Neutral Citation Number: [2025] EWHC 540 (TCC)

Case No: HT-2022-000043
HT-2022-000363

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (KBD)

Rolls Building
Fetter Lane
London, EC4A 1NL

Date: 11/3/25

Before :

MRS JUSTICE JOANNA SMITH DBE

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Between :

(1) MORNINGTON 2000 LLP (t/a STERILAB SERVICES)
(2) SANTE GLOBAL LLP

Claimants

- and -

THE SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE

Defendant

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Sarah Hannaford KC, Rose Grogan and Ben Graff (instructed by **Eversheds Sutherland (International) LLP**) for the **Claimants**
Michael Bowsher KC, Lara Kuehl and George Mallet (instructed by **Government Legal Department**) for the **Defendant**

Hearing date: **21 February 2025**

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JUDGMENT

This judgment was handed down remotely by email at 10.00 am on Tuesday 11 March 2025, by circulation to the parties or their representatives by email and release to the National Archives.

Mrs Justice Joanna Smith:

1. This is an application by the Claimants for a declaration that an audit report commissioned by the Defendant and created at a time when the parties were involved in Without Prejudice negotiations, together with various Associated Documents, do not benefit from the protection of the Without Prejudice rule ("**the WP Rule**").

2. The underlying proceedings arise out of a dynamic purchasing system agreement ("**the DPS Agreement**") dated 24 May 2021 between the Claimants and the Defendant (referred to in many of the documents as "**DHSC**") for the supply of lateral flow testing devices ("**Tests**" or "**LFTs**") intended for the detection of Covid-19 viral antigens. There are three sets of proceedings relating to: (i) breaches of the Public Contracts Regulations 2015 ("**the Regulations**") in relation to the allocation of orders and/or direct contracts for the Tests ("**the First Claim**"); (ii) the alleged wrongful rejection by the Defendant of 68.4 million Tests ("**the Second Claim**"); and (iii) further breaches of the Regulations in relation to the allocation of orders and/or direct contracts for the Tests and the unequal treatment of bidders in relation to alleged breaches of Chinese labour law ("**the Third Claim**").

The Background to the Application

3. In July 2021, the Claimants participated in a call-off competition under the DPS Agreement and were the successful second highest ranked bidder. There were three successful bidders. The parties entered into a call-off contract dated 6 September 2021 pursuant to which the Claimants agreed to supply Tests to the Defendant on receipt of committed orders, based on allocated volumes divided between the top three ranked bidders in accordance with a procedure set out in the call-off competition Invitation to Tender.

4. The Second Claimant engaged MP Biomedicals Germany GmbH ("**MP Bio**"), a company registered and operating in Germany, as its sub-contractor and the Legal Manufacturer of the Tests. At the same time, MP Bio engaged Xiamen Boson Biotech Co ("**Boson**"), a company registered and operating in China, as its sub-contractor and the Physical Manufacturer of the Tests.

5. On 30 September 2021, the Defendant placed a committed order for 68.4 million Tests from the Claimants ("**the Committed Order**"). The Tests were manufactured by Boson at its manufacturing facility in China ("**the Boson Facility**") between 11 October 2021 and 7 November 2021.

6. On 7 October 2021, the Defendant informed the Claimants that he had commissioned a standard Amfori Business Social Compliance Initiative ("**BSCI**") audit of the Boson Facility by a company called QIMA Limited ("**QIMA**"). BSCI audits assess working conditions in supply chains and thereby assist the Defendant to satisfy his legal obligations as to those working conditions. The subsequent audit report dated 26 October 2021 ("**the QIMA Audit Report**") awarded Boson an overall rating of "D", which the Defendant informed the Claimants amounted to a "failure". A follow-up report in the form of a Corrective Action Plan Acknowledgement Report ("**CAPAR**") was put in place pursuant to the QIMA Audit Report designed to identify and help

implement areas of improvement at the Boson Facility. This is part of the BSCI process. The Claimants immediately objected to the findings in the QIMA Audit Report.

7. Within a short time of receipt of the QIMA Audit Report, the parties began to discuss (on an open basis) ways in which the issues identified in that audit could be addressed. An email of 1 November 2021 from Scott Haughton of the Claimants to Isabel Fernandez of the Defendant refers to the potential for a "follow-up" or "re-audit". On 5 November 2021, Mr Sebastian Parsons ("**Mr Parsons**") of the Claimants emailed Ms Sarah Collins ("**Ms Collins**") of the Defendant suggesting that the solution was to "proceed as soon as possible with an interim audit to consider and report on the progress made against the CAPA plan" by Boson. He observed that such an audit would give the Defendant confidence that the areas of concern identified in the QIMA Audit Report had been, or were being, addressed. With a view to facilitating the conduct of this interim audit, and at the request of the Defendant, the Claimants withdrew their objections to the findings of the QIMA Audit Report and confirmed that they were continuing to work with Boson on a corrective action plan (as is confirmed in a letter from Lewis Silkin dated 13 December 2021 to which I shall return below).

8. Also, on 4 and/or 5 November 2021, the Defendant instructed QIMA to carry out a further inspection of the Boson Facility, albeit there is a dispute over the reasons why, in the event, this audit did not proceed.

9. The Claimants commissioned another BSCI audit provider, V-Trust, to carry out a further audit and to produce a report ("**the V-Trust Audit Report**") designed to verify the status of corrective actions taken by Boson, specifically with reference to the information that had been provided to QIMA in October 2021 and the improvements that had been made by Boson since the QIMA Audit Report. The V-Trust Audit Report (which recorded "significant progress since the previous audit") was sent to the Defendant under cover of an email of 8 November 2021 in which Mr Parsons indicated that he hoped that this would provide the confidence needed in relation to conditions at the Boson Facility to enable the Tests to be deployed with immediate effect.

10. The Defendant did not accept the findings in the V-Trust Audit Report. Instead, by notice of 12 November 2021 ("**the Rejection Notice**"), the Defendant rejected the Tests already delivered and the further Tests to be delivered pursuant to the Committed Order. The Defendant relied upon "breaches of labour law, health and safety and worker payment obligations" at the Boson Facility, identified in the QIMA Audit Report, together with Boson's failure to identify such breaches in the Standard Selection Questionnaire for the call-off competition.

11. The Claimants dispute that the findings in the QIMA Audit Report amount to breaches of Chinese labour law and/or that the QIMA audit gave rise to grounds lawfully to reject the Tests. They assert that there is no such thing as a "fail" within the context of an Amfori BSCI audit. Amongst other things they rely on a human resources licence authorising longer working hours issued by the Jimei District Human Resources and Social Security Bureau in China on 12 April 2021 ("**the Jimei Licence**") which the QIMA auditor failed to take into account, together with various other relevant documents that they say were available but were not reviewed by the QIMA auditor at the time of the QIMA audit.

12. Notwithstanding the Rejection Notice and the Defendant's refusal to accept the findings of the V-Trust Audit Report, the parties continued to explore the potential to resolve the issues between them by way of, amongst other things, a further audit.

13. There is evidence (exhibited by the Claimants and not challenged by the Defendant) that on around 4 and 15 November 2021, the Defendant created "reactive lines" – potential responses to external enquiries – anticipating the implementation of a further audit and planning the public statements that would be made to the media in the event of either a "pass" or a "fail", in respect of the audit. The Defendant's documents recording these "reactive lines" specifically identify Ms Elena Snook ("**Ms Snook**") as having "clearance". They evidence the requirement imposed by the Defendant on all Test suppliers and manufacturers to pass BSCI audits in order "to fulfil contractual obligations" together with the Defendant's internal recognition that, following an "independent audit" it would be necessary to have responses ready to address external enquiries – in other words there would be a need to make the audit public and to deal publicly with the results of the audit. An internal Note of 15 November 2021 entitled "Monday Exco 15th Nov" expressly anticipates the "next audit" which will "follow BSCI guidelines".

14. On 26 November 2021, the World Health Organisation identified Omicron as a variant of concern.

15. In an open letter from the Claimants' then solicitors, Lewis Silkin LLP ("**Lewis Silkin**") to the Government Legal Department ("**GLD**") dated 13 December 2021, Lewis Silkin dealt at some length with the open discussions between the parties as to the need for a further audit to be conducted, including the scope of that audit.

16. An internal email from Ms Snook to Ms Collins dated 15 December 2021 evidences the Defendant's thinking at that time that a new audit could be done to cover manufacturing at the Boson Facility during October and November 2021 which, if satisfactory, would enable the release of, and payment for, the Tests already supplied by the Claimants. By 24 December 2021, another internal email shows a more detailed discussion of the potential issues around conducting a further audit, together with the acknowledgement that "we need to also explore the routes to complete any audit as urgently as possible".

17. At around the same time (and in an attempt to assist the Defendant to use the rejected Tests), the Claimants commissioned a full follow up Amfori BSCI audit to be undertaken by an independent company called TUV Rhineland ("**TUV**"). TUV undertook the further audit at the Boson Facility in January 2022 and provided an (open) audit report to the Claimants on 20 January 2022 ("**the TUV Audit Report**"), which gave the Boson Facility an overall rating of "C". Once again, the Defendant apparently refused to accept the findings of this audit.

18. By this time, the parties had already begun to discuss the potential for mediation of their dispute, a process first raised in a letter from Lewis Silkin to GLD on 2 December 2021.

19. A mediation duly took place on 19 January 2022, followed by a further without prejudice meeting on 25 January 2022. It is common ground that, at this meeting, and in light of the Defendant's refusal to accept the outcome of either the V-Trust Audit

Report or the TUV Audit Report, the parties discussed the arrangements for a further audit to be conducted as one of eight proposed headline proposals for settlement. By now, and without going into the detail of the without prejudice discussions, the parties were discussing the potential supply by the Claimants of replacement Tests manufactured by Boson which would be able to detect the Omicron variant.

20. There then followed a series of emails between the parties, all marked "Without Prejudice", in which they discussed the scope and purpose of the proposed audit and the date on which it should take place. For the sake of ease when it comes to the publication of this Judgment, I have included discussion of these emails in Appendix A. I shall require submissions from the parties in due course as to whether Appendix A, together with any other references to these emails made in the body of the Judgment, should be redacted from the public version so as to preserve the parties' Without Prejudice privilege.

21. At an internal meeting of the Defendant on 23 February 2022, attended by Ms Snook, the minutes record that Ms Snook explained that:

> "Sante have now raised a procurement challenge claim against UKHSA around why they did not receive any volumes out of DPS2. A response is currently being formulated. A visit to Xiamen Boson has also been confirmed with lntertek for Monday 28/02 and Tuesday 01/03. The objective is to 1) verify additional information Sante claims was not reviewed during the previous audit and 2) conduct a new BSCI equivalent audit for the period October 21- Jan 22".

22. There was no reference in these minutes to the new audit being conducted on a Without Prejudice basis. As anticipated in the minutes, Intertek undertook the audit at the Boson Facility on Monday 28 February and Tuesday 1 March 2022. This audit was conducted on the instructions of, and funded by, the Defendant.

23. On 1 March 2022, Mr Henri Phan, a consultant employed by the Second Claimant, emailed Mr Parsons to confirm that the audit had been completed and that the auditor had provided a CAPAR to Boson. Mr Phan attached a copy of the CAP report (which includes a summary of the findings made during the audit) observing that the results looked similar to the previous TUV Audit Report.

24. On 4 March 2022, the Defendant received a copy of the full audit report prepared by Intertek ("**the Intertek Audit Report**").

25. Thereafter, in a further series of "Without Prejudice" emails, also set out in Appendix A, the Claimants chased the Defendant for disclosure of the Intertek Audit Report.

26. By a letter from GLD to Lewis Silkin dated 31 March 2022, marked "CONFIDENTIAL AND WITHOUT PREJUDICE", GLD noted that Mr Parsons had been requesting a copy of the Intertek Audit Report and said this:

> "For the avoidance of doubt the audit was procured as part of the confidential and without prejudice process and any documents disclosed in that process, including the Intertek audit report, are covered by without prejudice privilege. Please confirm this is agreed and that your client understands the parameters of any disclosure and their responsibilities in regard to any disclosure made to

> them. To be clear, your client cannot use or refer to the Intertek audit report in open correspondence unless and until this [is] agreed between the parties".

27. I understand this to have been the first time that anyone had expressly referred to the Intertek Audit Report itself being covered by without prejudice privilege (as opposed to including reference to its commissioning within Without Prejudice correspondence).

28. Lewis Silkin responded "Without Prejudice" on 1 April 2022 in the following terms:

> "Although the commissioning of a document review and further quasi-BSCI audit by your client was discussed as part of ongoing WP discussions between the parties, the precise scope of the review and audit were not agreed but ultimately decided by your client and neither we nor our client have seen the instructions provided to Intertek or, of course the report or any drafts thereof. Our client cannot therefore accept that the without prejudice negotiations are or were [for] the sole purpose of the review and audit and that the documents created in connection with Intertek's instruction and the review and audit (including the report) are covered by without prejudice privilege".

29. Nevertheless, Lewis Silkin indicated that, for the purposes of ongoing settlement discussions, the Claimants were prepared to receive the Intertek Audit Report on a without prejudice basis, albeit that their right to challenge the assertion of without prejudice privilege was reserved. There then followed further correspondence between the parties discussing the status of the Intertek Audit Report. In summary (and although the reasoning on both sides has subsequently developed and changed), it was GLD's position at this time that because the Intertek Audit Report was commissioned as part of without prejudice negotiations, it "necessarily follows" that it falls within the confines of those discussions and "is itself a document that benefits from without prejudice privilege" such that it is inadmissible in any proceedings. It was Lewis Silkin's position that they were not able to determine whether any exception to the WP Rule might apply to the Intertek Audit Report without seeing it.

30. Finally, upon confirmation from Lewis Silkin that the Claimants would not distribute the Intertek Audit Report to any other party, or use that report on an open basis without the Defendant's prior written consent, the Intertek Audit Report was provided to the Claimants under cover of a letter from GLD (again marked "CONFIDENTIAL AND WITHOUT PREJUDICE") dated 25 April 2022.

Relevant Procedural History

31. On 15 February 2022 the Claimants issued the First Claim against the Defendant alleging breach of the Regulations. This is the procurement claim that is referred to in the minutes of the Defendant's internal meeting of 23 February 2022, referred to above. Particulars of Claim were served on 22 February 2022. The Second and Third Claims were issued on 30 September 2022 and 27 August 2024 respectively.

32. The parties agreed that the First and Second Claims be managed together (as is recorded in the recitals to an order of O'Farrell J dated 17 October 2022). Accordingly, a CMC in these Claims took place on 9 June 2023. Waksman J ordered that disclosure be carried out pursuant to Practice Direction 57AD against a List of issues for Disclosure. The parties provided disclosure of documents responsive to the List of Issues for

Disclosure on 26 July 2024 and provided inspection on the same date. The Defendant disclosed approximately 8,500 documents but did not disclose the Intertek Audit Report or any Associated Documents.

33. The trial is listed to take place over 16 days in June 2026.

The Application

34. Against that background, the Claimants apply by notice dated 11 November 2024 for a declaration that the Intertek Audit Report and the Associated Documents do not benefit from without prejudice privilege. The Associated Documents are identified in the draft Order as falling within seven categories, albeit that Ms Hannaford KC, acting on behalf of the Claimants, confirmed during the hearing that these categories could probably be reduced for ease to only three; namely (i) the Defendant's internal documents concerning his instructions to Intertek and his subsequent consideration of the Intertek Audit Report; (ii) documents evidencing communications/discussions between the Defendant and Intertek; and (iii) documents provided by Boson to Intertek during the audit that are in the possession or control of the Defendant.

35. In the event, it is common ground that the Application in relation to the Associated Documents (other than those falling within the third category identified above) stands or falls on the outcome of the arguments in relation to the status of the Intertek Audit Report. As for the third category of documents, to which reference was originally made in a letter from GLD dated 25 April 2022, these are all documents created prior to the without prejudice discussions between the parties. They were identified in a Checklist prepared by Intertek and provided to Boson for the purposes of its audit. They include contemporaneous documents such as payroll records, labour contracts and attendance records. During the course of the hearing, I understood Mr Bowsher KC, on behalf of the Defendant, to accept that there is no obvious reason why these documents would be covered by without prejudice privilege. Accordingly, he confirmed that the Defendant would agree to an order that he make reasonable requests of Intertek for access to these documents. Ms Hannaford was content for such an order to be made, with the caveat that the Claimants reserved the right to make an application for disclosure of these documents on the grounds that they are within the Defendant's possession or control. In the circumstances, I need say nothing further about this third category of Associated Documents.

36. At the outset of the hearing, the Defendant made a formal application by notice dated 18 February 2025 pursuant to CPR 39.2(3) for the hearing to be in private on the grounds that publicity would defeat the object of the hearing (CPR 39.2(3)(a)), alternatively that there are other reasons which render it necessary to sit in private to secure the proper administration of justice (CPR 39.2(3)(g)). The application notice explained that copies of without prejudice correspondence were in the bundles for the hearing, together with the Intertek Audit Report, none of which should be placed before the Judge at trial.

37. I was not satisfied, however, that it was "necessary" to sit in private to secure the proper administration of justice. It seemed to me that a less restrictive order, designed to protect the parties', without prejudice privilege, whilst at the same time acknowledging the public interest in open justice, was a more appropriate means of addressing the

Defendant's concerns. Accordingly, I invited the parties to agree an order under CPR 31.22 which would restrict the use of documents referred to in connection with the Application pending the handing down of this Judgment, at which point the court will review the necessity for such an order in light of the content of the Judgment.

The Evidence

38. In support of the Application, the Claimants served the first witness statement of Mr Parsons, a director of the Second Claimant and, until 31 March 2024, senior contract manager. This statement explains the background to the Application, the events leading to the commissioning of the Intertek Audit Report by the Defendant and the events immediately following the production of that report. In summary, Mr Parsons explains that the prospect of an independent audit was first discussed in open correspondence between the parties after the QIMA Audit Report owing to the fact that the Defendant would need such an audit in order to enable it to accept the Tests. Mr Parsons confirms that subsequent discussions in 2022 about an audit took place in "a without prejudice setting" and that the prospect of the audit had the potential to assist the parties in resolving their dispute, but he says in terms that "at no stage in my discussions or correspondence with DHSC did I or Santé ever accept or agree that the sole purpose of any further audit would be purely for settlement discussions, nor did we agree that the Intertek Audit Report would be subject to without prejudice privilege". Mr Parsons says that it was self-evident that the Defendant would need to rely on the outcome of the Intertek Audit Report "within its own public audit trail". Mr Parsons also says that he never agreed to the scope of the audit and so does not accept that it was generated for an agreed without privilege purpose. He points out that findings from the Intertek Audit Report was shared with Boson and Mr Phan, i.e. with parties outside the scope of the settlement negotiations between the Claimants and the Defendants.

39. By way of response, the Defendant relies upon the first witness statement of Ms Snook, Commercial Deputy Director, New Testing Technology and Innovation at the United Kingdom Health Security Agency until June 2022. Ms Snook says at the outset that she strongly believes "(and have always believed) that it was at all times the parties' understanding that the [Intertek Audit Report] would be commissioned on a WP basis and remain subject to the WP Rule at all times", a point of view that she repeats later on. She sets out the background to the proceedings between the parties and then summarises the settlement discussions with reference to the without prejudice correspondence. She explains that the idea was that DHSC would commission its own audit report at its own expense "for our own purpose of negotiations" without the Claimants' agreement or involvement. She rejects the suggestion that the report was to be used as part of any public audit trail. She says that the Claimants eventually agreed to the scope of the Intertek Audit Report and she observes that if the Claimants did not agree to the full audit going ahead they could have prevented it from doing so. Ms Snook also says that she was unaware that Intertek held a meeting with Boson at the end of the audit and she has never heard of Mr Phan until recently. She says that she believed Boson and the Claimants to be part of a "single supplier group" and she confirms that in her view the context and purpose of the audit was to aid without prejudice negotiations and to allow the Defendant to consider whether the Claimants' proposals for settlement of the dispute could be accepted.

40. Mr Parsons replies to Mr Snook's statement in his second statement. In this statement he explains the significance of the Intertek Audit Report to the extant proceedings, he disagrees with Ms Snook's evidence as to the purpose of the Intertek Audit Report and he rejects her evidence as to the Claimants' belief and understanding at the time. He also contextualises the discussions between the parties against the background of a global pandemic and a general shortage of Tests, both globally and in the UK. He observes that "we were in the middle of a global crisis where finding a way to enable DHSC to take Tests manufactured by Boson…was critical". He expands upon his evidence about the open discussions between the parties concerning a further audit in the final months of 2021 and he exhibits evidence of the internal deliberations of the Defendant, including the "reactive lines" document and some internal emails to which I have referred above. He observes that "[t]his context is, in my view, key to understanding the real purpose behind the Intertek Audit Report. DHSC had made clear that it would not be able to use Tests manufactured by Boson unless and until there was a further audit undertaken that provided evidence that DHSC could rely upon". He confirms that at all stages, he and the Claimants' team "all understood and believed that this was a critical part of the process so as to give DHSC evidence that it could rely upon publicly so as to be able to use the Tests". Mr Parsons rejects the suggestion that he ever agreed to the scope of the Intertek Audit Report. He also rejects the "single supplier group" argument.

41. Upon first reading the evidence on both sides, I was concerned at the extent of the factual dispute between the parties. This concern was heightened by a suggestion in Mr Bowsher's skeleton argument to the effect that "it may be difficult for the court to determine what was agreed orally in the absence of cross examination" and that "if there is any doubt about what was agreed orally, the WP status of the [Intertek Audit Report] should not be determined at this interim stage".

42. However, upon hearing further submissions from the parties and on further reflection, I am satisfied that there is no difficulty with my making a decision on the Application without requiring cross examination of the witnesses.

43. In short, I am in agreement with Ms Hannaford that (i) Ms Snook cannot give evidence about what the Claimants' understood and believed (at least not evidence to which I can attach any weight); (ii) subjective evidence from Ms Snook and Mr Parsons as to their own understanding and belief is of limited, if any, use in determining the status of the Intertek Audit Report in circumstances where the test to be applied is an objective test (a point to which I return below); (iii) key to my determination, as both sides accept, is my analysis of the without prejudice correspondence passing between the parties, specifically whether that correspondence evidences an express or implied agreement between the parties that the Intertek Audit Report would be covered by without prejudice privilege.

44. Furthermore, and importantly in my judgment, in light of the fact that Ms Snook has not responded to certain potentially key parts of the evidence of Mr Parsons in his second statement (including as to the open discussions between the parties at the end of 2021, the context for the without prejudice discussions and the internal deliberations of the Defendant which appear consistent with that context - as evidenced in the Defendant's internal documents exhibited by Mr Parsons to his second statement including the "reactive lines" document), I asked Mr Bowsher during the hearing

whether he wished to have the opportunity serve further responsive evidence. Not only did he disavow any intention to rely upon additional evidence, but he also confirmed that it was the Defendant's wish that the Application be dealt with on the evidence as it currently stands. He confirmed that, notwithstanding the content of his skeleton argument, he was not seeking to invite the court to adjourn the hearing to facilitate cross examination of the witnesses and further that he did not consider cross examination likely to be of any real assistance.

45. In all the circumstances, it appears to me to be consistent with the requirements of the overriding objective that I determine the Application on the evidence before me. For reasons which will become clear, there is in fact no need whatever to determine which of the witnesses is "right" about disputed issues of fact.

46. Before turning to the parties' arguments, I must first set out the (largely uncontroversial) legal principles.

Relevant Legal Principles

47. I was referred to a number of authorities by the parties and draw the following principles from those cases relevant to the issue arising in this case:

    a. The WP Rule is a rule governing the admissibility of evidence and is founded in the public policy of encouraging litigants to settle their differences rather than litigate them to a finish (*Rush & Tompkins Ltd v GLC* [1989] 1 AC 1280 ("*Rush & Tompkins*"), per Lord Griffiths at 1299D). This public policy justification was clearly expressed in the earlier case of *Cutts v Head* [1984] Ch 290 at 306 (cited in *Rush & Tompkins*) and includes ensuring that parties are not discouraged by the knowledge that anything that is said in the course of negotiations may be used to their prejudice in the proceedings. As Oliver LJ said in *Cutts v Head*, the parties should be "encouraged fully and frankly to put their cards on the table". In *Ofulue v Bossert* [2009] 1 AC 990 ("*Ofulue*"), Lord Hope put it thus at [12]: "[t]he essence of it lies in the nature of the protection that is given to parties when they are attempting to negotiate a compromise. It is the ability to speak freely that indicates where the limits of the rule should lie".

    b. The WP Rule therefore applies "to exclude all negotiations genuinely aimed at settlement whether orally or in writing from being given in evidence" and its underlying purpose is "to protect a litigant from being embarrassed by any admission made purely in an attempt to achieve a settlement" (*Rush & Tompkins* at 1299G and 1300C). As Lewison LJ observed in *Avonwick Holdings Ltd v Webinvest Ltd* [2014] EWCA Civ 1436 ("*Avonwick*") at [17], it is essential to this public policy justification that there is a dispute (objectively determined by the court).

    c. The WP Rule is not limited to admissions made against a party's interest, although the protection of admissions against interest is its most important practical effect: *Unilever* at 2443-2444. Thus "without prejudice" negotiations will normally be inadmissible in their entirety (see *Unilever plc v The Proctor & Gamble Co* [2000] 1 WLR 2436 ("*Unilever*") at 2448H-2449B per Robert Walker LJ: "…to dissect out identifiable admissions and withhold protection

from the rest of without prejudice communications (except for special reason) would not only create huge practical difficulties but would be contrary to the underlying objective of giving protection to the parties" to speak freely when seeking a compromise).

d. In addition to finding its justification in public policy, the WP Rule may also be founded in the agreement of the parties. As Robert Walker LJ said in *Unilever* at 2442: "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". Thus, having regard to the principle of freedom of contract, "[i]f A and B agree for valuable consideration that their communications will not be used in civil proceedings in court" their agreement will be upheld (*Avonwick* at [18]). However, one party cannot unilaterally impose an extension of the ambit of the WP Rule on another – there must be agreement.

e. In some cases both of these justifications are present, in others, only one or the other (*Muller v Linsley & Mortimer* [1996] PNLR 74 at 77, per Hoffmann LJ, cited by Robert Walker LJ in *Unilever* at 2442G-H). However, unless the parties make some agreement to narrow or broaden its effect (as they are entitled to do – see *Ofulue* at [55] per Lord Walker), the scope of the privilege is a matter of general law and is not based on the supposed boundaries of a notional agreement between the parties (*Ofulue* at [37] per Lord Rodger).

f. Over the years the courts have recognised certain exceptions to the WP Rule which are made when the justice of the case requires it (see *Unilever* at 2444-2445 for a summary of these exceptions – none is said to apply in this case).

g. The WP Rule is an important one whose boundaries should not be lightly eroded. The protection afforded by the rule should be enforced unless it can be shown that there is a good reason for not doing so (*Willers v Joyce* at [32(7)] citing *Oceanbulk Shipping SA v TMT Ltd* [2011] 1 AC 662 per Lord Clarke at [28]-[29]).

h. The question of whether a document is truly "without prejudice" is an objective question for the court, subject to consideration where appropriate of the factual matrix and other matters that are properly and normally admissible in connection with the construction of a written document (*Pearson Education Ltd v Prentice Hall India Private Ltd* [2005] EWHC 636 (QB) per Crane J at [22]). The label "without prejudice" is not conclusive (*Rush & Tompkins* at 1299H).

i. Without prejudice privilege is a joint privilege which cannot be waived unilaterally by one party to the negotiations (*Briggs v Clay* [2019] EWHC 102 (Ch) at [52] per Fancourt J and *Sheeran v Chokri* [2022] EWHC 187 (Ch) at [31(6)] per Sir Gerald Barling). However, without prejudice discussions may become open by the parties' consent. If one party to negotiations wishes to change the basis thenceforth to an open one, the burden is on that party to bring the change to the attention of the other party and to establish on an objective basis that the recipient would have realised that a change in the basis of negotiation was being made (*Cheddar Valley Engineering Ltd v Chaddlewood*

Homes Ltd [1992] 1 WLR 820 per Jules Sher QC sitting as a DHCJ and White Book Vol 1 at 31.3.39 page 962).

48. During the course of his submissions, Mr Bowsher sought to rely upon a summary of the principle in *Rush & Tompkins* by Andrews J in *Willers v Joyce* [2019] EWHC 937 (Ch) at [32(3)], in which the learned judge records that the WP Rule applies to render inadmissible evidence "of what was said *and/or done* during the course of negotiations genuinely aimed at settlement: see *Rush & Tompkins*…per Lord Griffiths at 1299-1300" (*emphasis added*). This, suggested Mr Bowsher, supports a very broad reading of the ambit of the public policy justification for the WP Rule.

49. In my judgment, however, this passage needs to be approached with some care. It does not seek to distinguish between the public policy justification for the WP Rule and the contractual justification and it was plainly intended by the Judge only as a summary of the principle as set forth in *Rush & Tompkins*, in which Lord Griffiths expressly refers only to "negotiations genuinely aimed at settlement". For the purposes of considering the public policy justification, I do not consider the word "negotiations" to extend to cover anything that may be "done" by the parties, and each of them, during the course of without prejudice negotiations (although, of course, the parties might agree that something which is "done" by them should be without prejudice). I return to the words of Lord Hope in *Ofulue* as set out above; it is the ability to speak freely that indicates where the limits of the rule should lie. Accordingly, while I have no doubt that the Judge in *Willers v Joyce* was applying shorthand to describe the principle as set out in *Rush & Tompkins*, I decline to adopt that shorthand.

50. Both parties drew my attention to *Rabin v Mendoza & Co* [1954] 1 WLR 271. In that case, the parties in a negligence action involving an allegedly negligent survey of a property reached "an understanding" at a without prejudice meeting that if the risk in question could be covered by taking out an insurance policy, the litigation would be unnecessary. A survey report of the property was commissioned by the defendant firm in order to persuade insurers to cover the risk. No settlement was reached but the question arose in the proceedings as to whether the defendant firm was bound to produce the report or whether it was entitled to claim privilege "on the understanding that [the report was] not to be used to the prejudice of either party" – i.e. on grounds of without prejudice privilege.

51. That proposition appears at the time to have been novel. It is clear from Denning LJ's judgment that without prejudice privilege was not a head of privilege identified in the White Book. Nevertheless, he expressed the view (at 273) that "if documents come into being under an express, or, I would add, a tacit, agreement that they should not be used to the prejudice of either party, an order for production will not be made". Denning LJ held that the surveyors report fell within that principle, observing that it "was clearly made as a result of a "without prejudice" interview and it was made solely for the purpose of the "without prejudice" negotiations". Romer LJ agreed, saying that "[i]t seems to me perfectly plain…that the only object of obtaining the report was to implement the understanding which was arrived at during the interview which was without prejudice; therefore, in my judgment, the protection extends to the report which was obtained in pursuance of that understanding".

52. It was common ground at the hearing that *Rabin* is not concerned with the public policy justification for the WP Rule, but with the circumstances in which the ambit of the rule may be widened by agreement of the parties. Ms Hannaford submits that, subject to the words "tacit" and "implied" meaning the same thing, the general principle that was articulated in *Rabin* is on all fours with *Unilever* and *Avonwick*. Thus, she submits that if one is dealing with an express agreement, the parties may decide to agree to broaden (or narrow) the WP Rule in any way they think fit; as long as their agreement is for valuable consideration it will be upheld (*Avonwick*). However, relying upon Hollander: Documentary Evidence 15th Edn, at 20-06, Ms Hannaford contends that the court must take great care before implying an agreement that a document will be covered by without prejudice privilege. She submits that an appropriate degree of caution can be achieved by applying the Court of Appeal's approach in *Rabin* to the effect that the survey report was covered by without prejudice privilege not only because there had been an "understanding" or agreement to that effect but also because it was made "solely" for the purpose of the without prejudice negotiations.

53. I agree that it is likely to be difficult to identify a tacit or implied agreement that a document is to be covered by without prejudice privilege in circumstances where the document was not made solely for the purpose of the without prejudice negotiations. However, I did not understand Ms Hannaford to suggest that it was impossible for the court to find an implied agreement absent a finding of sole purpose for use in without prejudice negotiations – merely that it would be "inadvisable" to imply an agreement in a case where the disputed document had a number of different purposes.

54. Even assuming the requirement of "sole purpose" to be part of the *ratio* of the decision in *Rabin*, that case was decided before the development of the principles set out in the "modern cases" (which date from *Cutts v Head* in 1984 - see *Unilever* at 2448 per Robert Walker LJ) and so must be treated with a degree of caution. There is nothing in *Unilever* or in *Avonwick*, both of which discuss the parties' freedom to extend the ambit of the public policy rule by agreement, to suggest a "sole purpose" requirement. Indeed the imposition of a sole purpose requirement when examining any agreement made by the parties might appear to circle back into the public policy requirement for the WP Rule as articulated by Lord Griffiths in *Rush & Tompkins* (that all negotiations, whether oral or in writing be inadmissible where they are "genuinely aimed at settlement").

55. Accordingly, while it may be difficult to establish an implied agreement absent a sole purpose of use in without prejudice negotiations, I am not prepared to find that such sole purpose is an essential feature (and I agree with Mr Bowsher's submission that it is not). In any event, for reasons to which I shall turn, the outcome of this Application does not turn on the issue of "sole purpose".

56. Finally, Ms Hannaford submits that the burden of proof on an application of this sort rests with the party claiming privilege. Ms Hannaford relies for this proposition on *West London Pipeline and Storage Ltd v Total UK Ltd* [2008] EWHC 1729 (Comm) per Beatson J at [86(1)]. However, *West London* was a case involving litigation privilege, where there can be no doubt that the burden lies on the party asserting such privilege. I am less convinced that the same approach necessarily applies in the context of without prejudice privilege and it was Mr Bowsher's submission (albeit without reference to authority) that if something is done as part of without prejudice negotiations "the presumption is that it is part of those negotiations" – from which I

understood him to suggest that the burden of rebutting such presumption would rest with the party asserting an absence of privilege.

57. There is virtually no reference in the cases to which I was referred to the burden of proof in a case involving a dispute over without prejudice privilege. I note, however, Lord Hope's observation in *Ofulue* at [2] (immediately following a reference to *Cutts v Head*, *Rush & Tompkins* and *Unilever*) that "[w]here a letter is written without prejudice during negotiations with a view to a compromise, the protection that these words claim will be given to it unless *the other party* can show that there is good reason for not doing so" (*emphasis added*). Applying this proposition would suggest that (at least) once the words "without prejudice" are used in connection with a document written in the context of an attempt to compromise a dispute, the burden lies with the party disputing the privilege. That is not, however, the position here, where a document was created further to without prejudice discussions but was not itself marked "without prejudice". Whilst it may be that in such a case it is for the party asserting the privilege to rebut the inference that the document is open, I was not referred to any authority to this effect.

58. In any event, I do not need to decide the point and I doubt that the question of "burden of proof" will generally be of much assistance when it comes to determining an issue about without prejudice privilege. I have not needed to resort to the burden of proof in order to decide this Application.

Discussion

59. It is common ground that, but for the Defendant's assertion of without prejudice privilege, the Intertek Audit Report would be relevant to the issues arising in the Claims and, therefore, disclosable. The only issue before the court is therefore whether the Intertek Audit Report is in fact "without prejudice".

60. On this central issue, the Claimants contend, in summary, that:

    a. the Intertek Audit Report is not covered by the public policy justification for without prejudice privilege as articulated in the authorities to which I have referred;

    b. accordingly, the Intertek Audit Report can only be protected by without prejudice privilege if the parties agreed to extend the scope of the WP Rule to cover it;

    c. it is impossible to discern any express or implied agreement between the parties that the Intertek Audit Report be covered by without prejudice privilege; and

    d. without prejudice privilege cannot be unilaterally imposed.

61. In its skeleton argument, the Defendant appeared to be contending that without prejudice privilege attached to the Intertek Audit Report owing purely to the agreement of the parties. Thus, it was repeatedly asserted that there had been a mutual agreement that the Defendant would obtain a new audit report on a without prejudice basis. In a list of corrections provided after circulation of this judgment in draft, the Defendant

sought to echo this submission, saying that he had "intended and understood" his written and oral submissions to be that the email dated 28 January 2022 headed "without prejudice" (and included within Appendix A) "was an express statement that the audit report discussed in that email would be covered by without prejudice privilege". Although not entirely clear, this appears to be a suggestion that there was an express agreement made by the parties during the without prejudice negotiations.

62. However, this was not the way the argument was developed in submissions. Instead, as I understand his submissions at the hearing, the Defendant submits that:

    a. there is no dispute that the negotiations between the parties in January/February 2022 were without prejudice;

    b. accordingly, as a matter of public policy, the Intertek Audit Report is covered by without prejudice privilege;

    c. it is accepted that there was never an express agreement that the Intertek Audit Report would be "without prejudice". Until the date of the audit there were merely "evolving discussions" about the terms and scope of the audit;

    d. nevertheless, there came a point when the without prejudice status of the Intertek Audit Report was implicitly agreed by the parties. That point was the date when Intertek was given access to the Boson Facility to conduct the audit. It was only when the audit went ahead that its status was, effectively, confirmed as "without prejudice". This implied agreement was supported by valuable consideration in the form of a mutual agreement to negotiate. Mr Bowsher put the point thus: "[b]y allowing the auditors in, that was acceptance [by the Claimants] of the basis on which the audit would be done [i.e.] that it would be subject to the WP process agreed throughout";

    e. although there is no requirement as a matter of law that the report should be made for the sole purpose of without prejudice negotiations, in fact that was the only purpose of the Intertek Audit Report.

63. During the course of his submissions, I understood Mr Bowsher initially to acknowledge that he could not establish that the Intertek Audit Report was "without prejudice" purely by reason of the operation of public policy, but that he needed also to establish an agreement to that effect between the parties – in other words that the Defendant could only succeed in defending the Application if it could be established that the parties had agreed to widen the ambit of the policy. Certainly, there was no suggestion in his skeleton argument that the Intertek Audit Report fell within the public policy justification for the WP Rule.

64. However, as set out in paragraph 62(b) above, the Defendant's final position during submissions appeared to be that, on reflection, there was in fact no need to establish an agreement (whether express or implied); it was enough to contend (apparently contrary to its skeleton argument) that the Intertek Audit Report had been created under the umbrella of without prejudice negotiations and thus was subject to the public policy justification for the WP Rule.

65. I must examine the rival contentions set out above with care, applying the principles to which I have already referred.

The Public Policy Justification

66. Starting with the public policy justification for the WP Rule, I do not consider that the Intertek Audit Report can properly be said to fall within it. Although there is no doubt that the without prejudice negotiations between the parties as to settlement included discussions as to the commissioning of an audit report, I cannot see that the Intertek Audit Report is therefore automatically cloaked in without prejudice privilege. It is not itself a statement or offer made in the course of negotiations, it is not a record of negotiations between the parties and it has nothing to do with admissions. It is an independent report commissioned from a third party which does not contain statements from either party. It is very difficult to see how (absent agreement) it could fall within the underlying purpose and objective of the WP Rule of enabling the parties to speak freely.

67. I do not understand *Rabin* to be authority for the proposition that a third party report falls within the public policy arm of the WP Rule, that being a case which appeared to turn on the parties' "understanding" that the survey report should be "without prejudice". It is clear from the authorities to which I have referred that the public policy justification for the WP Rule is "a matter of general law" and has nothing to do with any notional agreement between the parties (see *Ofulue* at [37]). The evidence from Mr Parsons and Ms Snook therefore takes matters no further in relation to the public policy justification.

68. Furthermore, I have already rejected Mr Bowsher's reliance upon the broad proposition set forth in *Willers v Joyce* at [32(3)]. In my judgment, the public policy rationale for the WP Rule cannot possibly cover anything the parties do further to discussions at a without prejudice meeting. That would be to extend the ambit of the rule too far. The "unseen dangers" that Lord Hope identified in *Ofulue* (at [12]) as lurking behind things said or written by the parties in a period of negotiation and the inhibiting effect that these may have on the attempts to achieve a settlement do not appear to me to extend to an independently commissioned report into conditions at the Boson Facility written by a third party.

69. Finally, while negotiations and discussions should not be dissected (such that the parties can speak freely in the furtherance of the protection of admissions against interest), I reject Mr Bowsher's submission that (absent agreement) an independent report commissioned from a third party falls within that underlying objective. It strikes me as not entirely insignificant that the Defendant has only sought to rely upon the public policy justification for the WP Rule as a stand-alone argument at the eleventh hour, having, until then, focused his arguments (and evidence) on the existence of an agreement between the parties.

Implied Agreement

70. As explained by Mr Bowsher in oral submissions, it is not the Defendant's case that the parties entered into an express agreement that the Intertek Audit Report would be covered by without prejudice privilege. As Ms Hannaford submits (and the Defendant appeared in court to accept), the mere fact that negotiations which have referred to the

procurement of a third-party report are covered by the umbrella of without prejudice privilege does not mean that there is an express agreement that the report itself will also be "without prejudice".

71. Is it possible, however, to identify an implied agreement from the existence of the without prejudice negotiations in this case and/or from the content of correspondence between the parties during the course of those negotiations?

72. Ignoring the subjective evidence from Mr Parsons and Ms Snook, it is in my judgment impossible to identify any such implied agreement on the available evidence. Indeed, the way in which Mr Bowsher now puts this case appears to me only to highlight the implausibility of such a proposition. He does not appear to rely generally on factual context, or to suggest (at least not during his oral submissions) the existence of a common understanding as to the without prejudice status of the Intertek Audit Report engendered purely by reason of the ongoing without prejudice negotiations. He acknowledges that there was no agreement (express or implied) that the report would be without prejudice in January 2022 when the without prejudice negotiations began and he accepts that there is nothing in the without prejudice correspondence to support such an agreement. Instead, he suggests that, against the background of the ongoing without prejudice process, the Claimants' failure to object to the audit taking place at the end of February 2022 had the effect of "crystallising" an implied agreement as to the status of the report.

73. I reject this submission for the following main reasons:

    a. Given the Defendant's approach, there can be no basis for any finding other than that the existence of ongoing without prejudice negotiations did not give rise to an agreement (express or implied) that the Intertek Audit Report would itself be "without prejudice". This is not a case (as occurred in *Rabin*) where I am invited to discern an understanding arrived at during the without prejudice discussions, or in subsequent without prejudice correspondence, as to the status of the Intertek Audit Report.

    b. There is certainly no evidence on which I could find (as asserted in the Defendant's skeleton argument) that the Intertek Audit Report "was procured with the Claimants' agreement that it would remain subject to the WP Rule".

    c. Mr Bowsher acknowledged that it is "hard to know" when the parties made their implied agreement, and he accepts that it is "not straightforward". As developed in submissions, the Defendant's case boils down to no more than that there came a time when the Claimants no longer sought to pursue their concerns in without prejudice correspondence about the scope of the audit and instead permitted it to take place by arranging for access to the Boson Facility. But I can see nothing in those facts which, even remotely, supports a tacit or implied understanding or agreement between the parties as to the status of the audit.

    d. Mr Bowsher suggests that, by allowing Intertek to conduct the audit, the Claimants had "accepted the basis on which the audit would be done" in other words that it would be "subject to the without prejudice process agreed throughout". But, to my mind there is a distinction between an agreement as to

a without prejudice process and an agreement as to the status of an independent report; the latter cannot be inferred from the existence of the former. There is nothing in the documents (looked at objectively) to indicate that both parties agreed (or even understood) that the Intertek audit was to be conducted on the basis that the resulting report would be "without prejudice". There is no evidence that the Defendant made a proposal to that effect which was subsequently "accepted" by the Claimants and, as Ms Hannaford rightly says, the privilege is joint and cannot be imposed by one party upon another.

e. That Mr Parsons was questioning the scope of the Intertek Audit Report and (on my reading of the without prejudice emails in Appendix A) arrived at a point where he accepted that the audit should go ahead on the Defendant's terms (even if he did not agree with them) is nowhere near sufficient to cloak the report in without prejudice privilege. Those terms certainly never suggested that the report would be without prejudice.

f. Although Ms Snook's subjective evidence is to the effect that it was the parties' mutual understanding that the Intertek Audit Report "would be commissioned on a WP basis and remain subject to the WP rule at all times", I did not understand Mr Bowsher to rely upon this evidence. He also did not repeat the submission in the Defendant's skeleton argument as to the risk of unfairness in a situation where "the Claimants allowed [the Defendant] to commission an audit, knowing full well that [the Defendant] believed the results of such audit would be without prejudice". This is of course disputed but takes matters no further. Neither parties' subjective evidence is of any assistance to the court in seeking to determine, on an objective basis, whether or not there was an implied agreement to this effect.

g. I can see nothing whatever in the without prejudice correspondence between the parties, set out in detail in Appendix A, to support a finding that, as Mr Bowsher also said, "the parties made clear what the status of the report should be" and that was subsequently "crystallised" by their implied agreement upon Intertek entering the Boson Facility to conduct the audit. Certainly, there is nothing in that correspondence that evidences an intention on the part of both parties that their eventual agreement to the audit taking place at the Boson Facility on a particular date was also an agreement that it be conducted under the cloak of without prejudice privilege. In so far as the Defendant seeks to contend (after the hearing and in its proposed corrections to the draft judgment) that the without prejudice email of 28 January 2022 from Mr Parsons was "an express statement" by the Claimants that the audit report would be covered by without prejudice privilege, I reject that contention. Reading that email, I do not understand it to be referring to any agreement or understanding as to the status of the audit report itself.

h. Furthermore, and although not strictly necessary given my findings so far, looking at the unchallenged evidence (as to the existence of the Covid 19 pandemic; the urgent need for compliant Tests; the commissioning of the V-Trust and TUV Audit Reports on an open basis; the open discussions between the parties in late 2021 as to a further audit – which overlapped with the commencement of the without prejudice negotiations; the contents of the

reactive lines documents and the internal discussions on the part of the Defendant about the need for, and purpose of, a further audit), there appears to me to be nothing in the factual context to suggest or support the existence of an implied agreement to the effect that the Intertek Audit Report would be without prejudice. Quite the contrary. If anything, and notwithstanding Ms Snook's evidence that the Intertek Audit Report was not to be used as part of a public audit trail, that unchallenged evidence points strongly towards there being various purposes behind the commissioning of another audit report which do not sit comfortably alongside the Defendant's contention as to its sole purpose, just as they do not support an implied agreement that it be without prejudice. The Defendant has chosen not to explain or challenge this evidence.

i. Finally, Mr Bowsher sought to rely upon correspondence between the parties after the Intertek audit (and in particular an email of 17 March 2022, referred to in Appendix A) which he suggested confirmed that the parties had both always intended the audit to be "without prejudice". I disagree. I am not at all convinced that (applying a conventional approach to contractual construction) any document created after the audit is admissible for the purposes of determining objectively whether the Intertek Audit Report was commissioned on terms (express or implied) that it be without prejudice. Further, and in any event, I do not regard the email of 17 March 2022 sent by Mr Parsons as being in any way determinative: neither his reference to "a further BSCI type audit" nor his suggestion that another WP meeting take place to discuss the report (once provided) establish a joint understanding and agreement that the Intertek Audit Report should itself be without prejudice.

74. In light of my findings above, there is no need for me to address further the arguments raised by the Claimants as to (i) the absence of any agreement between the parties as to the scope of the audit; (ii) the significance of Intertek having been instructed solely by the Defendant; and (iii) the failure on the part of the Defendant to keep the Intertek Audit Report confidential (specifically by reason of sharing its results with Boson and Mr Phan when providing the CAPAR) – an argument which also raises the nature of the relationship between the Claimants and Boson. As the arguments were developed orally, these points did not appear to me to take matters any further.

Conclusion

75. For all the reasons set out above, I declare that the Intertek Audit Report and the Associated Documents (save those referred to as falling within the third category of documents identified by Ms Hannaford) are not protected by without prejudice privilege and I shall make an order that they must be disclosed.