Neutral Citation Number: **[2022] EWHC 856 (Ch)**

Case No: BL-2020-002279

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 13 April 2022

Deputy Master McQuail

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Between :

(1) Morten Høegh **(2) Thomas Høegh**	**Claimants**
- and -	
(1) Taylor Wessing LLP **(2) MSR Partners LLP (previously known as Moore Stephens LLP)**	**Defendants**

- -

Mr Patrick Lawrence QC and Mr Charles Phipps (instructed by **Fieldfisher LLP**) for the Claimants
Mr Christopher Greenwood (instructed by **Clyde & Co LLP**) for the First Defendant
Mr Ben Hubble QC and Mr Ben Smiley (instructed by **Mayer Brown International LLP**) for the Second Defendant

Hearing date: 22 March 2022

Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand down is deemed to be 13 April 2022 at 10.00 am

Deputy Master McQuail :

1. This application seeking the production of documents was issued on 11 January 2022 by the second defendant (**the Production Application**). The application form states that it is made "pursuant to paragraphs 21.1(2) and 21.4 of Practice Direction 51U … that the claimants produce the documents mentioned at paragraphs 32, 33, 34 and 55 of the Third Witness Statement of Jonathan Paul Ray-Smith, namely the review that the claimants instructed PriceWaterhouseCoopers LLP (**PwC**) to undertake in around March 2021".

2. I heard an application in these proceedings made by the claimants for permission to amend their particulars of claim in January of this year. I gave permission for those amendments to be made and gave a judgment dated 28 February 2022 with neutral citation number [2022] EWHC 392 (Ch)**.** I will not unnecessarily repeat matters recorded in that judgment here.

3. The evidence that was filed in connection with the amendment application included:

(i) the statement of Jonathan Ray-Smith (partner in Fieldfisher LLP, solicitors to the claimants) dated 17 September 2021 ("Ray-Smith 3") referred to in the Production Application;

(ii) the first statement of the first claimant dated 29 December 2021 ("Morten 1"), in support of the application.

4. The following evidence was filed in connection with the Production Application:

(i) the third witness statement of Jonathan Michael Oulton (partner in Mayer Brown International LLP, solicitors to the second defendant) dated 11 January 2022 ("Oulton 3") in support of the application;

(ii) the fourth witness statement of Jonathan Ray-Smith dated 16 February 2022 ("Ray-Smith 4"), opposing the application.

Brief Summary of Background

5. By their claim the claimants seek damages from the first defendant, Taylor Wessing LLP, their former solicitors, and the second defendant, MSR LLP (formerly Moore Stephens LLP), their former accountants, for alleged negligent advice in relation to their tax affairs.

6. After the claimants had lost confidence in the first defendant they consulted Mr Golden, then at Linklaters. Mr Golden and the second defendant worked together in preparing disclosures made to HMRC in early 2019 on behalf of the claimants. Following the termination of the second defendant's retainer in September 2020, Pricewaterhouse Coopers LLP (**PwC**) was appointed in the second defendant's place. It is apparent that PwC gave advice to the claimants from 2020 onwards.

The Application

7. By the Production Application the second defendant seeks an order under paragraphs 21.1(2) and 21.4 of Practice Direction 51U (Disclosure Pilot) for the production of what is said to be a document which it is said was mentioned in four paragraphs of Ray-Smith 3.

8. The relevant paragraphs of Ray-Smith 3 are as follows:

> "32. Moore Stephens' ongoing retainer to provide tax and accountancy advice to the Applicants was terminated. PriceWaterhouseCoopers LLP (**"PwC"**) were instructed in place of Moore Stephens. The first tax return that PwC prepared for the Applicants was for the tax year 2019/20, which had to be filed with HMRC by no later than 31 January 2021. As part of this process, in early 2021, PwC had identified further errors and issues in the approach previously taken by Moore Stephens. As a result PwC were instructed to undertake a review of the Applicants' tax affairs (the "Review"). Without waiver of privilege, the Review included advice on any further tax liabilities which may have arisen as a result of the Respondents' negligence.
> 33. Given that the Respondents had previously reviewed the Applicants' position and prepared disclosures to HMRC under the Worldwide Disclosure Facility (the **"WDF Disclosures"**), it was initially anticipated that the bulk of the Review had already been substantively completed by the Respondents in 2018 and that the role of PwC was simply to confirm that no further issues arose.
> 34. In the event, however, since their instruction in relation to the Review in around March 2021, PwC has uncovered multiple further issues as a result of the Respondents' negligence. In particular, without waiver of privilege, between around late April and June 2021, PwC identified a number of other relevant person companies which had made transfers that gave rise to undeclared taxable remittances for which the Applicants were liable, which had not been identified by either of the Respondents in the course of preparation of the WDF Disclosure.
> …
> 55. In the present case, the proposed amendments are not "completely outside the ambit of and unrelated to those facts" of that currently pleaded. They simply include all of the consequences of the original negligence, some of which were only revealed by PwC's Review (over which privilege is not waived). They do not change the underlying matters that the Respondents will need to investigate in order to defend the claim. As such the draft amended Particulars satisfy the test in CPR 17.4 and the criteria set out in *Libyan Investment Authority*."

10. The claimants resist the Production Application on the basis that:

(i) No document is mentioned by the relevant paragraphs of Ray-Smith 3;

(ii) Further or alternatively, any document mentioned is likely to be the subject of legal advice privilege or litigation privilege;

(iii) Further or in the yet further alternative, any document mentioned is highly confidential, its production is not required for the fair disposal of the proceedings, and the request to produce it is unreasonable and/or disproportionate.

11. In the face of those three objections, a hearing bundle of nearly 500 pages, an authorities bundle of nearly 600 pages, the best part of 50 pages of skeletons and notes from counsel and a hearing listed for only two and a half hours, I invited the parties to address me on the claimants' first objection in the first instance. If I accept that point the further questions will not need to be considered, at least at this stage of the litigation.

The Rules

12. Paragraph 21 of PD51U provides relevantly as follows:

> "21.1 A party may at any time request a copy of a document which has not already been provided by way of disclosure but is mentioned in…
> …(2) a witness statement…
> 21.2 Copies of documents mentioned in … witness evidence … and requested in writing should be provided by agreement unless the request is unreasonable or a right to withhold production is claimed.
> 21.3 A document is mentioned where it is referred to, cited in whole or in part or there is a direct allusion to it.
> 21.4 … the court may make an order requiring a document to be produced if it is satisfied such an order is reasonable and proportionate (as defined in paragraph 6.4).

13. Paragraph 21 of PD51U is the successor in the Disclosure Pilot to CPR 31.14, which provides relevantly:

> "(1) A party may inspect a document mentioned in…
> …(b) a witness statement…"

The Law

14. Under the heading "…document mentioned…" the first paragraph of the White Book 2022 note at 31.14.2 (which is in identical terms in the 2021 edition) reads as follows:

> "The statement of case, witness statement, witness summary or affidavit must specifically identify or make a direct allusion to the document or class of documents in question. It is insufficient that a witness statement etc. refers to a transaction which on the balance of probabilities will have been effected by the document for which inspection is sought; the document itself needs to be

> mentioned or directly alluded to. See *Rubin v Expandable Ltd* [2008] EWCA Civ 59; [2008] 1 W.L.R. 1099 at [23]–[24] per Rix LJ and *National Crime Agency v Abacha* [2016] EWCA Civ 760; [2016] C.P. Rep. 43, at [22]–[23] per Gross LJ, both applying the RSC-era authority of *Dubai Bank Ltd v Galadari (No.2)* [1990] 1 W.L.R. 731 at 738–739 per Slade LJ. "The expression 'mentioned' was 'as general as could be'—it was not intended to be a difficult test": *National Crime Agency v Abacha* (above) at [23]. Reliance is not a requisite but may be relevant to any issue of waiver. Reference by inference is indirect and insufficient.

15. The first case I was taken to was *Dubai Bank Limited v Galadari* [1990] 1 WLR 731, which was obviously concerned with the old RSC 24, rule 10 in which the wording was "reference is made" rather than "mentioned." The Court of Appeal referred to the case of *Smith v Harris* (1883) 48 L.T. 869 in which a party had referred to the content of "letters and bill heads" during a certain period, which Chitty J held to be both a

> "general reference and also a special reference to each and every bill head and each and every letter; because the plaintiff, instead of setting out each document separately, refers to them compendiously, that is no reason why inspection should not be allowed"

The Court of Appeal in *Dubai Bank* acknowledged the correctness of the decision in *Smith v Harris* and Slade LJ said at 738C:

> "a compendious reference to a class of documents, as opposed to a reference to individual documents, is well capable of falling within the rule, providing that it is indeed a reference."

16. Slade LJ went on to consider the example of the assertion "Blackacre was conveyed by A to B" and to reject counsel's submission that if there is reference to a transaction which on the balance of probabilities will have been effected by a document that must involve a reference to the document for the purpose of the rule saying at 739A:

> "It seems to us to involve reading the phrase "reference is made to any document" as including *reference by inference.* This we do not regard as the natural and ordinary meaning of the phrase. To our minds, the phrase imports the making of a *direct allusion* to a document or documents."

17. After discussing the case of *Marubeni Corporation v Alfafouzos* (unreported) 6 November 1986, Slade LJ noted at 739H that the Judges in that case had drawn attention to the real difference between a reference to the effect of a document and the contents of a document in the context of the question of privilege.

18. The Court's conclusion is stated at 739H:

> "In our judgment, a mere opinion that on the balance of probabilities, a transaction referred to in a pleading or affidavit must have been effected by a document, does not give the court jurisdiction to make an order under R.S.C., Ord. 24, r. 10, unless the pleading or affidavit makes direct allusion to the document or class of documents in question."

19. The Court of Appeal accordingly rejected the application for the production of a "discretionary trust" where the relevant affidavit referred to the act of setting up of a discretionary trust and for the production of certain bank accounts referred to in the affidavit on the basis that, although a bank account would usually be evidenced by documents, it was not itself a document.

20. In *Rubin v Expanadable Ltd* [2008] EWCA Civ 59 the witness statement in question stated "he wrote to me" and the question for the Court of Appeal was whether that constituted mention of a document. At paragraphs 19-20 Rix LJ, having referred to the *Dubai Bank* case and the passages I have mentioned at paragraphs 15, 16, 17 and 18 of this judgment, said:

> "[Slade LJ] also spoke, at 739H of "the real difference between a reference to the effect of a document and the contents of a document". It would appear that the latter would come within the rule.
> It appears therefore that a reference to a conveyance, guarantee, mandate or mortgage … would be a reference to a document as would reference to the contents of such documents: but that the mere reference to the *effect of* some

> transaction or document, such as to say that a property was conveyed or that somebody had guaranteed a loan would not be sufficient."

21. In considering the difference in the wording in the old RSC and the CPR Rix LJ said this at paragraphs 23-24:

> "I am content to assume that there is no effective or substantive difference in the meaning of the previous and the present rule. I am content to adopt the test of direct allusion as an elucidation of the present rule's language which speaks of "mentioned". Nevertheless, the rule is in terms of "mentioned" and any gloss can only be by way of elucidation. I am inclined myself to think that the change in the rule's language from "reference is made" to "mentioned" does underline two matters. The first is to confirm the test of "direct allusion" or, to use another gloss used by Slade LJ, "specifically mention". This is because the expression "refer" or "reference" is ambiguous between a direct or an indirect reference. *Dubai Bank v Galadari* (No 2) [1990] 1 WLR 731 [d]etermined that the reference must be direct or specific: hence "specifically mention" and "direct allusion". I think this is underlined by the current expression "mentioned.
> "The second matter is that, subject to my first comment, the expression "mentioned" is as general as could be. This is not to my mind intended to be a difficult test. The document in question does not have to be relied on, or referred to in any particular way or for any particular purpose, in order to be mentioned. … The general ethos of the CPR is for a more "cards on the table" approach litigation…I look upon the mention of a document in pleadings as a form of disclosure. The document in question has not been disclosed by list, or at any rate not yet, but it has been disclosed by mention in what, for the purposes of litigation, is another important and formal category of documents."

22. In paragraph 25 Rix LJ concluded that "he wrote to me" was

> "not a mere reference to a transaction otherwise to be inferred as effected by a document, as in "he conveyed" or "he guaranteed" but is a direct allusion to the act of making the document itself. It is the same as saying "he wrote a writing"."

23. A discussion followed as to whether it made a difference if the writing might have been an e-mail rather than a letter, although it was in fact common ground that there had been a letter. The conclusion was that it made no difference:

> "both are documents, and as long as there could be no confusion to the document there would be nothing in that point to prevent a direct allusion. It might have been different if there had been both a covering letter and an email, and only one or the other had been mentioned: that would not be a mention of the other.

> In this case, however, there could be no uncertainty as to the writing of which the witness statement made mention."

24. The next case to which I was referred was *Wm Morrison Supermarkets Plc v Mastercard Inc* [2013] EWHC 2500. Popplewell J was referred to the *Rubin* case and explained that he derived from it five principles, the first two of which he set out as follows:

> "(1) The test is whether there is a "direct allusion" to, or a "specific mention" of a document. That was the test previously applicable under rules of the Supreme Court, according to Slade L.J. in *Dubai Bank Ltd. v. Galadari* (No2) [1990] 1WLR 731; and that remains the appropriate test under the CPR.
> (2) The mention or allusion must be to the document itself, not merely to the effect or contents of a document."

The question for Popplewell J was whether a reference to the filing of an appeal was the mention of a document or a reference to a process; he concluded it was the latter.

25. *Rudd v Bridle* [2019] Costs LR 1067 is a decision of Warby J. There a witness statement had been filed containing the following passages:

> "(a) Whilst some form of equity release may have been an option, he has decided to sell part of the charged property to pay the costs in the judgment.
> …
> "(b) To pay the judgment debt, judgment debtor took out a short-term loan to cover those costs ….
> "(c) …The buyer's solicitor has informed the judgment debtor that the sale cannot be completed due to the restrictions put on the property ..."

The applicant sought disclosure of documents it was said must be inferred existed: one, the short term loan, two, the contract for sale and, three, a communication from solicitor to client. The Judge refused to order disclosure because there were no direct allusions to documents, just to transactions.

26. Finally, Mr Hubble referred to and placed particular reliance on *Scipharm v Moorfields Eye Hospital NHS Foundation Trust* [2021] EWHC 2079, a decision of His Honour Judge Pelling QC (sitting as judge of the High Court). In the judgment extracts from a witness statement of a Mr Beckers filed on behalf of the claimant for the purposes of trial are set out as follows:

> "Our solicitors spoke to Margaret Beveridge, who is referred to in paragraph 3 and onwards of the particulars of claim. She was the business development manager of the defendant at the time the development agreement was concluded and responsible for our account.
> …
> Mrs Beveridge was able to confirm a number of matters and provide information some of which was pleaded in the particulars of claim.
>
> Mrs Beveridge confirmed to our solicitor that in reality Moorfields did not consider cancellation fees to be appropriate given the size of the manufacturing business."

27. Mrs Beveridge was an employee of the defendant at the time material to the dispute. The defendant sought production of attendance notes or similar documents evidencing the claimant's solicitors' discussion with Mrs Beveridge pursuant to CPR 31.14. Once the application was issued the claimants disclosed a statement from Mrs Beveridge obtained some three years earlier. There were inconsistencies between that statement and what Mr Beckers alleged in his statement she had told the claimant's solicitors.

28. The only authority which the Judge mentions in his judgment is *National Crime Agency v Abacha* [2016] EWCA Civ 760. The claimant's submission to the Judge was that in order to satisfy the 31.14 requirement of being mentioned there must be a "sufficiently direct allusion to the document" and that it was unreal to suppose the information referred to by Mr Beckers could have been derived from anything other than a written document or documents. The defendant argued that there was no express

reference to any such document and therefore no sufficient mention. The Judge accepted that, absent any other explanation, the inference must be that the information in Mr Beckers' statement must have been incorporated into his witness statement by reference to an attendance note or similar and therefore its production was be ordered.

The Contentions on the Present Application

29. The application seeks production of a document or documents being the "review" that PwC were instructed to undertake and which is said to be mentioned in four places in Ray-Smith 3.

30. The mentions are as follows:

> (i) in paragraph 32: "PwC were instructed to undertake a review of the Applicants' tax affairs";
> (ii) in paragraph 33: "it was initially anticipated that the bulk of the Review had already been substantively completed by the Respondents";
> (iii) in paragraph 34: "since their instruction in relation to the Review";
> (iv) in paragraph 55: "the consequences of the original negligence, some of which were only revealed by PwC's Review".

31. Ray-Smith 4 at paragraph 11 states that the review was a process.

32. Mr Lawrence's contention was that the four references to "review" are not references to a document or documents at all but references to a process.

33. Mr Hubble's answer was to say that the review "comprised of and resulted in documents". I asked him what he meant by "comprised of". In answer he took me to Morten 1 at paragraph 7 where the first claimant explained: he "received the findings of a review undertaken by PwC" and "It was only following my consideration of the review that I understood that…" Mr Hubble therefore submitted that the label "review"

is a compendious reference to a class of documents generated by and resulting from the review process undertaken by PwC. He went on to submit that it is overwhelmingly likely that the PwC review comprised documents - the advice that was given, the findings that were made and that were referred to the claimants - and therefore that Ray-Smith 3, by referring to the review, was making a direct allusion to the documents which the PwC review comprised.

34. Mr Hubble went on to submit that the claimants' approach to the meaning of "mention" is unduly narrow in light of the authorities. He submitted that, by saying the review "included advice" in paragraph 32, Mr Ray-Smith mentioned that advice, and that it was at least the case that the advice and other documents generated were referred to or directly alluded to within the meaning of paragraph 21.3 of PD51U. He submitted also that references to "advice" and to "findings" cross the line from effect to contents as referred to by Slade LJ in *Dubai* at 739H and by Rix LJ in *Rubin* at [19]-[20]. He submitted that it is clear that the review did generate documents, which is a contrast with the *Wm Morrison* case and the *Rudd* case.

35. Finally he said that the approaches taken by the Judges in *Rudd* and in *Scipharm* are reconcilable. In the former case the mentions were not inevitably of documents whereas in the latter case HHJ Pelling QC had concluded that the mention was of a document or category of documents and therefore there was a direct allusion to it or them. If the approaches in these cases cannot be reconciled Mr Hubble submitted that the approach of *Scipharm* is preferable consistently with the CPR's cards on the table approach.

36. Mr Lawrence's position was that the authorities, with the possible exception of *Schipharm*, are dead against the second defendant and that what is really being sought is not the disclosure of a document or documents mentioned in a witness statement but early disclosure of a category of documents, that is relevant documents generated by what is unquestionably a process. He said that the consequence of any order would be to require the claimants to embark on a disclosure exercise now rather than in due time and process as required by the Disclosure Pilot.

37. Mr Lawrence submitted that paragraph 21.1 is engaged only when there is a certainty of the identity of the document or compendious set of documents which are mentioned or directly alluded to. He says that there is no certainty here of the identity of the documents of which production is sought.

38. As regards the *Scipharm* case Mr Lawrence says that it is wrong. He says that the judgment does not make clear whether and to what extent HHJ Pelling QC considered and addressed the distinction in the earlier cases between direct allusion on the one hand and on the other hand a strong inference from what is said in the witness statement that a document must exist; the former being sufficient, the latter being insufficient.

Analysis

39. I fully accept that it is likely that the review undertaken by PwC resulted in documents being generated, but the language of Ray Smith 3 would not be different if the review had consisted of PwC sifting through all the relevant documents that had gone before and reporting its advice and findings orally to the claimants. In my

judgment as a matter simply of language the review was a process, which probably generated documents, but it was not itself a document or a collection of documents or even a compendious reference to a class of documents and nor did it "comprise of" documents. Further I do not accept references to "advice" or to "findings" constitute direct allusions to any documents that necessarily exist or to the contents of any such documents.

40. The Court of Appeal cases of *Dubai* and *Rubin* are clear. A document is not "mentioned" to engage what is now paragraph 21 of PD51U unless the reference is a direct allusion to it or to its contents. Reference by inference is not sufficient and reference to the effect of a document rather than its contents is also not sufficient. Further a mere opinion that on the balance of probabilities a transaction will have been effected by a document is not itself enough.

41. The decisions in *Wm Morrison* and in *Rudd* are in my view reasonably straightforward applications of the Court of Appeal authorities. If the cases stopped there, I would have had no hesitation in dismissing the Production Application.

42. As a process the ambit of such documents as the PwC review may have generated is likely to be rather more diffuse than the process of a transaction such as a property being conveyed, somebody guaranteeing a loan, somebody filing an appeal or the transactions referred to in the *Rudd* case. If references to those examples of transactions do not engage the obligation to produce a relevant identifiable document or class of documents, it would be surprising if reference to the review process in this case should do so.

43. I have carefully considered the judgment in the *Scipharm* case. Although the key passages from both the *Dubai* and *Rubin* cases are set out in the *Abacha* case to which HHJ Pelling QC was referred there is, as Mr Lawrence submitted, no explanation of how what, as I read them, are no more than references by inference to attendance notes in a witness statement should be caught by the terms of CPR 31.14. One explanation of the result may be the relatively late stage of that litigation at which the application appears to have been made. The court was scrutinising a trial witness statement so the parties would seemingly already have engaged in the disclosure process and the court might have ordered disclosure of material referred to inferentially under its general powers. However, in the absence of an explanation which would enable me to justify a departure from them, I consider that I am bound on this application under paragraph 21 of PD51U to follow *Dubai* and *Rubin*.

44. In my judgment the mention of "review" in Ray-Smith 3 is not a mention of, a reference to or a direct allusion to a document or documents and nor is it a compendious reference to a class of documents. Accordingly, I dismiss the second defendant's application.

45. A final version of this judgment will be handed down remotely at 10 am on Wednesday 13 April 2022. Any consequential matters which are not capable of agreement between the parties will need to be dealt with at a further hearing which is to be listed to take place on 5 May 2022.