Case No. 12612-2024

IN 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

APPLICANT'S SKELETON ARGUMENT: SUBSTANTIVE HEARING

Reading list: This SA refers to all documents and authorities that the SRA considers to be relevant with references to the (very large) bundle. Assuming sufficient pre-reading time, the Tribunal should read the body of the pleadings and the WSs (and the exhibits insofar as judged necessary). The key documents in relation to the facts are the 16/7 Email and 19/7/ Letter (and the limited preceding communications between R and DN) and the WhatsApp communications ("WAMs") between R & NZ's "team", collated separately at B71-154 and B161-194. The most important WAMs are between 16/7 and 23/7. The earlier ones set the context. Attached to this SA are a referenced chronology between 16/7 and 23/7 (currently not agreed) which combines the WAMs in date/time order, a dramatis personae (agreed) and lined versions of the Email & Letter. Ch. 2, 4 and [17-010] – [17-025] of *Toulson & Phipps on Confidentiality* set out the relevant legal principles. The most relevant passages and citations from *Toulson* and the authorities are set out in this SA. Estimated reading time: 1 day.

Contents

The Applicant's Case

The Gravamen

1. This Application is far more straightforward than the voluminous documentation and authorities suggest.

X58-9

2. It primarily relates to two sentences set out below in an email ("the Email") sent by R to Dan Neidle ("DN") on 16/7/22 at 18:53 on behalf of Nadhim Zahawi ("NZ"), the Chancellor of the Exchequer at the time. The Email was headed "*Confidential & Without Prejudice*". It threatened a defamation claim against DN ("the Defamation Claim").

> *"It is up to you whether you respond to this email but you are not entitled to publish it or refer to it other than for the purposes of seeking legal advice. That would be a serious matter as you know.*"

3. The first sentence will be referred to as the Prohibition on Disclosure and the second as the Implicit Threat. Such wording is highly unusual if not unprecedented.

4. The Prohibition on Disclosure plainly extended to DN informing anyone other than a legal representative of the fact of the Defamation Claim. This appeared to have been unambiguously admitted in Answer [59(3)]. However, there have been two recent attempts by R to row back. First, it is suggested in R's WS that the Prohibition entitled disclosure to DN's "*friends, family and team*" (see further in [17]-[19] below). Second, very recent correspondence has sought to raise a distinction between the fact of the Claim and the fact of the Email, on the basis that only reference to the latter was covered by the Prohibition. Since the Email was the only notification of the Claim, it is difficult to see how it is possible to refer to the Claim without referring (directly or indirectly) to the Email. R's stance may become clearer at the hearing. In any event, it is not a distinction that would have appeared to DN or any other reasonable recipient of the Email.

B34

CMS letter 29/11 [6b] M269

X897

5. The Email was preceded by a message from DN: "*Please note I will not accept without prejudice correspondence*". DN had also declined R's invitation to "*have a quick call*" and requested: "*Please send me anything you have to say in writing*".

X897

6. The gravamen from the outset of DN's complaint to the SRA was and is the attempt to keep the Defamation Claim secret with no proper basis. R has made repeated diversionary assertions of changes of position by the SRA and a lack of clarity. On 18/10/24 the Tribunal rejected R's application to strike out and/or for further information in respect of parts of the R12 and Reply, finding that they were "*clear and properly pleaded*". The Application does not relate to the substantive merits

Memo F38-62

F60 [108]

of the Defamation Claim. However, the nature of the Defamation Claim is relevant to the seriousness of the attempt to keep it secret (see further in [25]-[31] below).

X41

7. The Defamation Claim related to a tweet ("the Tweet") published by DN earlier on 16/7/22 in the course of a series of tweets commenting on NZ's denial of tax avoidance. According to R's understanding, the Tweet conveyed the following allegation ("the Lying/Tax avoidance allegation"): "[NZ] *had lied in relation to his explanation of why Balshore had been allocated shares in YouGov in order to conceal tax avoidance*". The Answer describes it as the "Dishonesty Imputation". It is intrinsically linked to NZ's denial of tax avoidance.

OC letter 15/2/23 [5] B313

8. Whether NZ had engaged in substantial tax avoidance in relation to Balshore Investments and was being investigated by HMRC in relation to it had been the subject of widespread and escalating media coverage in the preceding week. DN is a former tax lawyer and his blog was the source of much of the media reporting. The topic ultimately led to the demise of NZ's political career when it emerged on

V309 15/1/23 that NZ had reached a reported £5m settlement with HMRC in relation to Balshore Investments during the period of his Chancellorship. A subsequent

V257 investigation by the independent ethics adviser found that NZ had repeatedly failed to disclose the HMRC investigation, commenced in April 22, and made a false public statement on 10/7/22 by asserting that news stories which said that he was being looked into by HMRC were "*smears*".

9. The Email does not directly threaten the Defamation Claim. The threat is implicit in the Without Prejudice ("WP") heading (which necessarily refers to the prospect of subsequent proceedings in relation to the claim referred to in the Email) and the references to over-stepping the mark by an accusation of lying and accompanying explanation of its falsity (thereby identifying the basis for the claim), the opportunity to retract, advice from a "*libel lawyer*", the reservation of rights, and "*time and expense on both sides*" (an obvious reference to future legal costs). The Email appears to have been drafted in an attempt to give deniability to it being a threat should DN publish it. Whether the Email is characterised as a threat, notification or advancement of a claim is irrelevant to the outcome of the Application.

10. The SRA's case is that there was no properly arguable basis for the Prohibition on Disclosure (or any prohibition on disclosure of the Email). R relies on two justifications.

11. First, the WP labelling. The Tribunal has been presented with voluminous authorities on WP. These have no application to the specific facts of the present case. It involves the notification of a claim solely in a WP communication when the potential defendant has stated that he will not accept such communications. It is plain that any duty of confidence in relation to a WP communication can only arise by the express or implied agreement of the parties to participate in WP discussions. DN's refusal to accept such communications is fatal to the imposition of a duty of confidence on him on this basis. In any event, there is no basis on which any duty of confidence arising from a WP communication could extend to the fact and nature of the claim. These points are explored further in [83]-[99] below.

12. Alternatively, the WP label was misused. The Email would have been admissible had the Defamation Claim ever been issued (see [100]-[104] below).

13. The second justification for the Prohibition was that the Email was headed "*Confidential*" thereby creating a duty of confidence on DN in relation to all the information conveyed by it. Again, there is voluminous citation of authority in relation to duty of confidence. None comes close to the facts of the present case. A duty of confidence usually arises by the agreement of the person to whom the information is communicated (inapplicable in the present case). It can also arise from the inherently confidential nature of the information communicated.

14. On analysis, the only basis relied on for the confidential nature of the information in the Email is that it would be reputationally harmful to NZ for the Defamation Claim to be reported. Where information is confidential in nature and reputationally harmful, a claimant can rely on breach of confidence alone. However, reputational harm alone cannot be the basis for rendering information to be confidential in nature. That would fundamentally conflate the torts of defamation and breach of confidence.

15. The fact that a person is threatening a defamation claim cannot be (and has never been) regarded as inherently confidential. This would impose on any potential

defendant the duty to keep the claim secret until proceedings are issued or, if no proceedings are issued (as is commonly the case), indefinitely. These points are explored further in [104]-[124] below.

16. The inclusion of the Implicit Threat following the Prohibition on Disclosure added the sanction of unspecified serious consequences to a breach of the Prohibition. This was never going to be actioned, whatever the theoretical basis for the Prohibition. [redacted].

WS ASH2 [151] D82

17. R belatedly states that his intended meaning in relation to the Prohibition on Disclosure involves adding "*publicly*" after "*to refer to it*"; i.e. "*you are not entitled to publish it or refer to it <u>publicly</u> other than for the purposes of seeking legal advice*". R states that it was not his intention to stop DN discussing the Email with his "*close circle"* including "*friends, family and team*". The precise boundaries of "*publicly*" and *"close circle*" are unclear. But if non-public disclosure were permissible under the Prohibition, as R apparently contemplates, it would permit disclosure beyond "*close circle*".

18. In any event, it is plain that the Prohibition is not limited to public disclosure. No recipient of the Email would have understood it to permit non-public disclosure. Further, R's current interpretation of his words is inconsistent with the 3 versions of the Email. [redacted].

19. If R had understood "*refer to it*" to mean "*refer to it publicly*" there would have been no need for him to insert the proviso for seeking legal advice. The proviso only makes sense if the Prohibition would otherwise cover any reference to the Email in any circumstances. The inclusion of the proviso reinforces the fact that the Prohibition plainly covers any reference.

20. As to the Implicit Threat, R has stated that it was not a threat. The relevant words are: "*That would be a serious matter as you know*". [redacted] If a solicitor informs a potential defendant that they are not entitled to publish or refer to an email and that to do so would be a serious matter that plainly contains an implicit threat of an adverse consequence should they do so.

21. The Tribunal will be invited to find that R must have recognised at the time of sending the Email that the combination of the breadth of the Prohibition on Disclosure and the Implicit Threat was, to use a colloquial expression, a "*try-on*".

22. Whatever mistaken belief R may have had as to whether a duty of confidence was arguable, he must have recognised that there was no basis for it to extend to the breadth of the Prohibition on Disclosure. Further or alternatively, the Implicit Threat was a threat that was never going to be actioned, whatever the theoretical possibilities. R must have realised this when he chose to insert the words [redacted]

A20

23. This is reflected in R12 [60]: "*the Respondent has sought to mislead Mr Neidle as to what he was entitled to do with the e-mail and the likely consequences if he did not comply with the Respondent's request"*.

24. If either of these averments are proved, there will be a breach of the integrity principle and the more specific paragraphs of the Code in relation to "*not attempt[ing] to mislead … others*" and "*taking unfair advantage of … others*". Paragraph 2.4 of the Code is engaged merely by the fact of making an assertion, statement or representation that is not properly arguable.

Seriousness

25. The SRA relies heavily on the strong public interest in the subject matter and the widespread public, Parliamentary, professional and ECtHR concerns about SLAPP related conduct as at 16/7/22.[1]

[1] See below for public, Parliamentary and professional concerns. See, for example, *OOO Memo v Russia* (2022) 75 EHRR 3 at [23] in relation to the ECtHR.

J645 J652

26. The starting point is the long-established domestic and ECHR principles in relation to political speech.[2] It is "*top of the list*" and crucial to the functioning of any democracy. It is recognised that politicians inevitably and knowingly lay themselves open to close scrutiny of word and deed by both journalists and the public at large. The more senior they are, the greater their power and the greater the accompanying scrutiny. The ability to scrutinise their actions is a powerful disincentive to impropriety.

27. The Chancellor of the Exchequer is one of the four Great Offices of State. Defamation claims by holders of these offices are extremely rare. The Chancellor has ultimate responsibility for HMRC and for ensuring that taxpayers are not avoiding taxes by, among other ways, the use of offshore structures, especially when tax burdens are high for those who cannot afford to put such structures in place. Any tax avoidance of this kind and/or related HMRC investigation is fundamentally incompatible with the office of Chancellor.

28. The fact that NZ was threatening a defamation claim in relation to an allegation of multi-million pound tax avoidance is itself a matter of strong public interest. The ability promptly to scrutinise the decision of a very senior politician to threaten a defamation claim is a salutary disincentive to such an office holder threatening an unmeritorious or otherwise abusive claim.

29. [redacted]

30. [redacted] There was a discrete public interest in the fact of the Defamation Claim. Further, R must have realised that there was, at least, a real prospect that Balshore Investments was an obvious tax avoidance scheme and that NZ was therefore lying by denying it. If so, the public interest in knowing about the Defamation Claim would be even greater.

[2] There are numerous domestic and ECtHR authorities to this effect. "*Top of the list*" is the phrase used by Lady Hale in *Campbell v MGN Ltd* [2004] 2 AC 457 at [148]. See, for example, *Jerusalem v Austria* (2001) 37 EHRR 25 at [38] in relation to close scrutiny of the acts of politicians. The statement has been repeated on numerous occasions in domestic and ECtHR cases.

J846 J649

31. For all these reasons, R was under a duty to take particular care in relation to any attempt by NZ to inhibit DN's ability to publish or refer to the Defamation Claim. The Prohibition on Disclosure and Implicit Threat sought to prevent any scrutiny of NZ's decision to threaten the Defamation Claim, potentially indefinitely.

32. The seriousness of any regulatory breach in this regard must also be seen in the context of existing concerns about SLAPP related conduct as at 16/7/22. R accepts that these were "very topical in the legal industry and legislature at the time". WS ASH2 [124] D75

33. The 4/3/22 Guidance on Conduct in Disputes X898-910 contains a short reference to SLAPPs, which are defined as: X899

"the misuse of the legal system, and the bringing or threatening of proceedings, in order to discourage public criticism or action. For example, cases in which the underlying intention is to stifle the reporting or the investigation of serious concerns of corruption or money laundering by using improper and abusive litigation tactics."

34. The Ministry of Justice's Call for Evidence V1 followed shortly after on 17/3/22. This characterised SLAPPs as:

V7

"an abuse of the legal process, where the primary objective is to harass, intimidate and financially and psychologically exhaust one's opponent via improper means. These actions are typically initiated by reputation management firms and framed as defamation or privacy cases brought by individuals or corporations to evade scrutiny in the public interest. They are claims brought by extremely wealthy individuals and corporations."

35. The SRA Guidance referred to "*the bringing or threatening of proceedings".* From the outset of the debate on SLAPP, it was recognised that most SLAPPs merely involve the threat of proceedings. The defendant is either "*intimidated into settling"* V10 or stands firm. Either way no proceedings are ever issued. The main justification for the Call for Evidence was: "*Only a small proportion of cases will result in formal litigation, which means official data cannot capture the volume of activity that may exist*." V11

36. The Call for Evidence referred to "*reputation management firms".* V7 & 9 A particular feature of defamation practice, evident in the present case, is a well-resourced claimant client using a team of PRs, strategic advisors and reputation management solicitors. The solicitors are the "muscle" deployed to use the threat of a defamation claim (and the notoriously large accompanying costs) to chill journalists and others in the coverage of public interest matters. The "*chilling effect*" V7 is not limited to the

specific allegation on which a complaint is based. The intention is to chill the journalist / other person generally in their coverage of the client. [redacted]

37. The solicitor's role within the team and accompanying lucrative remuneration can give rise to the pressure to go the extra mile for the client/team into "*try-on*" territory.

38. Any attempt to restrict a potential defendant's right to inform others of a threatened defamation claim will inevitably add to the anxiety arising from the claim. Depending on its breadth, it may also inhibit the defendant from obtaining information or financial support properly to respond to the threatened claim. The micro effect is that the defendant is totally isolated against a well-resourced claimant. The macro effect is that public interest speech is chilled with no way for the public or the judicial system to know about it.

39. All this reinforces the need for great care in relation to any attempt to restrict disclosure of a threatened claim and the seriousness of any regulatory breach in relation to it.

40. The fact that DN defied the Prohibition on Disclosure and Implicit Threat is a limited factor in mitigation. R relies heavily on DN being a former Clifford Chance partner. However, DN was not a commercial media publisher and did not have experience of defamation. R knew that DN would want to publish the Email but still went ahead with the Prohibition on Disclosure and Implicit Threat, presumably on the basis that they might work or cause delay. It is evident that they caused DN concern for a time and led him to postpone the disclosure of the Defamation Claim for 5 days.

<u>The 19/7 Letter</u> X61–63

41. The Application also includes the open letter of 19/7 sent by R to DN ("the Letter"). The Letter appears to have been prompted by DN's further enquiry on 19/7. The Letter is less serious than the Email in that there is no Prohibition on Disclosure, merely a request not to make it public:

See WAMs on 19/7 B150 & 189

"1.3 You have said that you will not accept without prejudice correspondence and therefore we are writing to you on an open, but confidential basis. If your request for open correspondence is motivated by a desire to publish whatever you receive then that would be improper. 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."

42. The Letter still asserted a duty of confidence on DN in relation to the Defamation Claim without any properly arguable basis. Further, the Implicit Threat had not been withdrawn and the sanction of serious consequences for making public the Claim was left hanging over the Letter. It was part of the attempt to keep the Claim secret. Accordingly, the same regulatory provisions are engaged.

The Evidence

Primary fact

43. Almost all the relevant evidence of primary fact is in documentary form. R's interaction with NZ and his strategic and political team is evident from the numerous WAMs. B71-194 [redacted] R's communication with DN was all in documentary form.

44. As to R's state of mind in relation to the Email and specifically the Prohibition on Disclosure and Implicit Threat, this can be inferred from his choice of words [redacted] The WS is lengthy and largely irrelevant to the gravamen.

45. R states that he has "*spent many hours thinking about what I might have done differently*". Such a process inevitably makes it difficult, if not, impossible reliably to remember one's thought processes at the time. This is particularly evident in R's suggested intended meaning of the Prohibition of Disclosure (see [17] above).

46. Insofar as judicial authority is needed as to the unreliability of memory in these circumstances and the related primary importance of contemporaneous documents, reliance will be placed on the observations of Leggatt J (as he then was) in *Gestmin SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) at [16]-[22]. These have been very widely cited including, in relating to SDT's findings of fact, in *Solicitors Regulation Authority v Day* [2018] EWHC 2726 (Admin) at [77]. J900 J676

47. The only witness of primary fact for the SRA is DN. His evidence is solely related to Reply [13]: C5

"Paragraph 3(4) of the Answer avers that there is no suggestion that Mr Neidle was in fact oppressed or intimidated or taken advantage of. It is not necessary for the SRA to demonstrate any impact on Mr Neidle. Without prejudice to this, Mr Neidle regarded the Implicit Threat to be a threat. He took it seriously as it referred to a "serious matter" (thereby implying serious consequences), was being made by a reputable law firm on behalf of a very powerful and wealthy client and Mr Neidle had no legal expertise in the relevant area. It caused him concern for a time until he became convinced that it was a bluff."

D201-214 R does not object to its admission D1–34

48. DN has signed two statements. DN2 (26/11) is a narrower version of DN1 (18/9). DN1 was served in advance of the date for exchange due to DN's intended involvement in the 19/9 directions hearing. It is not necessary to analyse the correspondence that arose in relation to DN1. The short point is that R sought to raise issues in relation to parts of it that were irrelevant to the limited purpose of adducing evidence from DN. Hence the service of DN2, on which the SRA solely seeks to rely.

Q1–56

49. R has served a bundle of documents relating to public statements made by DN in relation to the "*Zahawi affair*", the present Application and SLAPPs in general. None of it is inconsistent with the narrow focus of DN2. DN's opinion on the various matters referred to above is irrelevant to the Tribunal's determination.

<u>Practice & Usage</u>

D35–46

50. The other witness evidence relates to "practice". Gill Phillips ("GP"), who has had a lengthy career as an in-house media solicitor, gives evidence for the SRA. David Engel ("DE") (a solicitor), Lord Edward Garnier KC ("EG"), Lorna Skinner KC ("LS"), Adam Speker KC ("AS") and Hugh Tomlinson KC ("HT") for R.

D123–129 D130–137 D143-147 D149–157 D138–142

51. There are issues as to the potential relevance and proper ambit of such evidence, which are considered below. This should not obscure three fundamental points.

52. First, the SRA's primary position is that the legal and factual position is sufficiently clear that practice evidence is not necessary in order for the Application to succeed in whole or part. The fact and content of a communication threatening a defamation claim is not inherently confidential information. Any duty of confidence in relation

to a WP communication is contingent on the express or implied agreement to participate in such communications.

53. Second (and relatedly), R's practice evidence is not directed to the particular facts of the present case, namely, the breadth and force of the Prohibition on Disclosure and Implicit Threat and DN's refusal to accept WP communications.

54. Third, for practice to be supportive of a duty of confidence both the people commonly providing the relevant information and the people commonly receiving it must have a mutual understanding that the recipient is obliged to keep it confidential. In contrast, practice evidence will be incompatible with a duty of confidence simply because the people commonly receiving the information do not reasonably consider themselves under any such obligation.

55. The second and third submissions will be addressed further below. However, in order to understand the issues as to relevance and ambit of the parties' practice evidence, it is necessary to consider the procedural history.

E3–12

56. Practice evidence first arose when R applied on 13/6/24 for a preliminary determination ("the PID application") of whether:

> "*as a matter of law the Respondent was correct - or was arguably correct - to contend (by use of the Labels and otherwise) that the Email dated 16 July 2022 was sent on an occasion of without prejudice and that the Email and the Letter dated 19 July 2022 were subject to obligations of confidentiality*".

57. As with any preliminary issue application R was obliged to identify the savings in costs and court/tribunal time. He submitted that if he succeeded on the existence of an arguable duty of confidence, it would be the end of the Application. Further, the issue would be determined on the basis of legal submissions alone. This was contrasted with the position if there was no PID. R submitted that the Tribunal would then also have to consider whether the Email and/or Letter was "*abusive, misleading and/or oppressive to Mr Neidle*". This would require a 4-day hearing with oral evidence, contrasted with a one-day hearing for the PID. The nature of this evidence was particularised in [1.16] of section 2. E11

> "*1.16 In particular, if the matter proceeds to a full hearing the Respondent will have to prepare a detailed factual case not only as regards the specific incidents in the matter but also relating to the use of the Labels generally among the profession, and also the*

experience and expertise of Mr Neidle (who is a former partner of Clifford Chance). This would be a lengthy evidential process and would be unnecessary if the matter can be resolved on the basis of the Legal Issue."

58. As the SRA has repeatedly pointed out, evidence as to the use of the labels generally is of no or limited relevance to the Application. This is because the Email contained the Prohibition on Disclosure and the Implicit Threat, in addition.

59. The intended effect of the "*Private & Confidential*" ("P&C") or WP label in isolation may be unclear. As Toulson LJ (as he then was) noted in *Napier v Pressdram Ltd* [2010] 1 WLR 934 at [53]: J641

"First, I would not attach significance to the fact that correspondence was headed "Private and Confidential". Many letters are marked in that way when they are intended by the sender to be for the eyes of the person to whom they are addressed, without prior reading by others, but without necessarily intending to limit the use which the receiver may decide to make of them."

60. In contrast, the Prohibition on Disclosure and Implicit Threat amounted to an unambiguous limitation on use.

61. R has repeatedly sought to focus on labelling and avoid engagement with the impact of the Prohibition on Disclosure and Implicit Threat.

62. R's practice evidence is directed to the general use of the P&C label. It does not C2 appear to contradict Reply [6.1] that the Prohibition on Disclosure and Implicit Threat were highly unusual, if not unprecedented. The evidence from R's witnesses about politicians suing for libel also misses the point. The narrow C5 averments in Reply [6.1] and [11.3] are that claims by *"very senior politicians are highly unusual"* and that the offer of settlement in the Email, which did not refer to damages (see further at [96] below), could not be seen "*as a sign of weakness and/or undermine Mr Zahawi's subsequent position*". R's witnesses do not contradict these averments.

63. A similar observation can be made in relation to the WP label. R's practice evidence relates to the use of the label in the course of litigation or pre-action correspondence where the potential defendant has indicated a general or specific desire to engage in WP discussions. Such evidence has no application to a case involving the notification of a claim in a communication labelled WP where the defendant has made clear that he does not want to engage in such discussions.

64. The SRA opposed the PID application on two grounds. First, the focus on labelling missed the gravamen of the Application, for the reasons previously stated. Second, practice evidence was potentially relevant to the issue of duty of confidence. Reliance was placed on the authoritative statement of principle in *Toulson & Phipps on Confidentiality* (4th Edition) at [4-005]): J454

> "*4-005 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."*

65. The preceding paragraph is also relevant because the reasonable position of the recipient is fundamental to the imposition of any duty of confidence.

> "*4–004 In Lancashire Fires Ltd v SA Lyons & Co Ltd3 (also a trade secret case), Carnwath J noted the "subjective emphasis" of that approach and said that: "The subjective view of the owner cannot be decisive. There must be something which is not only objectively a trade secret, but something which was known, or ought to have been known, by both parties to be so.*"

I15 [7]

66. The SRA's written submissions stated that it wished "*to rely on the longstanding and consistent practice of potential defamation defendants informing others that they have been threatened with a claim and (relatedly) the absence of any recognition or understanding of an obligation to keep that fact confidential (in the absence of anything confidential in the subject matter)*".

Memo F11-19

67. The PID application was dismissed on 4/7 on the basis of the SRA's opposition.

68. There the matter rested until late September when Guardian News and Media Ltd ("GNM") made an application for access to documents. In response to this the SRA informed R that it would be adducing practice evidence from GP. From April 2009 to May 2023 GP was the Director Editorial of Legal Services at GNM, where she still conducts work as a consultant.

E234–295

69. This prompted R to issue an application on 10/10 ("the 10/10 Application") seeking to prevent reliance on evidence from GP unless the SRA made an application for permission to adduce such evidence. R submitted: "*There is a considerable body of authority that evidence of sector or market practice should be expert evidence*".

I63 [34]

70. At as 10/10, WS were due to be exchanged on 28/10. R had not indicated any intention to apply for permission to adduce expert evidence. It is obvious from the 10/10 application and the orders sought that R would not have adduced any practice evidence if the SRA had not sought to do so.

71. The SRA submitted that practice evidence was evidence of fact i.e. whether certain practices existed and if so, their extent. The SRA accepted that practice evidence witnesses were often treated as experts. This was because: "*Related questions may arise which are treated as opinion. These include whether the practice is desirable or whether a person's conduct is in accordance with the practice.*" However, the SRA made clear that GP's evidence would not stray into this territory.

I45 [39]

Memo F38-62

72. The Tribunal accepted the SRA's submissions. In particular it concluded:

F61

"112. The Tribunal thus found that there was nothing inherent in the giving of custom or usage evidence that meant that this could only be by way of expert evidence.

113. ….The Tribunal was confident that should the written or oral evidence of Ms Phillips stray into opinion evidence that should be given by an expert, that would be appropriately dealt with by the parties and the Tribunal."

73. WS GP1 was drafted in accordance with the SRA's submissions to the Tribunal. In contrast, R's practice evidence repeatedly strays into opinion about the merits of the alleged practice and the evaluation of R's conduct by reference to it.

74. The more fundamental point is that R's practice evidence and his response to GP1 misses the mark. This is primarily for the following reasons:

75. First, R seeks to downplay GP1 on the basis that her experience is only acting for defendants. This ignores the requirement for the information to be reasonably recognised as confidential by both communicator and recipient. R asserts that his witnesses all have experience acting for both claimants and defendants in this area. This is literally true, but DE, EG & HT generally represent claimants. In any event, none of the witnesses can cast doubt on GP's evidence as to the practice of defendants (both media publishers and individuals).

See CMS letter 11/11/24 M196

76. Second, the picture that emerges from R's witnesses is that there is no consistent practice of claimants seeking to label correspondence P&C. The most that can be

said is that it is common. It is, at least, equally common that correspondence is not labelled. Indeed, it is not unusual for claimants to publicise a threatened claim.

77. Third, the alleged practical impact of the label is unclear. EG refers to it being a "*request*"[D132 [5.1]], consistent with Toulson LJ in *Napier.* In addition, no clear picture emerges as to the ambit of any alleged restriction on use. Is it simply about not publishing the letter of complaint or does it extend to any reference to the threatened claim at all and if so, does that extend to anyone other than a legal representative? There is certainly nothing in the witness statements to suggest a common recognition that the effect of the labelling is to impose a restriction with the breadth and force of the Prohibition on Disclosure and Implicit Threat.

78. Fourth, the statements refer to the potential benefits to a defendant of not disclosing the threatened claim. A defendant may well decide not to disclose. But as GP1 points out, this is a matter of choice, not a legal obligation solely at the claimant's behest.

79. Fifth, the same point applies in WP communications. It is a matter of choice for the defendant whether to participate in them.

80. Finally, it is surprising that only one of R's five practice witnesses is a solicitor. None of the barristers have the equivalent experience of a solicitor in relation to the interaction with client/team and opponent, WP negotiations and sending and receiving correspondence. Some of the witness statements appear to be making submissions on legal principle, far removed from the purpose of practice evidence.

Relevant legal principles and application to the facts

81. R advances two bases for an arguable duty of confidence: (a) the WP labelling and (b) that the information in the Email was arguably confidential in any event. He has relied on a large number of authorities relating to each, perhaps on the basis that the more authorities the less likely that a proposition is not arguable. None of the authorities come close to the facts of the present case.

82. Every analysis of the relevant legal principles advanced on R's behalf before and after the commencement of the Application has failed to engage with the key

features of the present case. These are (a) the notification of the claim solely in a WP communication (b) the prior indication that DN would not accept WP correspondence (c) the breadth of the Prohibition on Disclosure in terms of the extent of the prohibited information and the restriction on any publication other than to a legal representative and (d) the Implicit Threat which was never going to be actioned. The analysis when these are taken into account is straightforward.

Even if properly labelled WP - no arguable duty of confidence

83. The Prohibition on Disclosure and the Implicit Threat are plainly based on the WP labelling. The preceding sentence is: "*You have said that you will "not accept" without prejudice correspondence*". WS ASH1[133] D79 appears to accept that the inclusion of the Implicit Threat was because of the WP labelling. It may also be noted that the Letter, which was not labelled WP, merely contained a request not to make its contents public.

84. WP is directed to the admissibility of evidence of settlement negotiations in court proceedings. It almost invariably arises (a) in relation to a statement in the negotiations potentially adverse to a party's case and (b) which has been made in a communication after or at the same time as the claim has been notified on an open basis.

85. It is nevertheless accepted that WP is capable of extending to "opening shots". However, the question inevitably arises as to why no open communication was made at the same time. Further, a court will only be considering whether an opening shot is WP where proceedings have been subsequently issued and the claim is known. If the WP label could justify confidentiality in relation to the fact of the claim, a person could threaten a claim in a WP communication, not proceed with it and the defendant would not be able to tell anyone about it.

86. Solely for the purposes of the analysis below, it is accepted that the Email was properly labelled WP and therefore inadmissible in subsequent libel proceedings brought by NZ against DN. The reasons why the Email was not properly labelled WP are addressed subsequently.

87. This Application is all about confidentiality, not admissibility. The Email is not capable of generating a duty of confidence on DN (or not to the extent of the Prohibition of Disclosure), even if it is treated as WP.

88. The case law on WP is almost exclusively concerned with admissibility, reflecting the nature of the doctrine. It is well-established that the jurisprudential basis for the non-admissibility is either contractual or the public policy of encouraging settlements.

89. Occasionally, the question arises as to whether the fact that a communication is WP is capable of giving rise to a duty of confidence and if so, to what extent and in what circumstances. There is debate on this issue. None of it is capable of impacting on the analysis to the particular facts of the present case.

90. The leading textbook on confidentiality is *Toulson & Phipps on Confidentiality* (4th Edition). This makes clear that any such duty of confidence must be derived from the express or implied agreement of the parties to participate in WP discussions:

J775 *"17–017 Nevertheless, it is well established that the without prejudice rule is not based solely on public policy. In Unilever Plc v Procter & Gamble Co,28 Robert Walker LJ, who gave the leading judgment, said:*
"Its other basis or foundation is in the express or implied agreement of the parties themselves that communications in the course of their negotiations should not be admissible in evidence if, despite the negotiations, a contested hearing ensues."
A person participating in without prejudice negotiations therefore owes to his opponent a private law duty of confidentiality, and this must be so whether or not the document is formally marked "without prejudice"." [emphasis added]

91. In the present case there is not only an absence of express or implied agreement. There is the unambiguous refusal of DN to participate in WP communications.

92. In response to this, R has submitted that a duty of confidence can be founded on the alternative public policy justification for WP. If that is correct it could be unilaterally imposed on the opposing party. Answer [28] f/n 23 states:

B17

"*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.*"

93. This conflates the well-established distinction between admissibility and confidentiality. Judges are accustomed to excluding inadmissible information that comes to their attention. *Toulson & Phipps* correctly limits any duty of confidence to the express or implied agreement of the parties. There is no justification for imposing a duty of confidence on a person who has refused to accept WP communications.

94. But even if it was assumed that the public policy justification for WP could arguably justify a duty of confidentiality where a party had refused to accept WP communications, it would make no difference on the facts of the present case.

95. Such a duty could only apply to the "*material [that is] inadmissible*". This could not include the fact and nature of the claim for obvious reasons. Applying this to the present case, there could not have been a public policy WP justification to prevent DN stating publicly or otherwise that he had been threatened with a libel claim by NZ in relation to the Tweet. If no claim is brought, WP is not an issue. If it is brought, there can be nothing confidential in its fact and nature.

96. The only part of the Email that could, in theory, engage a public policy justification is the implicit offer of settlement ("the Implicit Offer") in the words below. This is the sole justification for the WP labelling:

> "*Our client wants to give you the opportunity to retract your allegation of lies in relation to our client.... Should you not retract your allegation of lies today, we will write to you more fully on an open basis on Monday*."

97. Potential detriment is a necessary element of any confidentiality. The relevant detriment in a WP context is the adverse impact on a party's case arising from disclosure of their WP communications. For this to occur the disclosure of the WP communication has to be sufficiently widespread to risk it coming to the attention of the judge and the relevant information has to be capable of harming the case. In this regard, F/n 23 refers to "*widely publicised outside the court".*

98. If the judge in the notional Zahawi v Neidle defamation case became aware of the Implicit Offer, there is no basis on which it could harm NZ's case, either on liability or damages. None is suggested by R. It is a fundamental part of defamation law and practice that a swift retraction is the best remedy, far better than the notorious

delay, stress, risk and expense of litigation. It is apparent from the various practice witnesses that it is commonplace to forgo the entitlement to damages in exchange for a speedy retraction.

99. Further, the Prohibition on Disclosure seeks to prohibit non-public disclosure of the Email in circumstances where there would be no risk of it coming before a judge.

The WP label was misused

100. The SRA's case in this regard is set out in Reply[11]. C4 [redacted] This was a misuse of the WP principle.

101. R's immediate reaction to the Tweet was: WAM 12:48 B182 [redacted] as the coverage on Balshore Investments intensified largely due to DN's continued digging.

102. [redacted] the absence of any manifestation of concern that publication of the Email / disclosure of the Implicit Offer would negatively impact on any defamation claim that might be brought by NZ at some point in the future. There would be no reason for such concern as there was nothing in the Email that was capable of any adverse impact (see [98] above).

103. Finally, R persisted in the WP labelling notwithstanding that DN had insisted on an open communication in writing. At that point R could have sent an open email notifying DN of the claim. He could have accompanied this with a WP email containing the Implicit Offer. The obvious reason why he did not do so was because he knew that DN would [redacted] any open communication that Saturday night with the risk of immediate widespread media coverage. Whereas a single email with WP labelling, the Prohibition on Disclosure

Disclosure and Implicit Threat would, at a minimum, give DN some cause for concern and consequent delay.

104. The provision of information giving notification of the claim within a single WP communication in these circumstances is not "*bona fide intended to be part of or to promote negotiations*".[3] To use the words of *Hollander on Documentary* J939 *Evidence* at [20-02], citing the SRA's SLAPPs guidance and the facts of the present case, it is a "*Misuse of the [WP] Principle*"

<u>No arguable duty of confidence distinct from WP</u>

105. R relies on the "*Confidential*" label on the Email to justify an arguable duty of confidence, distinct from the WP label. Accordingly, the following analysis will proceed as if the Email was merely labelled "*Confidential*".

106. The basis of the alleged duty of confidence is essentially the reputational harm to NZ from disclosure of the Defamation Claim. There are two aspects to this. First, harm from the repetition of the Lying/Tax avoidance allegation. Second, harm from criticism of the decision to threaten the Defamation Claim.

107. It is appropriate to make some general observations before considering the legal principles relating to breach of confidence.

108. First, the risk of both aspects of reputational harm could be said to be consequential on any disclosure by a potential defendant of a threatened defamation claim. The scale of coverage may be greater as regards NZ's Defamation Claim, but the principle potentially applies to any such claim.

109. Second, the risk of criticism arising from the disclosure of a threatened claim could apply to any civil claim, not just defamation.

110. Third, notwithstanding the above, there has never been proceedings for breach of confidence arising from the actual or threatened disclosure of a threatened defamation claim or any other claim. Whatever the dispute about how frequently such disclosure occurs in practice, publication of the fact and nature of the claim

[3] See Williams v Hull [2009] EWHC 2844 (Ch) at [19]-[20]. J790

and/or the letter/email itself has happened on a sufficiently large number of occasions that the absence of any proceedings for breach of confidence is significant.

111. Fourth, to recognise even an arguable duty of confidence in relation to the threatened claim would be a significant fetter on the defendant's rights. The issue has been considered in [32]-[38] above in a SLAPP context. In order safely to disclose the claim the defendant would have to be confident of a public interest defence. This defence is notoriously difficult to establish. The starting point is that it is in the public interest to maintain confidential information. The defence is limited to disclosures that are "required" to breach confidentiality in the public interest. The practical consequence would be that defendants are chilled from disclosing even the fact of the claim until proceedings were brought, if they ever were.

112. Fifth, if the SDT recognised an arguable duty of confidence on the basis of reputational harm, solicitors would routinely assert it explicitly. It would drive a coach and horses through the key element of the specific SLAPP Guidance on this issue (published on 28/11/22 and amended on 31/5/24): B328–342

B340

"Where a recipient indicates they wish to publish correspondence they have received, they must not be misled as to the consequences. Unless there is a specific legal reason which prevents this, recipients of legal letters should be able to generally disclose the fact that they have received them."

113. Sixth, such a duty would be one way only. It is not unusual for claimants to choose to disclose the claim at the pre-action stage. There is no suggestion that a defendant could assert a duty of confidence on the claimant to prevent this.

114. Seventh, where a defendant discloses a threatened claim there are defamation law remedies. It can aggravate the damages, should the claimant succeed at trial. The disclosure can give rise to a freestanding claim. Re-publication or criticism on a false factual basis by a third party can also give rise to a claim.

115. The elements of a claim in breach of confidence remain as stated by Megarry J in *Coco v AN Clark (Engineers) Ltd* [1968] F.S.R. 415 at 419:

"*In my judgment, three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. 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."

116. It may be noted that "*detriment*" is only one element. Further, "*the necessary quality of confidence*" is not satisfied simply because the information is not publicly known. It follows that a claim is not established simply as a result of the unwanted disclosure of information that may harm the claimant.

J746

117. Chapter 4 of *Toulson* addresses the necessary quality of confidence. [4-004]-[4-005] were cited in [64] above. The case law was originally primarily concerned with trade secrets. However, it has expanded to cover personal information. In both contexts, it makes sense to refer to the "*owner*" of the information, a word commonly used in the case law. The fact that A has threatened a defamation claim against B is no more A's information, than it is B's. There is no meaningful sense in which A can be considered the owner of it. Other cases refer to information available to one person (or group) who does not intend to make it available to others. The same point applies. The threatened claim is information "available" to both claimant and defendant.

118. R relies on cases where the recipient of a letter has been found to owe a duty of confidence in relation to its contents. This does not establish a general duty of confidence in relation to correspondence. It all depends on the nature of the information in the correspondence. *Gatley* [23.6] on which R relies refers to

J889 "*<u>personal</u> communications and correspondence*". *Duchess of Sussex v*

J853 *Associated Newspapers Limited* [2021] 4 WLR 35, also relied on by R, involved a letter from the Duchess to her father, which was published in the *Mail on Sunday* under the headline: *"Revealed: the letter showing true tragedy of Meghan's rift with a father she says has 'broken her heart into a million pieces'"*. Her case was summarised in [3]:

"*She says that the contents of the Letter were private; this was correspondence about her private and family life, not her public profile or her work; the Letter disclosed her intimate thoughts and feelings; these were personal matters, not matters of legitimate public interest; she enjoyed a reasonable expectation that the contents would remain private and not be published to the world at large by a national newspaper; the defendant's conduct in publishing the contents of the letter was a misuse of her private information*."

119. In this context Warby J made the following passing reference at [76(1)]: *"This was not a business letter, or one advancing a complaint to a politician about their public conduct or functions. It was a communication between family members with a single addressee."*

120. R has suggested that because the Email is not in either of the two examples provided by Warby J it is arguably confidential. This is plainly misconceived. In any event, the Email was a complaint *by* the Chancellor of Exchequer in libel against an individual in relation to an allegation of tax avoidance and related dishonesty which was fundamentally incompatible with his office. It is an even stronger case for the absence of confidentiality than a complaint *to* a politician.

121. *Duchess of Sussex* was a claim in misuse of private information, as the publisher was not the recipient of the letter. However, the same analysis applies.

122. The relationship between defamation and breach of confidence is addressed in *Toulson* [4-020]-[4-2-26]. This makes good the submission advanced in [14] above, repeated below for ease of reference. Where information is confidential in nature and reputationally harmful, a claimant can rely on breach of confidence alone. However, reputational harm alone cannot be the basis for rendering information to be confidential in nature. That would fundamentally conflate the torts of defamation and breach of confidence.

123. On occasion, a pre-action communication in a defamation claim will include information that is confidential in nature in order, for example, to demonstrate the falsity of the defamatory allegation. The SRA accepts in the SLAPP Guidance that such information may be subject to a duty of confidence. This has no application to the present case. Personal financial and tax information is a category of confidential information. However, all the information in the Email (and Letter) in relation to Balshore Investments had already been made public by or on behalf of NZ. It was not the justification for the "*Confidential*" label, nor could it have been.

124. Finally, it has been suggested that there is a discrete justification for the Implicit Offer being subject to a duty of confidence on the basis that it could harm NZ's negotiating position in relation to claims against other publishers if known by them. There are a number of observations that may be made in relation to this. First, it

was not the reason for the label. If R/NZ had been genuinely concerned about this, the Offer could have been excluded from the Email and put in a separate WP communication. Second, any duty of confidence on this basis would be limited to the Offer. The Prohibition on Disclosure goes well beyond it. Third, for the reasons stated in [98] above, there is no basis on which the Offer could harm NZ in relation to whatever claims might be brought against any other publishers in the future. There is no arguable case on detriment.

David Price KC Solicitor-Advocate
Michael Collis Counsel
For the Applicant, 9 December 2024