather than leave it until trial. In relation to (1), Ms Chalmers says there are reasonable grounds to consider that the statement of instructions to Mr Cutting is inaccurate or incomplete. Accordingly, the discretion conferred by rule 35.10(4) to order disclosure of instructions is engaged. I bear in mind two things. The first is that rule 35.10(3) does not require the expert's statement of instructions to be complete, but only to state "the *substance* of all *material* instructions, whether written or oral…" (emphasis supplied). The second is that the test laid down by the rule is not whether the court is satisfied that the statement of instructions in fact *was* inaccurate or incomplete, but instead only whether it is satisfied that there are *reasonable grounds so to consider it*.

82. In this connection, I was referred to the decision of the Court of Appeal in *Lucas v Barking, Havering and Redbridge Hospitals NHS Trust* [2004] 1 WLR 220. This was a claim for personal injuries said to have been caused by the defendant's negligence. The claimant's expert reports listed documents which had been supplied to the experts. The defendant applied for the production of two of them. The master made the order sought, holding that they were not part of the instructions within the meaning of rule 35.10(3), and therefore it was not necessary to satisfy the test in rule 35.10(4) before making the order. The claimant appealed, and the Court of Appeal reversed the decision of the master.

83. Waller LJ (with whom Mantell and Laws LJJ agreed, although Laws LJ added a few comments of his own) said:

> "31. … It seems to me that CPR 35.10(4) is designed primarily to give protection to a party who would otherwise have waived privilege by being compelled to set out matters in an expert's report. It is also designed so far as possible to prevent lengthy arguments as to whether there has been a waiver of privilege either prior to the trial or indeed at trial leading to an entitlement to further disclosure.
>
> […]
>
> 34. … Material supplied by the instructing party to the expert as the basis on which the expert is being asked to advise should in my view be considered as part of the instructions and thus subject to CPR 35.10(4)."

84. Ms Chalmers first of all relies upon the terms of Mr Cutting's letter itself. They refer to "comments", "suggestions" and "requests" relating to the draft joint statement of the experts. She also relies upon the terms of Mr Charlesworth's second witness statement, dated 14 June 2022, where, at paragraph 13, he explains that the first part of Mr Cutting's letter "included his comments in respect of an aide memoire my firm had sent to him in connection with the preparation of the expert's joint statement in these proceedings". Ms Chalmers points out that there is no reference to these comments, suggestions and requests, or to the aide memoire, in either the joint statement or Mr Cutting's own report. (I have already set out the relevant extracts above.) She submits accordingly that the court should be satisfied that there are reasonable grounds for considering that Mr Cutting's statement of instructions is

incomplete. On the assumption that she crosses the threshold for the discretion to arise, she further submits that it would be appropriate in this case to exercise it.

85. Mr Crowley made two main submissions to the effect that the defendant's application was misconceived. First of all, he submitted that communications made to the experts for the purposes of their joint statement were not material communications for the purposes of rule 35.10(3). Secondly, he submitted that Mr Cutting's statement of his instructions was not incomplete. He amplified the first submission by saying that an expert's instructions to prepare his report did not extend to every communication to him. In support of this submission, he referred to several paragraphs in Lord Woolf's Final Report on Civil Justice:

> "31. … The point has been made that experts must be free to submit drafts to clients and their legal advisers, so that factual misconceptions can be corrected. A further that a great deal of time could be wasted if all these documents were disclosable, because the opposing party would have to comb through the various versions of a report to identify any changes… Another possibility is that lawyers and experts might begin to subvert the system by avoiding written communication in favour of off the record conversations.
>
> 32. I accept, in the light of these arguments, that it would not be realistic to make draft experts' report disclosable. I do not, however, consider that privilege should apply to the instructions given to experts. …
>
> 33. Under the new system, transparency of instructions to experts will be particularly important. … I therefore recommend that expert evidence should not be admissible unless all written instructions (including letters subsequent upon the original instructions) and a note of any oral instructions are included as an annex to the expert's report."

86. Mr Crowley also referred to the decision in *Lucas v Barking, Havering and Redbridge Hospitals NHS Trust*, in particular at [42], where Laws LJ said:

> "As it seems to me the key to the case, and to the sense to be attributed to the term 'instructions' in CPR 35.10(3) and (4), is the imperative of transparency, a general theme of the CPR but here specifically applied to the deployment of experts' reports. Thus the aim of CPR 35.10(3) and (4) is broadly to ensure that the factual basis on which the export has prepared his report is patent. That approach demands a wide reading of the term 'instructions' … "

And also at [34], where Waller LJ said:

> "Material supplied by the instructing party to the expert as the basis on which the expert is being asked to advise should in my view be considered as part of the instructions and thus subject to CPR 35.10(4)."

87. He submitted that solicitors' comments on a draft report were not part of the instructions to the expert. They were simply routine communications during the conduct of the case. Moreover, he said that Mr Cutting's report set out a complete statement of his instructions. In this respect, he referred to the *Lucas* case at [35]-[36] where Waller LJ said:

> "35. There is however in this court an alternative string to the defendants' bow. They say that it must follow that the experts in this case have not stated 'the substance of all material instructions…'. Thus they say there has been a failure to comply with CPR 35.10(3) and an order for disclosure of the statement and the report should be made under CPR 35.10(4).
>
> 36. This submission as it seems to me misunderstands the relationship between CPR 35.10(3) and CPR 35.10(4). The obligation under CPR 35.10(3) is to disclose the substance of all material instructions. The protection under CPR 35.10(4) relates to 'any specific document' and 'questioning in court' unless the statement of instructions given under paragraph (3) is inaccurate or incomplete. There is no requirement to set out all the information contained in the statement or all the material that has been supplied to an expert. The only obligation on the expert is to set out 'material instructions'. But the protection applies to any particular document and any particular question over any area, and has to do so because disclosure of part of privileged material by implication when deployed may waive other privileged material."

88. He also referred to the statement of Laws LJ that:

> "43. There is a plain impact on the scope of legal professional privilege, and thus a degree of protection against the loss of privilege is given by the restrictions on disclosure provided for by 35.10(4). I think it a premise of the arrangements constituted by 35.10(3) and (4) that in the ordinary way the expert is to be trusted to comply with 35.10(3): the effect of the 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 expert's instructions as a check to see that 35.10(3) has been fulfilled. There must be some concrete fact giving rise to 'reasonable grounds' within the closing words of 35.10(4). It is unsurprising that the expert is thus to be trusted; it is of a piece with his overriding duty to help the court (CPR 35.3). Overall, 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 35.10(3) where there is a real question-mark as to its fulfilment."

89. He further submitted that the report of Mr Cutting set out the factual basis for his opinions. In any event, it was the question what was material for the report, and not what was material for the joint statement. In this respect, the claimant referred to Waller LJ's statement at [36] (cited above). He also pointed out that Mr Pither, the expert for the defendant, simply referred to his own written instructions. He did not mention the joint statement at all. So it was hardly fair to criticise Mr Cutting for not doing so.

90. I agree with Mr Crowley that not every communication between experts and those instructing them is part of their "instructions" for the purposes of rule 35.10(3). At the same time, as Laws LJ said in the *Lucas* case, the aim of that rule is to ensure that the "factual basis" for the expert's opinion evidence is apparent to the reader, and therefore a "wide reading" of the term "instructions" is needed. The question is where the line is to be drawn. It seems to me that the key lies in the words "factual basis". The expert is a witness of opinion evidence, and not (or not primarily) of fact. Typically, the expert takes the facts from others. But if you change the facts, you may change the expert opinion. So knowledge of the facts, or assumptions of fact, on

which the expert acts is fundamental to the direction and operation of the opinion. In my judgment, what rule 35.10(3) and (4) is concerned with is the question of the factual (and, I may add, sometimes the legal) basis for the opinion. These are matters which the expert cannot know him- or herself, but for which reliance must be placed on others.

91. Whether the expert is then *independent* of the instructing party in giving an opinion is a quite different matter from the facts on which the opinion is based. That is governed, not by CPR rule 35.10(3), but by CPR rules 35.2, 35.10(1), Part 35 PD para 2.1, and the TCC Guide para 13.6.3. I see no reason to construe the words in rule 35.10(3) as requiring the expert to state the substance of all *communications* with those instructing him or her which go beyond providing the facts or factual (or indeed legal) assumptions for the opinion. If that is so, the power of the court to order disclosure of a specific document will not be engaged merely because the court is satisfied that there are reasonable grounds to consider that the statement of instructions does not refer to such communications.

92. In relation to the application for the disclosure of the aide memoire, the question therefore is on what side of the line the aide memoire falls. Is it something setting out a factual or legal basis for the opinion of the expert, or is it something else, such as comments on a draft report or statement? In the first case, it would be part of the instructions, not privileged, but disclosable only if ordered under rule 35.10(4). In the second, it would not be part of the instructions, and would remain privileged unless and until privilege were waived, which would not happen unless it were deployed before the court, and not merely referred to. The problem is that, not having seen it, it is impossible for me to tell from the description alone, and therefore (for these purposes) I cannot be satisfied that it is part of the expert's instructions. That conclusion means that I must proceed on the basis that it does not fall under the rule 35.10 regime at all, and I have no power to order its disclosure under that rule.

93. On the other hand, in my judgment, there is nothing *in rule 35.10(4)* to prevent a party cross-examining the other party's expert on such an aide memoire or on other communications which go beyond providing the facts or factual (or indeed legal) assumptions for the opinion. What *would* prevent that are the rules of privilege, and the trial judge's ordinary case management powers. Here, however, the witness statement referring to the aide memoire was never covered by privilege, and any privilege that there was in the letter of 3 May 2022 has been waived. Given what is stated in the letter, the reference in Mr Charlesworth's witness statement to an "aide memoire", and the unresolved concerns which the defendant expressed about the independence of the expert, it seems to me that there is a proper basis for the cross-examination of Mr Cutting on these matters, although as I say rule 35.10(4) in my judgment has nothing to do with it.

94. I may add that at present I see no basis for reaching the same conclusion in relation to the claimant's other expert, Mr Pryce. The fact that there is a proper basis for cross-examining one expert on his independence does not by itself raise any presumption of such a basis in relation to another expert, and there is no material before me in relation to Mr Pryce to raise any suggestion of compromised independence.

95. Accordingly I refuse to order disclosure of the aide memoire, or of any "comments", "suggestions" and "requests" in relation to the experts' joint statement or Mr

Cutting's report. On the other hand, but subject to any contrary direction of the trial judge, the defendant may cross-examine Mr Cutting (but not Mr Pryce) in relation to any such aide memoire, "comments", "suggestions" or "requests".

The defendant's application for production of the "Prior Associates" report

96. Lastly, I turn to the defendant's application for production of the "Prior Associates" report referred to by Mr Pryce in the joint statement of the arboriculturists dated 19 May 2022 and in his report dated 12 June 2022. Documents mentioned in witness statements, witness summaries and affidavits are subject to CPR rule 34.14(1), set out above. That rule confers a *right* on a party to inspect documents mentioned in such documents. However, documents mentioned in an expert's report are subject to a more restrictive regime contained in CPR rule 34.14(2), also set out above. This confers no right on any party, but instead gives the court a *power* to order production of such a document, subject to the restrictions contained in rule 35.10(4), just considered.

97. First of all, I proceed on the basis that Mr Pryce drafted the paragraph in the joint statement which refers to the "Prior Associates" report. The joint statement contains a number of paragraphs which are headed either with the name of Mr Pryce or with that of the claimant's expert, Mr Hart. These paragraphs read in such a way as to express the views of the individual and not the experts jointly. There is no evidence to show that Mr Hart had any hand in drafting the relevant paragraph in the joint statement. Secondly, I proceed on the basis that the "Prior Associates" report which is mentioned in the joint statement and also in Mr Pryce's own report is a document which has not previously been disclosed. Mr Pryce says in both places that it contains a discussion about a layer of sand underneath the damaged property and its neighbour, and Mr Cutting's report disclosed in these proceedings does not do that. No other such "Prior Associates" report is listed in the material said to have been relied on by Mr Pryce. The defendant has asked for a copy of this report, but the claimant has declined, asserting privilege over it. It is clear from this that it is another, so far undisclosed, document.

98. If this report were part of the claimant's instructions to Mr Pryce, then it would fall within rule 35.10(4). Accordingly, it would not be privileged, but might only be ordered to be produced if the court were satisfied of reasonable grounds to consider the statement of instructions inaccurate or incomplete. If however the report is *not* part of the claimant's instructions to Mr Pryce, then it falls outside rule 35.10(4), and is likely to be privileged, which means that the court can order its production only if privilege has been waived. Ms Chalmers submitted that the report had not been argued to be part of the expert's instructions, but that it had been deployed before the court, rather than merely referred to, and that therefore privilege had been waived.

99. Mr Crowley submitted that the earlier report was indeed privileged, and that that privilege had not been waived. He referred to the Court of Appeal's decision in *Jackson v Marley Davenport Ltd* [2004] 1 WLR 2926. There the court held that only reports intended to be relied on before the court at trial fell within the rule 35.10(4) regime. Other expert reports (including drafts of the final report) were subject to litigation privilege, as documents brought into existence for the purposes of the litigation. CPR Part 35 did not override that privilege. I am of course bound by that decision. I would therefore have expected some evidence about the circumstances of

the creation of the earlier report which would satisfy the test for privilege. As Ms Chalmers pointed out, however, I do not have any such information. Neither the claimant nor anyone on his behalf has given any evidence as to those circumstances. Accordingly, I cannot hold that the claim to privilege is justified. So, I should proceed simply to decide whether to order production under CPR rule 31.14(2).

100. In case I am wrong to do so, however, I will consider the position as if the report *were* privileged. In these circumstances, the question would not be whether there are reasonable grounds to consider that Mr Pryce's statement of his instructions were inaccurate or incomplete. Instead, it would be whether privilege in the earlier report had been waived. This in turn would depend on a combination of two matters. The first is whether the expert report of Mr Pryce merely refers to the earlier report (for example, as an event in the narrative) or whether it relies on (deploys) the content of that report. In the former case, the mere reference would not amount to any kind of deployment, and could not waive privilege. In the latter case, however, the content of the earlier report would be being deployed, and would in principle be capable of operating as a waiver of any privilege in that material. In the present case, I have no doubt that the position is indeed the latter rather than the former. Mr Pryce does not merely refer to the report, he sets out a particular conclusion in that earlier report as a basis for something that he himself says. He has relied on it to reach his own conclusion.

101. The second matter is whether the deployment of the earlier Pryce Associates report in Mr Pryce's expert report is binding on the claimant. Generally speaking, only the party or an agent of the party (*eg* a lawyer) can waive a client's privilege. A witness (even an expert witness) cannot do so: *Donnelly v Weybridge Construction Ltd* [2006] EWHC 721 (TCC), [49]-[50]. So, the question is whether the claimant has in effect adopted the deployment of the earlier report for himself. Here, the report was deliberately served by the claimant in compliance with the order of 22 October 2021 made at the costs and case management conference held before HHJ Russen QC. Without more, that simply adopts the deployment by Mr Pryce, and *prima facie* waives privilege: *Bourns Inc v Raychem Corporation* [1999] FSR 641, 676, per Aldous LJ. However, the claimant has now attempted to reverse the position, by purporting to withdraw that report and to substitute a different (called "supplemental") expert report, which does not mention the earlier report.

102. In his skeleton argument, Mr Crowley relied on a statement in *Matthews and Malek on Disclosure*, 5th ed, para 16.23:

> "Perhaps if the maker goes too far, he can be put to his election as to whether to leave in the reference and produce the document or take it out and retain privilege."

He did not take me to the cases referred to in support of it, the most important of which are those which I shall consider. However, the first I shall mention is *Roberts v Oppenheim* (1884) 26 Ch D 724, because it appears to be the foundation of the second. (It is discussed in Matthews and Malek at paragraphs 16.16-16.17.). Here, the plaintiffs sought a declaration and an injunction in respect of certain land which they claimed to own, and in respect of which the defendant was said to be trespassing. In giving discovery in the action, under RSC 1883, Order XXXI rules 12-14, they claimed privilege for certain documents on the ground that they related exclusively to

their own title and not to that of the defendant. (This head of privilege was subsequently abolished by the Civil Evidence Act 1968, section 16(2).) However, in their statement of claim, they had specifically referred to some of these documents of title, and also set out their effect.

103. The defendant applied to the court by summons, seeking production of them on the basis that privilege could not be claimed for documents referred to in pleadings. In part he relied on what he said was the principle behind RSC 1883, Order XXXI, rule 15, although he did not rely on the terms of the rule, for he had given no notice under that rule to the plaintiffs. This rule then read:

> "Every party to a cause or matter shall be entitled, at any time, by notice in writing, to give notice to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice. And any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such cause or matter, unless he shall satisfy the Court or a Judge that such document relates only to his own title, he being a defendant to the cause or matter, or that he had some other cause or excuse which the Court or Judge shall deem sufficient for not complying with such notice."

104. Kay J explicitly said (at page 733) that he was not now dealing with an application for production under rule 15, but instead with a challenge to the validity of a claim to privilege under the general discovery and production rules. The defendant's argument was that, if the plaintiffs could be compelled under rule 15 to produce such documents for inspection by the plaintiff, they could not under the general discovery rules (that is, rules 12-14) maintain a claim for privilege to withhold them from such inspection. The judge said (at page 733) that the general rules did not say that, and refused to make any order on the summons, The defendant appealed.

105. On the appeal, Cotton LJ said (at pages 734-735):

> "It is then said that the plaintiffs cannot avail themselves of a claim to protection because they have referred to the deeds in their pleadings, and R.S.C., Ord. 31, r. 15, is relied on. But that rule only says that if a party will not produce a document to which he has referred in his pleadings, he shall not afterwards be at liberty to put such document in evidence. That is the penalty. He may prefer to lose part of his claim rather than produce the document. In my opinion, that rule does not take away the privilege of the documents, but only prevents them from being put in evidence unless produced."

106. The other member of the two-judge court, Fry LJ, said (at page 735):

> "With respect to the second point, we are invited to say that Order XXXI., rule 15, has introduced a new practice, namely, that where a document is referred to in the pleadings, all privilege with regard to it is gone. The rule does not say any such thing."

The appeal was accordingly dismissed.

107. The second case is *Infields Ltd v P Rosen and Son* [1938] 2 All ER 591. This was an action for infringement of a registered design. The plaintiff had claimed privilege for certain documents on discovery, and the defendants challenged this. Most of the argument about this concerned the right of a litigant in the Chancery Division in those days to have a matter adjourned from the master to a judge. But there was also a point that at an earlier stage, an affidavit had been sworn by a director of the plaintiff, referring to some of the documents said to be privileged. As to this, Sir Wilfred Greene MR (with whose judgment Scott LJ agreed) said, at page 597C-E:

> "First of all, the reference in this paragraph to those documents does not, in my judgment, amount in any sense to a waiver of the claim of privilege. It would, I think, have been competent to the defendants, when it was proposed to read that paragraph, to object to its being read unless the documents were produced. That course was not taken, and the mere fact that the paragraph was read and relied upon without objection does not, in my opinion, amount to a waiver of the privilege. It has been laid down that a reference to a document in a pleading does not amount to a waiver of a claim of privilege."

The Master of the Rolls then went on to refer to *Roberts v Oppenheim* in support of the last sentence. The third judge, MacKinnon LJ, agreed with the proposed order, but gave a short concurring judgment of his own.

108. Thirdly, in *Government Trading Corporation v Tate & Lyle International Ltd*, *The Times*, 24 October 1984, the respondent had sold sugar to an Iranian company. An issue arose as to whether the appellant was now liable to the respondent under the relevant contracts. At an earlier stage, the respondent's solicitor had sworn an affidavit setting out what he understood to be the effect of the relevant Iranian law, stating (as he was obliged to do under the rules) that the source of this was advice given by a firm of Iranian lawyers. The appellant argued on the later trial of a preliminary issue that privilege had thereby been waived in the relevant Iranian law advice. Webster J rejected that argument, and the appellant appealed to a two-judge Court of Appeal.

109. Robert Goff LJ (with whom Oliver LJ agreed, though he added a short concurring judgment of his own) held that the reference to the effect of the advice was not sufficient to waive privilege, and dismissed the appeal. In the course of doing so, he referred to the earlier decision in *Infields Ltd v P Rosen and Son* [1938] 2 All ER 591, and continued:

> "The learned Master of the Rolls, however, held that this did not amount to a waiver of privilege, but was simply what he called a reference to a document. He referred to the fact that if, for example, a document is referred to in a pleading, the other side could apply to the court for production of the relevant document. If so, the party who has referred to the document in his pleading may prefer to withdraw his pleading rather than produce the document. If he does so, then there is no waiver of privilege, because the waiver of privilege in those circumstances, if it does occur, will take place on the production of the document and not upon the reference to the document in the pleading."

110. It will be seen that the first case, *Roberts v Oppenheim*, turned on the wording of the then rule, RSC 1883, Order XXXI, rule 15. This provided for a notice procedure for

obtaining production of documents referred to in pleadings. The explicitly stated sanction for non-compliance with the notice was however that the party in default could not admit the document in evidence, and it was this sanction to which Cotton LJ referred. It did not provide for the party in default to have the option of withdrawing the relevant pleading, and Cotton LJ did not suggest that this was possible.

111. The second case, *Infields Ltd v P Rosen and Son*, was one which referred back to *Roberts v Oppenheim*, but where the reference to a privileged document occurred in an affidavit rather than in a pleading. Sir Wilfred Greene MR did not refer to the sanction of *non-admissibility* of the document referred to, but instead to the possibility that the party putting forward the offending affidavit might prefer *not to rely* on the relevant paragraph, rather than to produce the document referred to in it. But in any event he rested his decision on the point that a mere reference to privileged documents did not involve a waiver of the privilege.

112. Thirdly, I observe that, by the time of *Government Trading Corporation v Tate & Lyle International Ltd*, RSC 1883, Order XXXI rule 15 had been replaced by RSC 1965, Order 24 rules 10-13. Rule 10(1) provided that:

> "Any party to a cause or matter shall be entitled at any time to serve a notice on any other party in whose pleadings or affidavits reference is made to any document requiring him to produce that document for the inspection of the party giving the notice and to permit him to take copies thereof."

113. However, the sanction of *non-admissibility* of the document referred to, previously provided in rule 15 of Order XXXI, had been replaced, by rule 11(1) of the new Order 24, with a power for the court *to order production* of that document. In other words, the boot was very much on the other foot. Robert Goff LJ referred to the earlier cases, though without adverting to the change in the wording of the rule, and simply amalgamated the twin statements of Cotton LJ and Sir Wilfred Greene MR. He said simply that the party who had referred to the document in his pleading might prefer to withdraw his pleading rather than produce the document. Then there would be no waiver.

114. Accordingly, on closer examination of the relevant authorities, and faced with the facts of the particular case, I have to say that they do not strike me as a sound basis for this tentative conclusion. So, I must consider the matter afresh, in the light of the modern rules and the facts of this case. A party who has obtained an expert report after an order has been made for the admission of such a report in evidence is not obliged to produce it to the other side, if the party decides not to use it or to call the expert: *Carlson v Townsend* [2001] 1 WLR 2415, CA. But, if he or she does not, the report may not be used, or the expert called, at the trial without the court's permissions: CPR rule 35.13. In the present case, however, the claimant here *has* served the report, thereby demonstrating an intention to rely upon it at trial. CPR rule 35.11 provides that, where a party has disclosed an expert's report, *any* party may use that expert's report as evidence at the trial.

115. These are not the rules which prevailed when the earlier authorities were decided. As Hobhouse J (as he then was) said a generation ago in *Sveriges Anfatygs Assurens Forening v The 1976 Eagle Assurance Co Ltd*, unreported, 28 March 1990,

> "the citation of 19th century cases decided under different circumstances … and under different Rules of Court is not a correct approach to practical questions of procedure in the last decade of the 20th century under the present Rules of Court."

How much stronger the point is now that our rules have been completely replaced by a new system with a different culture, including the new 'overriding objective' in CPR Part 1. Many decisions of the Court of Appeal since have deprecated attempts to rely on pre-CPR caselaw. In *Biguzzi v Rank Leisure plc* [1999] 1 WLR 1926, Lord Woolf MR, architect of the new CPR, said (at page 1934G):

> "Earlier authorities are no longer generally of any relevance once the CPR applies."

116. I accept that in the present circumstances the court has not yet sat to receive the expert evidence of Mr Pryce. But, whether or not the court may permit the claimant to serve a further expert's report, the claimant cannot now prevent the original's being admitted in evidence. When one considers the purposes of providing such reports in advance, including to enable a fair trial (by giving an opponent notice of the evidence against him), and also to facilitate efficient preparation for trial (and indeed settlement), it seems to me to be too late for a party to say it is not deploying the material in the original report by merely serving it, even though it now repents of its decision to do so. Trial by ambush is no longer the order of the day. Mr Pryce has reached the view that he has in reliance on the earlier report. He cannot now simply say, "Oh well, I would have reached the same conclusion without reference to that report". So in my judgment privilege has already been waived.

117. The result is that, whichever view is taken of the lack of evidence of the circumstances of the genesis of the earlier Prior Associates report, it is not privileged from production. Should it therefore be disclosed under CPR rule 31.14(2)? In my judgment it should. The claimant has, in accordance with HHJ Russen QC's order, filed and served Mr Pryce's report relying on the earlier report, seeking to gain the advantage of praying in aid the contents of that earlier report. It would not be right for the claimant to do so without disclosing the whole of it, so that the defendant can be satisfied that the claimant is not cherry picking.

118. Accordingly, I will order that the claimant produce to the defendant a copy of the earlier Prior Associates report.

Conclusion

119. For the reasons given above, (1) I refuse to grant an injunction to restrain the defendant from using the letter from Mr Cutting of 3 May 2022 or its contents at trial, (2) I refuse to order the production of the so-called aide memoire and associated comments *etc* by the claimant to the defendants, but I will give permission to the defendant to cross-examine Mr Cutting on them at trial, and (3) I will order the claimant to produce the earlier Prior Associates report for inspection by the defendant. I am very grateful to the legal teams concerned for their considerable assistance, and to the parties generally for their patience.