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Case No. 12612-2024

BEFORE THE SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 (as amended)

BETWEEN

SOLICITORS REGULATION AUTHORITY LIMITED

Applicant

-and-

ASHLEY SIMON HURST

Respondent

ANSWER

THIS ANSWER CONTAINS INFORMATION WHICH IS PRIVILEGED TO THE FORMER CLIENT – HIGHLIGHTED IN RED BELOW; IT IS INCLUDED ON THE EXPRESS BASIS THAT NECESSARY PROTECTIONS WILL BE ADOPTED TO ENSURE THAT SUCH PRIVILEGE IS PRESERVED

Introduction and Summary

1. This is Mr Hurst's Answer (the "**Answer**") to the SRA's Statement Pursuant to Rule 12(2) of the Solicitors (Disciplinary Proceedings) Rules 2019 (the "**Rule 12 Statement**"). References to paragraph numbers are to paragraph numbers of the Rule 12 Statement unless otherwise indicated or clear from context. The Answer should be read in conjunction with (i) the Annex to the Answer: Summary of Background Facts ("**Summary of Background Facts**"); and (ii) the bundle, marked Exhibit ASH1, containing the documents on which Mr Hurst intends to rely ("**Exhibit ASH1**"). References in the Answer and Summary of

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Background Facts to "**ASH1/X**" are to pages in Exhibit ASH1 where "**X**" is the page number.

2. The Allegations set out in paragraphs 1.1 and 1.2 of the Rule 12 Statement (the "**Allegations**") are denied. For the reasons set out in this Answer, Mr Hurst did not improperly attempt to restrict Mr Neidle's right to publish and/or discuss the contents of the email of 16 July 2022 (the "**Email**") **[IWB1/58-59]** or the letter of 19 July 2022 (the "**Letter**") **[IWB1/61-63]**.

3. In summary, as is set out in the body of this Answer:

   (1) The SRA does not dispute that Mr Hurst was entitled to take the view that Mr Zahawi had a reasonably arguable claim in defamation against Mr Neidle in respect of a serious and damaging imputation of dishonesty Mr Neidle had published via Twitter on 16 July 2022 (the "**Dishonesty Imputation**") **[IWB1/41-55]**. Nor does the SRA argue that it was inappropriate for Mr Hurst to write to Mr Neidle on behalf of Mr Zahawi threatening legal action in respect of the Dishonesty Imputation.

   (2) Both the Email and the Letter necessarily made reference to the Dishonesty Imputation in order to identify to Mr Neidle the nature and scope of Mr Zahawi's complaint. Given Mr Neidle's extensive reporting in relation to Mr Zahawi, and the fact that he was a key source of information for the mainstream media, it was important to make clear to Mr Neidle that it was the Dishonesty Imputation which gave rise to Mr Zahawi's complaint, rather than anything else. Publication by Mr Neidle of the Letter and Email, or the fact of Mr Zahawi's complaint in relation to the Dishonesty Imputation, would therefore necessarily involve republication of the Dishonesty

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Imputation, potentially causing further damage to Mr Zahawi. It was a legitimate aim for Mr Hurst to seek to avoid the risk that publication of the correspondence by Mr Neidle would be likely to lead to a wave of secondary publicity, which would give further currency to the Dishonesty Imputation. Publication of the fact that the Mr Zahawi had written on a without prejudice basis to Mr Neidle on 16 July 2022 would also risk undermining any future action that Mr Zahawi wished to take in relation to the publication.

(3) Mr Hurst was correct, or at the least arguably correct, as a matter of law to label the Email "*without prejudice and confidential*" and the Letter "*private and confidential*" and to seek to limit publication of their contents. The SRA does not allege in the Rule 12 Statement that it was improper to label the Email "without prejudice". There is a considerable body of authority which supports the proposition that both pieces of correspondence were confidential and/or private. It is well recognised that a person's financial and tax arrangements are prima facie private affairs and the Supreme Court recently expressly identified "*involvement in civil litigation concerning private affairs*" as a type of information that will normally be regarded as giving rise to a reasonable expectation of privacy[1]. Further, *Gatley*, the leading defamation practitioner text, positively advises that "*…if there is a risk that it [a letter of complaint] may be published, it <u>should</u> be headed "Private and confidential - Not for publication*" and that "*Heading a letter as suggested will not necessarily put off the recipient from [publishing it], but <u>a responsible solicitor would certainly advise his client that it would be inadvisable (as a potential breach of confidence</u>, or as aggravating the situation and possibly the damages)*"[2] (emphasis added).

(4) In any event, Mr Hurst acted appropriately and reasonably in the circumstances of the matter. He was not seeking to oppress nor intimidate Mr Neidle, nor take unfair advantage of him, and there is no suggestion that Mr Neidle was in fact oppressed or intimidated or taken advantage of. The

[1] *Bloomberg v ZXC* at [52]. See generally §45 below.
[2] *Gatley on Libel & Slander*, 13th edition, at §26-007.

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factual background demonstrates that although under intense time pressure Mr Hurst was at all times properly pursuing the interests of his client in compliance with his regulatory duties and obligations. There is no basis for a finding that his conduct breached any of Paragraphs 1.2, 1.4 or 2.4 of the SRA Code of Conduct for Solicitors, RELs and RFLs 2019; or Principles 2 or 5 of the SRA Principles 2019.

Parties and Cast List

4. Paragraphs 5 and 6 are admitted. Mr Hurst is a Partner and Head of Client Strategy, UK at Osborne Clarke LLP, where he is also leads the Media and Information law team and co-leads the international Cyber and Contentious Data Protection team. He has 20 years' experience in the area of defamation and privacy, acting for both claimants and media defendants, and is recognised by the legal directories as a leading practitioner in the field.

5. Mr Neidle was a tax lawyer at Clifford Chance between 1990 and 2022 becoming the UK Head of Tax at the firm in 2020 **[ASH1/281-282]**. After he retired from Clifford Chance, he founded Tax Policy Associates **[ASH1/283]**. He is an active user of social media which he uses to promote the Tax Policy Associates website and to express his views publicly on various subjects.

6. Mr Zahawi is an Iraqi-born British businessman and politician who was an MP between 2010 and 2024. On 5 July 2022 Mr Zahawi was appointed Chancellor of the Exchequer and on 9 July 2022, after Boris Johnson resigned as UK Prime Minister on, he declared as a candidate to succeed him as Conservative Party leader and UK Prime Minister until he dropped out following the first ballot of MPs held on 13 July 2022.

Key Factual Background

7. In response to paragraphs 7 to 42, Mr Hurst sets out the relevant background in the Summary of Background Facts.

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8. A number of conclusions can be drawn from that summary:

(3) Mr Hurst emphasised that the reporting on Mr Zahawi's tax affairs was generally on a matter of public interest. This was stated directly in the letters to the Guardian, Independent and Associated Newspapers **[ASH1/134-139]**, as well as in both the Letter and the Email. Mr Hurst did not seek to "shut down" such reporting, either as a blanket policy or in any individual case. Indeed, he expressly stated that this was not what was being done. The language and tone of all communications was neither aggressive

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nor intimidating. On the contrary, it was deliberately measured and conciliatory.

(4) Each of Mr Hurst's communications make this distinction very clear. He was conscious at the time of not being seen to be heavy-handed. Thus while "*Our client considers that it is entirely right that questions be asked about his tax affairs and whether he has received tax benefits from the use of offshore trust arrangements*" the letters to the newspapers also stated that "*our client's position is that he has not engaged in either tax evasion or tax avoidance through the use of offshore structures. Any suggestion to the contrary (or that there are grounds to suspect or even investigate this) is false and defamatory of our client.*" **[ASH1/134-139]** Each of these letters was labelled "*private and confidential*" and "*not for publication*".

(5) The Email and the Letter followed this same approach. Mr Hurst had realised that Mr Neidle was the source for many of the questions that were being raised by media organisations (his Tweets and Blog were specifically referenced on a number of occasions). By this point, Mr Hurst was aware of Mr Neidle's expert status and his experience as a former Partner and UK Head of Tax at Clifford Chance. When Mr Neidle made an unequivocal allegation of dishonesty against Mr Zahawi in the Tweets (the Dishonesty Imputation), As the Letter itself makes clear, as at 19 July 2022 "*none of the media has accused our client of dishonesty in the way that you have.*" **[IWB1/62]** SLAPPs concerns are sometimes raised when a claimant chooses to sue an individual rather than a well-resourced organisation for no reason other than that the former is less likely to be able to defend a claim. This is not the case here.

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(6) The Email and the Letter both made clear that Mr Zahawi was not complaining in relation to Mr Neidle's general reporting or the questions which Mr Neidle had raised extensively on his blog. Mr Zahawi's complaint to Mr Neidle related to the specific Dishonesty Imputation, which was made by Mr Neidle in unequivocal terms: "*turns out Zahawi was lying*" **[IWB1/41]**. As with the letters to the newspapers, the Email emphasises that "*you are absolutely entitled to raise the questions that you have done about his tax affairs, especially given your expert status*" but that "*our client considers that you have overstepped the mark today by accusing him of lying to the media and the public...*" **[IWB1/58]**. Similar wording is contained in the Letter. Both the Email and the Letter are expressed in measured tones and cannot (whether objectively or subjectively) be considered oppressive or intimidating.

<u>NZ had an Arguable Claim</u>

9. The SRA accepts that it was not inappropriate for Mr Hurst to write to Mr Neidle on behalf of Mr Zahawi threatening legal action[3]. The SRA similarly accepts in its Clarification Letter dated 2 July 2024 that it does allege that the threatened libel claim was not properly arguable[4] (the "**Clarification Letter**") **[ASH1/276-277]**.

[3] Rule 12 Statement, at §62.

[4] "*It is not necessary for the SRA to allege that the libel claim, itself, was not properly arguable and the Rule 12 Statement does not contain such an averment*" **[ASH1/276]**.

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11. As the SRA makes clear, the Allegations now made against Mr Hurst concern only Mr Hurst's "*attempt to prevent disclosure of the threatened libel claim*"[5]. At places the Rule 12 Statement appears to suggest that this was *prima facie* objectionable, but it is unclear on what basis. Mr Hurst's actions were taken in pursuit of a proper strategic objective, given the potential for damaging secondary publicity in relation to both the fact of the complaint and the reiteration of the Dishonesty Imputation if the threatened libel claim was made public. In short, once it is recognised that the claim in respect of the Dishonest Imputation was arguable, it was then a proper strategic objective of Mr Hurst to seek to limit the repetition of the Dishonesty Imputation, including by seeking to limit publication (and public criticism) of the fact of the complaint about it. This was Mr Hurst's own reasoning at the time, as made clear in a draft response to Mr Neidle's email of 19 August 2022 which stated[6]:

> "*By marking our letter "private & confidential" and "not for publication", our client was hoping to be able to engage with you on a confidential basis to address your concerns and to ensure that you do not continue to publish false allegations. We are surprised that you do not see the public interest in opening up channels for the frank exchange of communications without their correspondence being made public. As you will be aware, publishing solicitors' correspondence tends to do little to resolve disputes. <u>This is especially so when publication of correspondence inevitably repeats defamatory allegations that are the subject of the dispute</u>.*" (emphasis added) **[IWB1/893]**

12. In the event, that repetition is what happened when Mr Neidle published the Email and the Letter on 23 July 2022, as had been anticipated **[IWB1/79-80]**. As

[5] Clarification Letter, at §1 **[ASH1/276]**.

[6] Draft email sent by Mr Hurst to Mr Zahawi for consideration on 23 August 2022. It was not sent. **[IWB1/893]**.

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Mr Neidle himself explains in his blog post of 19 January 2023 entitled "*Nadhim Zahawi – the whole story*", the Times newspaper reported on the story and the issue "*goes slightly viral. The Tax Policy Associates website normally gets a few thousand readers a day – today we got 400,000.*" **[ASH1/239]** The Dishonesty Imputation was thus republished to each of these readers, as well as those of the *Times* and other media who reported on the story, which in turn was likely to make mitigation of the Defamatory Imputation extremely difficult for Mr Zahawi.

13. Publication of the Email (or its contents) in particular could also adversely impact Mr Zahawi as publication of the fact that Mr Zahawi had made a without prejudice offer to Mr Neidle immediately following the Dishonesty Imputation could undermine his position if he took stronger action in the future. [redacted]

14. In this context, the suggestion in the Rule 12 Statement that Mr Zahawi should have responded to the Dishonesty Imputation "*through a public statement*" is somewhat unreal[7] and ignores the potential serious consequences of harm to his reputation of doing so[8]. Criticising Mr Hurst or indeed Mr Zahawi for not doing this is misconceived and ignores Mr Zahawi's entitlement to protect his own interests.

15. The SRA's stance in relation to the merits of Mr Zahawi's claim also has significant implications from a human rights perspective:

    (1) The right of access to Court (whether pursuant to Article 6(1) of the ECHR or otherwise[9]) can be impaired by the existence of procedural bars preventing

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[7] It is striking that the SRA appears to be dictating (or at least advising) how an individual should appropriately pursue a matter that gives rise to an arguable legal claim.

[8] Rule 12 Statement, at §58.

[9] Article 6(1) states: "*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*". The "*basic principle underlying Article 6(1)*" is that "*civil claims must be capable of being submitted to a judge for adjudication.*": *Al-Adsani v United Kingdom* (2002) 34 EHRR 11.

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or limiting the possibilities of applying to a Court: the right of access must be "*practical and effective*"; and each party must be afforded a reasonable opportunity to present his case[10]. These principles dovetail with what individuals require of their solicitors under domestic law: "*The English lawyer's duty to their client is to seek by all proper professional means to advance the client's case, fearlessly, in accordance with the client's instructions, as long as there is a proper argument capable of being advanced*."[11] In other words, consideration must always be given to the requirement that individuals have a practical and effective opportunity to present arguable claims to the Court. The (former) Government has recognised this proposition in relation to the issue of SLAPPs:

> "*Our understanding of SLAPPs, therefore, must be flexible enough to incorporate these and other areas, but not so broad that it hinders access to justice for legitimate claims where individuals or businesses are trying to protect their reputations*." **[ASH1/182]**

(2) The threatened proceedings pursued the proper purpose of protecting Mr Zahawi's reputation (whether pursuant to Article 8(1) of the ECHR or otherwise[12]). Thus, they must be considered as being at least arguably in the public interest as well as further to Mr Zahawi's private interest, particularly given the political dimension. This is equally true of any attempt to prevent further publication of the Dishonest Imputation. As was observed by Lord Nicholls in *Reynolds -v- Times Newspapers Ltd* [2001] 2 AC 127:

> "*Reputation is an integral and important part of the dignity of the individual. It also forms the basis of many decisions in a democratic society which are fundamental to its well-being: whom to employ or work for, whom to promote, whom to do business with or to vote for... ...it should not be supposed that protection of reputation is a matter of importance only to the affected individual and his family. Protection of reputation is conducive to the public good. It is in the public interest*

[10] It is axiomatic that a libel claim can fail at trial but nonetheless have been properly pursued: see e.g. *Banks v Cadwalladr* [2022] EMLR 21 per Steyn J at [9]: "*Although, for the reasons I have given, Mr Banks's claim has failed, his attempt to seek vindication through these proceedings was, in my judgment, legitimate. In circumstances where Ms Cadwalladr has no defence of truth, and her defence of public interest has succeeded only in part, it is neither fair nor apt to describe this as a SLAPP suit.*"

[11] *Haddad v Rostamani & Ors* [2024] EWHC 448 at [44].

[12] See e.g. *Tamiz v United Kingdom* (App. No. 3877/14) [2018] E.M.L.R. 6 at [77].

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> *that the reputation of public figures should not be debased falsely. In the political field, in order to make an informed choice, the electorate needs to be able to identify the good as well as the bad. Consistently with these considerations, human rights conventions recognise that freedom of expression is not an absolute right. Its exercise may be subject to such restrictions as are prescribed by law and are necessary in a democratic society for the protection of the reputations of others*."

(3) As also observed in *Reynolds*, if an imputation is false, that is critical to the nature and extent of the important right to freedom of expression (whether pursuant to Article 10(1) of the ECHR or otherwise)[13]:

> "*The liberty to communicate (and receive) information has a similar place in a free society but it is important always to remember that it is the communication of information not misinformation which is the subject of this liberty. There is no human right to disseminate information that is not true. No public interest is served by publishing or communicating misinformation. The working of a democratic society depends on the members of that society being informed not misinformed. Misleading people and the purveying as facts statements which are not true is destructive of the democratic society and should form no part of such a society. There is no duty to publish what is not true: there is no interest in being misinformed. These are general propositions going far beyond the mere protection of reputations*."

(4) The right to vindicate one's reputation from false and defamatory allegations by means of a defamation complaint would be illusory if there were in practice likely to be adverse consequences to the complainant of merely making the complaint. When such complaints are publicised, particularly when they are brought by leading politicians, one can expect there to be a great deal of adverse publicity. Such publicity is likely to repeat the allegations complained of, causing further reputational damage[14]. It is well-recognised by the Supreme Court in the context of police investigations that "*the public's ability and propensity to observe the presumption of*

[13] Per Lord Hobhouse at 237-8. See also e.g. *WXY v Gewanter & Ors* [2012] EWHC 496 (Slade J) at [62]: "*It is uncontroversial that there can be no public interest in the publication of false information*"; and *Tesla Motors Ltd & Anor v BBC* [2012] EWHC 310 (QB) (Tugendhat J) at [43]: "*There is no public interest in the dissemination of malicious falsehoods, and so Art 10 is not engaged*."

[14] As is well-recognised in privacy cases.

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innocence" is very limited when serious allegations are published[15]. Accordingly, there are strong reasons of policy why a party should, at least at the initial stages, be able to advance a defamation complaint in a manner that seeks to prevent further publicity. An appropriate way to do that is to treat the correspondence in question as confidential.

The SRA's Changing Case

16. The SRA's case has undergone significant transformation since it was first raised. This is important both because it illustrates the lack of clarity and coherence in the SRA's allegations against Mr Hurst over time, but also because the allegations have previously focussed almost exclusively on the question of whether Mr Hurst was right to use the labels he did as a matter of law. The SRA's legal position on the law was wrong (as is now to a significant degree acknowledged) but the focus on it is understandable: it is difficult to understand how Mr Hurst can be held to be in regulatory breach if everything he did was correct, or arguably correct, as a matter of law.

Notice of 31 January 2024

17. The Notice recommending referral of conduct to this Tribunal (the "**Notice**") is dated 31 January 2024 **[IWB1/5-18]**. The two allegations made are set out in paragraph 11 of the Notice as follows (the "**Original Allegations**") **[IWB1/8]**:

No.	**Allegations**
1.	In an email dated 16 July 2022, improperly labelled correspondence as 'Confidential & Without Prejudice'.
2.	In a letter dated 19 July 2022, improperly labelled correspondence as "Private and Confidential" and 'NOT FOR PUBLICATION'.

[15] *Bloomberg v ZXC* ibid at [108]-[109].

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18. The Original Allegations concerned whether the Email and Letter had been "*improperly labelled*". This focus is borne out by the content of the Notice, which states, for example: "*the conditions for using the relevant terms were not fulfilled*" (§15, §26) **[IWB1/9, 11]**; "*it is clear that the 'Without Prejudice' label was misapplied*" (§22) **[IWB1/10]**; "*The contention that 'Without Prejudice' communications are confidential is wrong*" (§24) **[IWB1/10]**; "*The label "Private and Confidential" is misapplied since the contents of the letter were not protected under the law of privacy or confidence*" (§28) **[IWB1/12]**; "*the letter was not confidential*" (§29) **[IWB1/12]**; "*Neither the email of 16 July 2022 nor the letter or 19 July 2022 attracted confidentiality protections and the conditions for the use of such labels were not in place*" (§32) **[IWB1/12]**; "*The labels represented a statement and/or representation that was not properly arguable. Since the labels were misapplied, it could not be properly argued that the correspondence was Without Prejudice or confidential. These were improper assertions*" (§34) **[IWB1/13]**.

19. In Representations to the Notice dated 28 March 2024 (the "**Representations**") **[IWB1/125-177]**, solicitors for Mr Hurst set out, by reference to a considerable body of authority, why Mr Hurst had in fact not improperly labelled the correspondence and why the labels were used correctly, or arguably correctly, by Mr Hurst. The Representations referred back to the letter from Osborne Clarke to the SRA dated 15 February 2023 (to which the SRA did not respond), which also set out the relevant law and why, in their opinion, the labels were applied correctly **[ASH1/244-257]**.

Decision of 3 May 2024

20. The SRA's Decision on Referral to the Solicitors Disciplinary Tribunal is dated 3 May 2024 (the "**Decision**") **[IWB1/865-870]**. The Decision abandoned the contention in Original Allegation 2 that the "*Not for publication*" label was improperly used. The Decision otherwise remained focussed on the alleged "*misuse of labels*" **[IWB1/869]**, confirming that the allegations against Mr Hurst

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are that the remaining "*labels were used improperly*" **[IWB1/866]**. The Decision accurately recorded Mr Hurst's Representations as follows:

> "*In the representations, it is asserted that the SRA have misunderstood the law and that Mr Hurst was entitled to use the labels referred to above. Alternatively, it is submitted that, to the extent that the authorities are open to interpretation, it is at least properly arguable that Mr Hurst was entitled to use these labels. On either basis, it is suggested, such use was not improper and cannot amount to professional misconduct. The independent opinion of Mr Caldecott KC is cited in support of that proposition...*" **[IWB1/867]**

21. The response in the Decision was to assert that Mr Hurst was wrong: "*I do not consider that there was a proper basis to label the Email "Confidential and Without Prejudice*" **[IWB1/867]**; "*I do not consider that the authorities cited in the representations provide support for any arguable duty of confidence in respect of the Email*"; "*If, which I do not accept, the contents of the Email could be argued to be confidential, the fact of it was not*"; "*there has never been any suggestion*[16]*, nor could there be, that any such duties extended to the fact of the dispute*"; "*I do not accept that the email was properly headed "Without Prejudice"*"; "*I do not consider it to be properly arguable that Mr Neidle was subject to a duty of confidence*"; "*The information contained in the Letter does not have the quality of confidence nor is anything imparted which give rise to a duty of confidence*" **[IWB1/867]**. Mr Hurst's motive in using the labels was said to be relevant to the question of seriousness: "*The misuse of labels by a solicitor such as Mr Hurst is more than a minor or administrative point...*" **[IWB1/869]**.

Rule 12 Statement of 28 May 2024

22. In the Rule 12 Statement, the SRA's position has changed yet further. Despite the Original Allegations and the case made at length in the Notice and the Decision, the SRA no longer asserts that the Without Prejudice label was improperly used; it is now merely "*not expressly accepted that the label was*

[16] This is simply incorrect: see §29 below.

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correctly used in this case"[17]. Nor does the SRA argue that the Letter was not private. The SRA's case is now pursued only in respect of the "confidential" label. However, the case made is now more amorphous. Aside from the contention that the SRA's approach to the Email "*was not correctly based on legal principles*"[18], it is now more widely alleged in the Allegations that Mr Hurst "*improperly attempted to restrict Mr Neidle's right to publish* [the Email and the Letter] *and/or discuss* [their] *contents*". The wider case is summarised in the Clarification Letter as follows:

> "*The gravamen of the Application is the attempt to prevent disclosure of the threatened libel claim without a properly arguable basis*." **[ASH1/276]**

23. In this Answer Mr Hurst responds to the Allegations and their "gravamen", as now set out in the Clarification Letter **[ASH1/276-277]**. However, it remains important to understand how the case against Mr Hurst has developed. First, it illustrates the lack of clarity and coherence in the SRA's allegations against Mr Hurst over time. Second, the SRA's case against Mr Hurst had always centred on the contention that he had improperly labelled the Email and Letter, i.e. that there was no properly arguable basis as a matter of law for using the labels he did. This focus was misconceived as a matter of law, but in one sense understandable; it is difficult to understand how Mr Hurst can be held to be in regulatory breach if everything he did was correct, or arguably correct, as a matter of law.

24. For his part, Mr Hurst's response remains that if the Tribunal determines, as a matter of law, that the Email was (or arguably was) without prejudice and confidential, and the Letter was (or was arguably) confidential, then that is determinative of the Allegations against him. Nonetheless, in view of the SRA's new wider case, Mr Hurst advances two central contentions in this Answer in support of his case that he acted at all times properly and in accordance with

[17] Rule 12 Statement, at §50. Somewhat oddly, in seeking to clarify the Rule 12 Statement by way of the Clarification Letter, the SRA has now suggested that it is "*likely*" that it will argue that the label was not correctly (although not improperly) used as a matter of law in its response to this Answer **[ASH1/277]**.
[18] Rule 12 Statement, at §61.

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both his client's interests and his own professional responsibilities and obligations:

(1) Mr Hurst was correct (alternatively he was arguably correct) as a matter of law to label the Email "*without prejudice and confidential*" and the Letter "*private and confidential*", and in those circumstances any restriction on Mr Neidle's right to publish and/or discuss the contents of the Email or the Letter cannot have been and was not pursued "*improperly*"; and

(2) Further, and in any event, Mr Hurst's conduct in writing the Email and the Letter to Mr Neidle was not "*inappropriate*"; "*oppressive*"; "*improper*", "*abusive*", "*intimidating*" (as variously alleged in the Rule 12 Statement); neither did Mr Hurst seek "*to take unfair advantage of Mr Neidle*"[19] or "*to mislead Mr Neidle*"[20].

These issues are addressed in turn below.

Legal Position

Without Prejudice Privilege

General Position

25. As stated above, the SRA no longer pursues an allegation that the Email was improperly labelled "without prejudice"[21]. However, the SRA has asserted in its Clarification Letter that if Mr Hurst advances a positive case in the Answer that such label was used correctly "*such an averment is likely to opposed by the SRA*" **[ASH1/277]**. There are two immediate responses to this unhelpful stance of the SRA. First, if it is relevant whether this label was used correctly, then the SRA was obliged to state its case in the Rule 12 Statement (and was and is not entitled to hold its case back for its Reply). Secondly, it is not necessary for Mr Hurst to establish that the label of without prejudice was used correctly, only

[19] Rule 12 Statement, at §59.

[20] Rule 12 Statement, at §60.

[21] The SRA's original (erroneous) position in the Notice was that in order for without prejudice privilege to apply there must be "*a genuine contemplation of subsequent litigation*" **[IWB1/10]** which contention was wrong in law: parties who have a potential dispute but have no active desire to litigation can engage in without prejudice discussions. (In any event, as at July 2022, Mr Zahawi was exercised by the allegations made against him and was ready to bring proceedings.)

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that it was *arguably* used correctly. The SRA does not suggest that it can, or will, contend that it was not arguable that the Email was without prejudice.

26. Given the SRA's position, and in order to avoid unduly lengthening the Answer, Mr Hurst does not here repeat the extensive recitation of supporting authority for Mr Hurst's position contained in and exhibited to the Representations **[IWB1/125-177]**. Mr Hurst does not understand this summary of the law to be controversial. If the SRA seeks, and is permitted by this Tribunal, to set out a positive case in its Reply, Mr Hurst will respond to that case as necessary.

Confidentiality of WP Communications

27. Without prejudice communications are by their nature confidential. As set out above, in the Notice the SRA had originally argued that "*The contention that 'Without Prejudice' communications are confidential is wrong*" (§24) **[IWB1/10-11]**. That argument has now been abandoned by the SRA. The argument now pursued by the SRA is different – it is that[22]:

> "*Even where a communication is properly headed without prejudice... it is not properly arguable that any duty of confidence arising from this would extend to the fact of the claim.*"

28. There are three things to note about the SRA's stance. First, it is clear the SRA now implicitly accepts that confidentiality can arise from the fact that communications are without prejudice[23]. The SRA's assertion is now focussed instead upon the ambit of that confidentiality. Second, the SRA's assertion that

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[22] Rule 12 Statement, at §50.

[23] The Clarification Letter takes a different approach again, stating "*Any duties of confidence arising from the fact of without prejudice communications must be derived from the express or implied agreement of the parties to participate in such communications*" **[ASH1/277]**. This is wrong as a matter of law. Without prejudice privilege is not predicated on any express or implied agreement between the parties and it follows that the confidentiality in such correspondence is not predicated on any such express or implied agreement. Such duties of confidence arise from the fact that such correspondence meets the legal test for confidentiality and in particular the public policy purpose for the without prejudice principle. The effect of without prejudice correspondence is to render the material in question inadmissible in proceedings, which is in and of itself a form of confidentiality. Moreover, the benefit of that inadmissibility could be jeopardised if the correspondence could be widely publicised outside the court.

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obligations of confidentiality do not extend to the fact of a claim intimated in without prejudice correspondence is unsupported by reasoning or authority.

29. Thirdly, the contrary conclusion, namely that the confidentiality in without prejudice communications does extend to the fact of offers and intimated claims, is at the very least arguable. Indeed, it is submitted that it is correct. Again, to avoid unduly lengthening this Answer, Mr Hurst draws attention to the contents of the Representations: the weight of authority supports the conclusion that without prejudice communications are confidential **[IWB1/125-177]**. The confidentiality arising from the without prejudice principle may extend to the fact of settlement negotiations[24] and to the fact of an intimated claim.

30.

Privacy and Confidentiality

Privacy

31. The SRA no longer pursues the allegation that the Letter was improperly labelled "private". The SRA does not allege in the Rule 12 Statement that the Letter was not private, let alone that it was not arguably private. In light of the SRA's stance in the Rule 12 Statement, attention is merely drawn at this stage to the uncontroversial summary of the law set out in the Representations **[IWB1/125-177]**.

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[24] See e.g. *Wildbur v MOD* [2016] EWHC 821 (Cranston J) at [14] where the Judge said that the principles set out in *Cutts v Head [1984] Ch 290*: "*...extend to the very fact of an offer of settlement negotiations*".

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Confidentiality

32. The starting point remains the formulation in *Coco v AN Clark (Engineers) Ltd* [1968] FSR 415, 419:

> '*First, the information itself, in the words of Lord Greene, M.R. in the Saltman case … must 'have the necessary quality of confidence about it'. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it*.'

33. In *Associated Newspapers Ltd v HRH Prince of Wales* [2008] Ch 57 at [33] the Court of Appeal approved the following formulation[25]:

> '*It seems to us that information will be confidential if it is available to one person (or a group of persons) and not generally available to others, provided that the person (or group) who possess the information does not intend that it shall become available to others*.'

34. The authors of *Toulson & Phipps on Confidentiality (4th Edition)* summarise the position[26]:

> '*To adapt these principles for more general application, it is suggested that the following elements characterise information that is confidential: (a) There must be some value to the party claiming confidentiality (not necessarily commercial) in the information being treated as confidential; (b) The information must be such that a reasonable person in the position of the parties would regard it as confidential; and reasonableness, usage, and practices in the relevant sector (for example, industrial or professional) are to be taken into account*.'

It is noted that this summary is expressly relied upon by the SRA[27].

35. The second principle from *Coco* was described in *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 281 as follows:

> '*… a duty of confidence arises when confidential information comes to the knowledge of a person (the confidant) in circumstances where he has*

[25] Given by the Court of Appeal in *Douglas v Hello (No 3)* [2006] QB 125 at [55]. Similarly in *The Racing Partnership Ltd & Ors v Sports Information Services Ltd* [2020] EWCA Civ. 1300, Arnold LJ concluded that "*the basic attribute which information must possess before it can be considered confidential [is] inaccessibility*".

[26] At §4-005.

[27] See the SRA's Note for Case Management Hearing on 4 July 2024 at §7 **[ASH1/279]**.

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> *notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others*.'

36. An obligation of confidence may therefore arise in the absence of any pre-existing relationship or agreement. In general, a recipient will be treated as having notice of the confidentiality of information where a reasonable person standing in the position of the recipient would know or ought to have known that the claimant would reasonably expect the information to be kept confidential[28].

37. Consistently with the second principle (and proposition (b) of *Toulson* set out above) confidentiality markings may be very important. The authors of *The Law of Privacy and the Media* cite the observation of Jacob J (as he then was) in *Barrymore v News Group Newspapers Ltd* [1997] FSR 600, 603 that "*if something is expressly said to be confidential, then it is much more likely to be so held by the Courts*" and conclude[29]:

> *"[a] non-contractual stipulation that information is, or is to be treated as, confidential will not be conclusive, but may be an important factor in determining whether the information is indeed confidential in nature*".

38. It follows that if a client wants a document to be treated confidentially, it may well be negligent for a solicitor not to stipulate that it should be treated as confidential, whether by suitable labelling or otherwise[30]. The starting point should thus be that it cannot be improper for a solicitor to make such an assertion of confidentiality when the assertion is itself material to the question of whether a document or piece of information is objectively confidential. That is particularly so in this case, where the SRA has acknowledged that it was proper for Mr Hurst to use the "Not for Publication" label on the Letter to

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[28] *Imerman v Tchenguiz* [2011] 2 WLR 592 [66]-[67]; *Primary Group (UK) Ltd v Royal Bank of Scotland* [2014] EWHC 1082 (Ch) [223]; *Matalia v Warwickshire CC* [2017] EWCA Civ 991 [46].

[29] *The Law of Privacy and the Media, Tugendhat & Christie, 3rd edition, 2016, Oxford* at §4.69.

[30] See e.g. *Tett Bros Ltd v Drake & Gordon* (1934) [1928-35] MacG CC 492 (Clauson J) referred to in *Gurry* at §2.110 in which a claim for breach of confidence failed in part because "*The letter had not been marked private and confidential*".

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indicate that Mr Zahawi did not want its contents published – i.e. he wanted it kept confidential.

39. Specific consideration can be given to correspondence. As is stated in *The Law of Privacy and the Media*[31], *"The court has protected the confidentiality of private correspondence since at least the late 18th century. It is clearly established that, as a starting point, the contents of private letters are to be regarded as subject to a duty of confidentiality owed by the recipients to the writer"*. The editors of *Gurry* cite the 19th century case of *Earl of Lytton v Devey*[32] in which Bacon V-C stated:

> "*It would be strange, indeed, if, because a man writes to another a confidential communication, that other has a right to publish it to the world. It is a matter between themselves. It would be neither just, nor right, nor lawful, that any publication of these communications should be made*."

40. The modern approach is similar. Because "correspondence" is specifically referred to in Article 8 of the ECHR as a matter in which an individual has a right to privacy, the Court will often analyse the issues through the same prism, although information need not be private to be confidential[33]. In *HRH The Duchess of Sussex v Associated Newspapers Ltd* [2021] 4 WLR 35 at [74] Warby J (as he then was) rejected as being *"at odds with a large body of authority"* the proposition that "*as a general principle, a recipient of a letter is not obliged to keep its existence or contents private, unless there are special circumstances, such as a mutual understanding between sender and recipient that the contents of a letter should be kept private"*[34].

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[31] *Ibid* at §5.92.
[32] *Earl of Lytton v Devey* (1884) 54 LJ Ch 293, 295-6; see *Gurry* at §2.106.
[33] See e.g. *Prince of Wales v Associated Newspapers Ltd* [2008] Ch 57 at [29] which also draws attention to the fact that *"Article 10.2 provides that the freedom to receive and impart information and ideas 'may be subject to such formalities, restrictions or penalties as are prescribed by law and necessary in a democratic society* _*for preventing the disclosure of information received in confidence*_*'"* (emphasis added).
[34] In *RH the Duchess of Sussex v Associated Newspapers Ltd* [2021] EWCA Civ 1810 the Court of Appeal did not cast any doubt on this analysis, and at [106] confirmed the fact that the claimant "*realised that her father might leak its contents to the media*" did not prevent the letter in question from being private.

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41. Further, in *Tchenguiz v Imerman* [2011] 2 WLR 592 at [76]-[77] the Court of Appeal stated that:

> "*Communications which are concerned with an individual's private life, including his personal finances, personal business dealings, and (possibly) his other business dealings are the stuff of personal confidentiality, and are specifically covered by article 8 of the Convention, which confers the right to respect for privacy and expressly mentions correspondence... ...Many emails sent to and by and on behalf of Mr Imerman, whether connected with his family or private life, his personal and family assets, or his business dealings must be of a private and confidential nature*."

That financial and tax information is presumptively private and confidential is beyond argument[35].

42. Nonetheless, a Claimant is still obliged (in accordance with *Coco v Clarke* and *Toulson* proposition (a)) to identify specific information which is said to be private and confidential: "*...neither privacy rights nor confidentiality rights are imposed in respect of information purely by virtue of the fact that it is disclosed and comes to a person's attention on an occasion which is private, rather than public. Nor does information attract the protection of the law of confidence purely by reason of being confided. The nature of the information is unquestionably an element of a claim in traditional breach of confidence, and one of the factors that go into the mix when applying the circumstantial test for whether information is private in nature*"[36].

43. As for the specific information in issue in the underlying matter, what was most private and confidential were the facts that (i) Mr Zahawi had instructed libel solicitors Osborne Clarke to respond to a specific allegation of dishonesty (the

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[35] See e.g. *Bloomberg LP v ZXC* [2022] UKSC 5 at [52] and *Revenue and Customs Commissioners v Banjerjee* [2009] EWHC 1229 (Ch) at [13]: "*the starting point is that a person's financial and tax affairs are private and confidential in nature*".

[36] *Candy v Holyoake & Ors* [2017] EWHC 373 (QB) at [47].

Dishonesty Imputation) in relation to his personal tax affairs[37], (ii) [redacted] and (iii) in respect of the Letter, was not threatening legal action at that stage. This information was not publicly known. The confidentiality in this information was of value to Mr Zahawi (as per *Toulson* (a)) for at least three reasons. First, because its repetition would lead to damaging secondary publicity of the Dishonesty Imputation (through reporting the fact that Mr Zahawi had instructed libel lawyers to seek to address it). Second, because it would reveal Mr Zahawi's negotiating position, including to other potential publishers who might consider it a sign of weakness in relation to such a serious allegation, and which might in turn impact the force of any future libel action. Third, because the reality was that public revelation of Mr Zahawi's decision to take legal steps in respect of the Dishonesty Imputation, including through the use of libel lawyers, would likely lead to further adverse and unfair publicity of Mr Zahawi.

44. In further support of Mr Hurst's position in relation to *Toulson* (b), in addition to the facts and matters set out above Mr Hurst will rely upon the following in relation to usage and practices in the relevant sector:

(1) As set out in the Summary of Background Facts, each of Osborne Clark's letters to the Independent, Guardian and Associated Newspapers (publishers of the *Daily Mail*) suggesting that they had gone too far in accusing Mr Zahawi of engaging in tax evasion or tax avoidance was headed "*private and confidential*" **[ASH1/134-139]**. None of those publishers queried the labelling, suggested it was in any way improper, or indeed published the correspondence or the fact of it.[38]

[37] In *ZXC* the Supreme Court identified "*involvement in civil litigation concerning private affairs*" as a type of information that will normally be regarded as giving rise to a reasonable expectation of privacy.

[38] Forensically, Mr Hurst obviously did not expect the three letters to be published or circulated as if he did it would have written only a single letter. The SRA has recently suggested that it may argue that there is a "practice" of recipients of letters to media organisations sharing it with "others". It is not clear what this means or what (admissible) evidence the SRA proposes to advance to support the contention. It is not part of the Rule 12 Statement, and so Mr Hurst's position in relation to it is reserved.

(2) In the recent decision of *Pacini & Anor v Dow Jones & Company Inc*. [2024] EWHC 1709 (KB) the experienced media Judge HHJ Richard Parkes KC referred without criticism to pre-action letters from specialist media solicitors (both Harbottle & Lewis; and Withers) being marked "*Strictly Private and Confidential'*[39].

(3) In *Gatley*, practitioners are specifically advised that "*…if there is a risk that it [a letter of complaint] may be published, it should be headed "Private and confidential - Not for publication*" and that "*Heading a letter as suggested will not necessarily put off the recipient from [publishing it], but a responsible solicitor would certainly advise his client that it would be inadvisable (as a potential breach of confidence, or as aggravating the situation and possibly the damages)*"[40]. The second part of this extract emphasises that responsible solicitors should understand that publishing a letter in such circumstances may be a breach of confidence.

(4) Attempting to restrict publication of the Email and Letter or their contents was a proper strategic objective for the three reasons identified in paragraph 43 above.

(5) In *Hayden v Dickenson* [2020] EWHC 3291 (QB), Nicklin J refers at [9] to Julian Knowles J having relied upon the fact that "*the Defendant had posted on Twitter and Facebook part of correspondence – marked 'private and confidential' – which had been sent to her by the Claimant*" in support of granting an injunction without notice against the Defendant[41].

(6) In the Updated Warning Notice on SLAPPs (published after the Email and the Letter had been sent[42]), the SRA specifically records that: "*We accept that there will be legitimate reasons for labelling correspondence and that this is a long-established practice in the legal profession. Such labels can be a useful indicator of the intention of the author of the letter and the*

[39] At [17], [28] and [29].
[40] *Gatley on Libel & Slander*, 13th edition, at §26-007.
[41] Mr Hurst has not been able to locate a copy of any judgment or ruling given by Julian Knowles J.
[42] Although it reflects the approach adopted by Mr Hurst.

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purpose of correspondence. Further, we recognise the importance of enabling views, and often confidential information, to be exchanged on both sides, to ensure that reporting is appropriate, accurate and balanced. Further, the confidentiality of communications often encourages parties to share information and resolve disputes on the understanding that the issues will not become public."[43] **[ASH1/273]**.

Public Interest

45. Finally, the Rule 12 Statement mischaracterises and misstates the law in relation to "public interest":

(1) First, contrary to what appears to be suggested in the Rule 12 Statement[44], there is a fundamental distinction between "the public interest" and "interesting to the public". The latter does not meet a "public interest" test. The distinction is well recognised in the jurisprudence of both breach of confidence and privacy[45]. Much of the reasoning and references in the Rule 12 Statement fall into the category of "interesting to the public".

(2) Second, the question of public interest must be assessed not in relation to the general "story" but in relation to the precise piece of information that the would-be publisher intends to publish. Thus, in *ZXC*, as explained by the Supreme Court, the Judge considered that, while there was a high general public interest in the issue of corruption in foreign states and possible involvement by a specific company, that had "*only an indirect bearing*" on the case because the article in question was not presenting the fruits of an investigation but "*reported some of the contents of the [Letter of Request]*"[46]. The question was therefore whether there was "*sufficient*

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[43] This is consistent with what is stated in §1.6 of the Representations (without subsequent challenge): "*It is relevant to appreciate that the application of the Labels is entirely consistent with standard professional practice. It is commonplace for legal correspondence to be marked "confidential" and "without prejudice" in reputation management matters where one of its aims is to restrict the circulation of damaging allegations.*" **[IWB1/127]**.

[44] Rule 12 Statement, for example at §§48, 58.

[45] *The Law of Privacy and the Media* at §11.79 and §11.125.

[46] *ZXC* at [28].

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public interest in revealing information about the UKLEB's investigation drawn from the LoR to outweigh the reasonable expectation of privacy..."[47]. In this case, Mr Hurst openly acknowledged the public interest in scrutiny of Mr Zahawi's tax affairs.

(3) Third, as indicated in the quote above, the fact that a publication may be in the public interest is not conclusive as to whether it is defensible. As was said in *ZXC*: "*It has at all times been common ground that liability for misuse of private information is determined by applying a two-stage test. Stage one is whether the claimant objectively has a reasonable expectation of privacy in the relevant information. If so, stage two is whether that expectation is outweighed by the publisher's right to freedom of expression. This involves a balancing exercise between the claimant's article 8 right to privacy and the publisher's article 10 right to freedom of expression*"[48]. The SRA does not refer to or attempt to undertake any balancing exercise in its Rule 12 Statement. To the extent that it was in the public interest to publish the Dishonesty Imputation or the fact of the Email and Letter, it was at least arguable that any such public interest was outweighed by opposing public interest factors, such as Mr Zahawi's own rights and interests.

(4) Fourth, the position is *a fortiori* in relation to confidence, where the question is slightly different. As stated by the Court of Appeal in *HRH the Prince of Wales v Associated Newspapers Ltd* [2006] EWCA Civ 1776, [2008] Ch 57 at [68]:[49]

> "*For these reasons, the test to be applied when considering whether it is necessary to restrict freedom of expression in order to prevent disclosure of information received in confidence is not simply whether the information is a matter of public interest but whether, in all the circumstances, it is in the public interest that the duty of confidence should be breached. The court will need to consider whether, having regard to the nature of the information and all the relevant circumstances, it is legitimate for the owner of the information to seek*

[47] *ZXC* at [29].
[48] *ZXC* at [26].
[49] See also *ABC & Ors v Telegraph Media Group Ltd* [2018] EWCA Civ 2329 and *ZXC* at [152]-[153].

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to keep it confidential or whether it is in the public interest that the information should be made public."

The SRA does not even refer to that test, let alone engage with it.

(5) Fifth, the statement of Mr Neidle that *"publishing the fact that the Chancellor is seeking to silence an allegation of dishonesty against him is absolutely in the public interest"* (which the SRA appears to adopt) is incorrect **[IWB1/115]**; in fact, in accordance with the principles of Article 10 set out above, if the allegation is untrue and any claim in defamation in respect of it not susceptible to a defence of public interest (no attempt having been made by Mr Neidle to put his intended allegation of dishonesty to Mr Zahawi before publication), the public interest is best served by not repeating the allegation and retracting it and not occasioning further adverse publicity to Mr Zahawi for taking steps he was entitled to take to address it. Any public interest in that fact is outweighed by the factors set out above.

(6) Sixth, a contention that publication was or would be in the public interest is most unlikely of itself to establish that it was or is unarguable that a piece of correspondence is private or confidential; rather, once privacy and/or confidentiality are established, then rival positions on the public interest balance are or would be arguable, as was the position in the present matter.

SRA's Position

46. The SRA does not engage with these authorities and instead asserts that "*there is no authority that comes close to supporting*" Mr Hurst's position[50]. This is wrong as set out above (and as previously detailed in the Representations, **[IWB1/125-177]** with which the SRA did not engage), but the SRA also approaches the issue backwards. It is the SRA which must show that Mr Hurst's contention is unarguable. Put another way, the SRA must establish that no reasonable lawyer could believe that the correspondence was potentially

[50] Rule 12 Statement, at §52.

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confidential. At no point has the SRA identified any authority to support such an extreme view. Mr Hurst is not aware of any prior matter in which it has even been contended that asserting confidentiality in such correspondence is wrong, let alone that to do so constitutes a regulatory breach of such seriousness that it merits referral to the Tribunal.

47. The SRA's approach has another consequence. As set out at paragraphs 37 to 38 above, labelling a document confidential may be an "*important factor*" in determining whether it is indeed confidential[51]. The SRA's position would appear to prevent a solicitor from using such a label, thereby creating an impossible situation whereby a document might be deemed not to be confidential solely because the SRA have deemed it improper for a solicitor to assert that it is.

Conclusions

48. For these reasons, the Email and the Letter were arguably confidential to Mr Zahawi and Mr Hurst was entitled to contend that they were confidential. Mr Hurst was also entitled to assert and/or request that Mr Neidle should not publish or refer to them, other than for the purposes of seeking legal advice.

Conduct Not Oppressive/Improper

49. As set out above, insofar as the SRA alleges that Mr Hurst's conduct was in any event improper, Mr Hurst will additionally rely upon the following:

    (1) Mr Hurst was at no stage seeking to intimidate or oppress or mislead Mr Neidle. The Email and Letter were written in a moderate, clear tone and did not use abusive, intimidating or aggressive language. Further, Mr Hurst specifically stated that "*We recommend that you seek advice from [a] libel lawyer if you have not done already*" **[IWB1/59]**. Had Mr Hurst been seeking to intimidate or oppress or mislead Mr Neidle, he would not have written in

[51] *The Law of Privacy and the Media, Tugendhat & Christie, 3rd edition, 2016, Oxford* at §4.69.

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such terms. Mr Hurst first sought to speak with Mr Neidle before writing to him at all – correspondence was only necessary because Mr Neidle refused to speak with him.

(2) Both the Email and the Letter made it clear that no complaint was being made in respect of the vast majority of Mr Neidle's reporting in relation to Mr Zahawi: "*Our client recognises that, as Chancellor and an MP, he is accountable to the public and it is right that he be asked questions relating to the use of offshore companies. He also recognises that you are absolutely entitled to raise the questions that you have done about his tax affairs, especially given your expert status. Until today, you have mainly done so in a balanced and fair way, even if our client does not agree with some of your allegations and assumptions*" **[IWB1/58, 61]**.

(3) While Mr Neidle was an individual, he was in an exceptional position because he was an acknowledged tax expert (and former partner at a leading law firm) whose publications and background briefings were being treated by many media organisations as authoritative. Mr Hurst was careful to consider and reflect this position in his correspondence.

(4) Mr Hurst did not use the "*private and confidential*" label only with Mr Neidle. He also used it in his contemporaneous correspondence with media organisations who had also published (or threatened to publish) defamatory allegations which were considered to fall outside the wide ambit of public interest **[ASH1/134-139]**. This belies any intention to intimidate or oppress or mislead Mr Neidle. Had Mr Hurst considered his approach to be in any way other than in accordance with the law or his duties, he would not have written to media organisations in this way.

(5)

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Mr Hurst also subsequently confirmed in an email to Mr Neidle: "... *we previously tried to open up a confidential channel of communication with you in an attempt amicably to resolve a dispute over your allegation that our client lied...*" **[ASH1/226]**.

(6) One of the reasons that Mr Hurst sought to engage with Mr Neidle on a without prejudice basis was the protection of Mr Neidle. Mr Hurst anticipated that Mr Neidle was not an expert in defamation law, and therefore wanted to ensure that Mr Neidle felt that he was able to speak without having to worry about saying anything that would impact his legal position. As above, Mr Hurst specifically recommended in the Email that Mr Neidle take specialist advice. He reiterated his offer of a without prejudice phone call as well **[IWB1/59]**.

(7) The Letter was specifically couched in terms of a *request* to Mr Neidle that it was treated confidentiality: "*Please note that this letter is headed as both private and confidential and not for publication. We therefore request that you do not make the letter, the fact of the letter or its contents public.*" (emphasis added) **[IWB1/61]**. This cannot sensibly be viewed as intimidatory or abusive.

(8) Mr Neidle was not vulnerable to intimidation, or uninformed. On the contrary, he has described his dealings with Mr Zahawi as "*a fun legal litigation game which is what I do. I am a really fucking terrible person to sue, because I enjoy it, I have money, I have time. I have lots of legal friends*." **[ASH1/259]** At one stage he himself threatened libel proceedings against Mr Hurst **[ASH1/240-241]**. As to relative strength, Mr Neidle has specifically refuted that there was some imbalance of power:

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> *This was David vs Goliath, and David won!*
>
> *No – Zahawi and his advisers made the tactical mistake of accidentally SLAPPing someone with plenty of financial resources, time, litigation experience, and plenty of contacts and friends in the legal, tax and media worlds. I'm sure Zahawi spent a small fortune on advisers – but my team would probably have cost ten times as much (had they charged me). Goliath accidentally started a fight with a bigger Goliath …* **[ASH1/242]**

50. At all material times, Mr Hurst's conduct was appropriate and proper, and did not seek to mislead or take unfair advantage of Mr Neidle.

Response to the Rule 12 Statement

51. The response to paragraphs 1 to 42 of the Rule 12 Statement is set out above and in the Summary of Background Facts.

52. Paragraph 43 is admitted. It is averred that the Allegations contained in the Notice differ significantly from the content of the Notice. Paragraphs 16 to 24 above are repeated.

53. As to paragraph 44:

    (1) It is admitted that Mr Hurst's Response to the Notice made the assertions set out in paragraphs 44.1 to 44.2.

    (2) It is denied, and it is a mischaracterisation to suggest, that Mr Hurst's Response to the Notice only contained the assertions set out in paragraphs 44.1 to 44.2.

54. As to paragraph 45, Mr Hurst repeats the Summary of Background Facts. The contents of the Email set out at paragraphs 45.1 to 45.5 are admitted, but Mr Hurst will rely upon the whole of the Email for its precise terms.

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55. As to paragraph 46:

(1) The first sentence is denied as being materially inaccurate and incomplete. Mr Neidle was in fact responsible for much of the media scrutiny that was taking place at the material time. The Summary of Background Facts, in particular, paragraphs 13, 22-23, 32, 41-43, 57 and 66, is repeated.

(2) As to the second sentence:

a. It is denied that publication of the fact that Mr Neidle had accused Mr Zahawi of being dishonest was in the public interest. Paragraph 45 above is repeated.

b. In any event, whether or not publication of that fact was in the public interest is not the relevant question for determining whether publication of the Email was private or confidential, or whether Mr Hurst's conduct in relation to it improper. Paragraph 45(6) above is repeated.

(3) As to the third sentence:

a. It is denied that publication of the fact that Mr Zahawi's response was to instruct a solicitor at a specialist libel lawyer to send correspondence to Mr Neidle threatening legal action was a matter of public interest. Alternatively any such public interest was outweighed in all the circumstances of the case. Paragraph 45 above is repeated.

b. Further, any contention that publication of the fact that the Mr Zahawi was seeking to silence the allegation of dishonesty was itself in the public interest is wrong as matter of law. Paragraph 45(5) above is repeated.

c. In any event, whether or not publication of those facts were in the public interest is not the relevant question for determining whether

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publication of the Email was private or confidential, or whether Mr Hurst's conduct in relation to it improper. Paragraph 45(6) above is repeated.

56. As to paragraph 47:

(1) It is admitted that Mr Hurst was aware that there was a risk that Mr Neidle would publish or refer to the contents of the Email. It is denied that this means that the contents were not private or confidential. Indeed, this risk underlined the importance of Mr Hurst indicating to Mr Neidle that the intention of Mr Zahawi was for the correspondence to be kept confidential. Paragraph 45 above is repeated.

(2) In the event, Mr Neidle did not immediately publish the Email on the internet. He only did so on 22 July 2022, after he had also received the Letter **[IWB1/75-80]**.

57. As to paragraph 48:

(1) The first two sentences are noted, but are irrelevant. Further:

b. Any suggestion that Mr Zahawi should be treated differently because he sought to address "*what he perceived to be a false allegation of lies*" by instructing specialist solicitors to respond is denied. Such a suggestion would have serious implications for access to justice. Paragraph 15 above is repeated.

(2) The final sentence is denied and is also irrelevant; the fact that something might have merited reporting does not mean that it was in the public interest; the fact that Mr Zahawi had instructed his lawyer to send the Without Prejudice Email was not of itself in the public interest; in any event,

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that is not the applicable test, as set out above. Paragraph 45 above is repeated.

58. Paragraph 49 is denied. In particular:

(1) It is denied that the Email "*simply referred to matters which were already subject to public scrutiny*". On the contrary, it contained private and confidential information. Paragraphs 31 to 48 above are repeated.

(2) It is denied in any event that the attempt to restrict Mr Neidle's right to publish it or its contents was inappropriate. Paragraph 24 above is repeated.

59. As to paragraph 50:

(1) It is denied that it was not properly arguable that Mr Neidle was subject to a duty of confidence in relation to all (or any) of the information conveyed by the Email. On the contrary, Mr Neidle was arguably subject to such a duty as is supported by the authorities. Paragraphs 31 to 48 above are repeated.

(2) It is denied that it is common ground that there is nothing confidential in the information relating to Mr Zahawi's tax affairs.

(3) It is admitted that the Email sought to prevent Mr Neidle from referring to the fact of Mr Zahawi's threatened defamation claim against him "*other than for the purposes of seeking legal advice*". This was correct, or arguably correct, as a matter of law and was not improper. Paragraphs 3(3) and 31 to 48 above are repeated.

(4) It is denied that it is not properly arguable that any duty of confidence arising from a communication being without prejudice would extend to the fact of the claim.

60. Paragraph 51 is admitted. Paragraph 32 above is repeated.

61. Paragraph 52 is denied.

    (1) As to the first sentence, there is a proper basis for submitting that the fact of Mr Zahawi's claim had the necessary quality of confidence and/or that it was imparted to Mr Neidle in circumstances importing an obligation of confidence on him. Paragraphs 32 to 44 above are repeated, where the position is considered in detail.

    (2) The second sentence is so vague as to be impossible to plead to;

    (3) As to the third sentence, it is denied that there is no authority that "*comes close*" to supporting the imposition of such a duty on Mr Neidle. The relevant authorities are considered in detail in paragraph 32 to 44 above. Mr Hurst will rely in particular upon: *Earl of Lytton v Devey* (1884) 54 LJ Ch 293*; Prince of Wales v Associated Newspapers Ltd* [2008] Ch 57; *Tchenguiz v Imerman* [2011] 2 WLR 592; *HRH The Duchess of Sussex v Associated Newspapers Ltd* [2021] 4 WLR 35; and *Bloomberg LP v ZXC* [2022] UKSC 5.

62. As to paragraph 53:

    (1) [redacted] Contrary to the implication of paragraph 53, this was a proper objective. Paragraph 11 above in particular is repeated.

    (2) It is further admitted that when Mr Neidle published the Email there was considerable coverage which repeated the Dishonesty Imputation, and averred that Mr Hurst was entitled to take the steps that he did to prevent such secondary publication.

63. As to paragraph 54:

    (1) The first sentence of paragraph 54 is denied. Contrary to the SRA's implication, it can be (and was in this case) a proper objective to seek to limit

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the ability of a recipient of a legal complaint from publishing that complaint. It is denied that in and of itself that amounts to "*an oppressive or abusive tactic*". Paragraph 11 above in particular is repeated.

(2) As to the remainder of paragraph 54, it is unclear whether it is alleged that Mr Hurst has engaged in the behaviour identified in paragraphs 54.1 to 54.3[52]. If that is alleged, it is denied. As to which:

a. Mr Hurst did not allege that Mr Neidle was potentially liable for costs that are not legally recoverable. Mr Hurst did not refer to costs at all. Nor did Mr Hurst make exaggerated claims of adverse consequences for Mr Neidle from his publication of the Dishonesty Imputation. In any event, paragraphs 3(4) and 49 to 50 above are repeated.

b. The Email (and the Letter) were not excessively legalistic, whether "*with the aim of intimidating*" or otherwise. The Email (and the Letter) were written in plain English, in a clear and conciliatory tone. Mr Neidle was not in any event a vulnerable party – he was a sophisticated lawyer with access to a wide range of resources and specialist advice.

c. The Email (and the Letter) were not written in an abusive, intimidating or aggressive tone or language. The opposite is the case.

64. As to paragraph 55, the Guidance is admitted but the interpretation which the SRA now seeks to place upon that Guidance is denied.

65. As to paragraph 56:

(1) [redacted]

[52] It is presumed that the SRA intended to plead that it had "condemned" such behaviour, rather than "condoned" it.

(2) It is denied (if it be alleged) that the Dishonesty Imputation had been published widely or at all in the press coverage to that date.

(3) It is admitted that Mr Hurst was aware of the risk that Mr Zahawi's actions in relation to the Dishonesty Imputation might generate significant press attention (but that is not the same thing as "the public interest").

66. Paragraph 57 is denied. The attempt was not "improper"; on the contrary it was a proper objective to seek to limit Mr Neidle's ability to publish or discuss the Email or Letter. Paragraph 11 above in particular is repeated. It is denied that Mr Hurst adopted an "*oppressive and intimidating*" approach in any way. Paragraph 3(4) and 49 to 50 above are repeated.

67. As to paragraph 58:

(1) [redacted]

(2) It is for the SRA to prove whether that was "*capable of being of great concern to the British public*" (but in any event that is not the same as something being in "the public interest"). It is denied that that is the material question for the purposes of whether Mr Hurst engaged in improper behaviour.

(3) The suggestion that Mr Zahawi was obliged to engage, or should have, engaged with the Dishonesty Imputation only in a way in which it was publicly repeated is denied and would be contrary to his Convention rights. Making "*a public statement*" in relation to the Dishonest Imputation could have led to further damaging Mr Zahawi's reputation by widely publishing the allegation, and would not have achieved the objective of securing a retraction of the Defamatory Imputation by Mr Neidle as the source and exponent of it.

68. Paragraph 59 is denied. Mr Hurst was at no time seeking to take unfair advantage of Mr Neidle or allegedly relying on some apparent lack of knowledge

on the part of Mr Neidle in relation to matters connected with defamation and privacy. The suggestion is without foundation. In particular, Mr Hurst wrote in the same terms, on the same "*Private and Confidential*" basis, to mainstream media organisations in relation to aspects of their own reporting which were considered to be defamatory and unsustainable **[ASH1/134-139]**. Paragraphs 34 and 37 of the Summary of Background Facts in particular are repeated. Contrary to the impression created in paragraph 59, Mr Hurst did not only adopt this approach when writing to Mr Neidle. Further, Mr Hurst positively recommended that Mr Neidle should obtain specialist legal advice (although it is now clear that such recommendation was unnecessary as Mr Neidle had access to a team that would apparently have cost "*ten times*" that of Mr Zahawi) **[IWB1/59], [ASH1/242]**.

69. Paragraph 60 is denied. Mr Hurst at no stage sought to mislead Mr Neidle as to what he was entitled to do with the Email. On the contrary, Mr Hurst at all times considered that he was correctly stating the position. Paragraphs 3(4) and 49 to 50 above are repeated.

70. Paragraph 61 is denied:

    (1) It is denied that there was a "*threat of serious consequences*" in the Email and it is noted that the SRA misstates its contents. The Email stated that it would be a "*serious matter*" for Mr Neidle to publish or refer to the Email, other than for the purpose of seeking legal advice **[IWB1/59]**. [redacted] The reference to it being a "*serious matter*" was immediately followed by a recommendation by Mr Hurst for Mr Neidle to contact a specialist lawyer. The reference to it being a "*serious matter*"

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simply indicated [redacted] that it would be a serious matter for Mr Neidle (a former partner of a city law firm) to publish it; the reference had no menacing tone or imputation of any threat.

(2) The attempt to restrict Mr Neidle's handling of the Email and the statement that publication would be a serious matter were correctly based on legal principles; alternatively it was arguably based on legal principles and at all times Mr Hurst believed it was based on legal principles. Paragraphs 24 to 48 above are repeated.

(3) It is denied that the attempt was made "*to try and shield Mr Zahawi and his affairs from public scrutiny*". On the contrary, the Email expressly stated that "*Our client recognises that, as Chancellor and an MP, he is accountable to the public and it is right that he be asked questions relating to the use of offshore companies. He also recognises that you are absolutely entitled to raise the questions that you have done about his tax affairs, especially given your expert status*." **[IWB1/58]** Paragraphs 8(6) and 49 to 50 above are repeated.

(4) It is averred that the attempt was made in order to avoid a wave of damaging secondary publicity for the Dishonesty Imputation; to avoid the risk of undermining any subsequent attempt by Mr Zahawi to take action in relation to the Dishonest Imputation; and to attempt to resolve matters without recourse to litigation. These are proper purposes.

71. As to paragraph 62:

(1) It is admitted that the public is entitled to trust and expect that solicitors will act appropriately towards opposing parties in any apparent dispute, and not seek to make inappropriate requests of them which serve only to benefit their client's interests. It is denied that Mr Hurst acted contrary to this principle.

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(2) It is denied that the request to Mr Neidle was made "*to prevent public scrutiny*" of Mr Zahawi's decision. It was made in order to avoid a wave of damaging secondary publicity for the Dishonesty Imputation, to avoid the risk of undermining any subsequent attempt by Mr Zahawi to take action in relation to the Dishonest Imputation; and in an attempt to resolve matters without recourse to litigation. These are proper purposes.

(3) The use of the word "*resort*" together with the phrase "*threaten legal action*" are unduly pejorative; Mr Zahawi, as with any client, was entitled to instruct a solicitor to defend and advance his legitimate interests;

(4) It is noted that, in any event, the SRA does not allege that the threat of legal action in respect of the Dishonest Imputation was inappropriate.

(5) It is denied that Mr Hurst's attempt to restrict publication of the threat of legal action was improper. On the contrary, it was done for proper purposes.

72. Paragraph 63 is denied. In particular:

(1) It is denied that Mr Hurst acted with a lack of integrity, whether as alleged or at all.

(2) It is denied that Mr Hurst sought to mislead Mr Neidle in any way. Paragraphs 3(4) and 49 to 50 above are repeated.

(3) It is denied that Mr Hurst was seeking "*simply to try and save his client from further embarrassment*". Mr Hurst was seeking to avoid a wave of damaging secondary publicity for the Dishonesty Imputation, to avoid the risk of undermining any subsequent attempt by Mr Zahawi to take action in relation to the Dishonest Imputation and to attempt to resolve matters without recourse to litigation. These are proper purposes.

(4) It is denied that Mr Hurst prioritised his client's interests over his own professional responsibilities or obligations. Mr Hurst acted appropriately in accordance with the best interests of his client.

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73. As to paragraph 64:

    (1) The first two sentences are noted. The Letter was indeed an "open" letter rather than being without prejudice. Mr Hurst repeats the Summary of Background Facts.

    (2) The contents of the Letter set out at paragraphs 64.1 to 64.3 are admitted, but Mr Hurst will rely upon the whole of the Letter for its precise terms.

74. As to paragraph 65:

    (1) It is unclear what "*points advanced above*" are said to "*equally apply*"; it is denied that the Letter can simply be equated with the Email;

    (2) It is for the SRA to prove "*what the public would have wanted to know*". It is further denied, even if true, that this is relevant to "the public interest" and/or provides any support for the SRA's case that Mr Hurst acted improperly. Paragraph 45 above is repeated.

    (3) It is denied that Mr Hurst acted improperly in sending the Letter. Paragraphs 49 to 50 above are repeated.

75. As to paragraph 66, the Letter was indeed an "open" letter rather than being without prejudice:

    (1) It is denied that the Letter expressly sought to impose any restrictions on Mr Neidle;

        a. The Letter stated that "*If your request for open correspondence is motivated by a desire to publish whatever you receive then that would be improper*" **[IWB1/61]**; that sentence did not of itself seek to impose a restriction and was in any event an accurate statement;

        b. The Letter <u>requested</u> that Mr Neidle did not make the Letter, the fact of the Letter or its contents public; that sentence did not of itself seek to impose a restriction nor make any threats against Mr Neidle, and was in any event an accurate statement;

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(2) In any event, to the extent that Mr Hurst can be said to have sought to impose a restriction on Mr Neidle's handling of the Letter, it is averred that it was proper for him to do so. Paragraphs 3(3) and 31 to 48 above are repeated.

76. In the circumstances, paragraph 67 is denied.

77. Save that it is denied that the SRA undertook a proper investigation or followed a proper process herein, paragraph 68 is noted.

Conclusion

78. For the reasons set out in this Answer, the Allegations set out in paragraphs 1.1 and 1.2 of the Rule 12 Statement are denied. Mr Hurst did not improperly attempt to restrict Mr Neidle's right to publish and/or discuss the contents of the Email or the Letter. In particular:

(1) Mr Hurst was correct (alternatively he was arguably correct) as a matter of law to label the Email "*without prejudice and confidential*" and the Letter "*private and confidential*", and in those circumstances any restriction on Mr Neidle's right to publish and/or discuss the contents of the Email or the Letter cannot have been and was not pursued "*improperly*"; and

(2) Further, and in any event, Mr Hurst's conduct in writing the Email and the Letter to Mr Neidle was not "*inappropriate*"; "*oppressive*"; "*improper*", "*abusive*", "*intimidating*" (as variously alleged in the Rule 12 Statement); neither did Mr Hurst seek "*to take unfair advantage of Mr Neidle*"[53] or "*to mislead Mr Neidle*"[54].

(3) Mr Hurst acted appropriately in accordance with the best interests of his client and in compliance with his regulatory duties and obligations.

[53] Rule 12 Statement, at §59.
[54] Rule 12 Statement, at §60.

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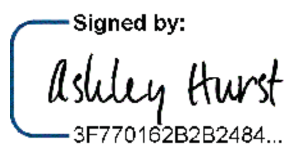
79. In those circumstances, Mr Hurst has not breached any of Paragraphs 1.2, 1.4 or 2.4 or Principles 2 or 5 of the Code, whether as alleged or at all.

Ben Hubble KC

Ian Helme

I believe that the facts and matters stated in this Answer to the Rule 12 Statement are true.

Signed:



Ashley Hurst

Dated 8 August 2024

File and served by CMS Cameron McKenna Nabarro Olswang LLP on behalf of the Respondent