CA on appeal from TCC (HHJ Coulson QC) before May LJ; Smith LJ; Sir Martin Nourse. 21st December 2006

1. **LORD JUSTICE MAY:** One of the prominent recommendations in Lord Woolf's report of "Access to Justice" of July 1996 was for a series of reforms of civil procedure relating to expert witnesses. A mature version of these recommendations is now to be found as Part 35 of the Civil Procedure Rules. Two particular problems which Lord Woolf addressed were that experts' reports and evidence had tended to be too voluminous, expensive and time-consuming, and that some experts were hired or thought they were hired to be advocates rather than to give their independent opinion, uninfluenced by the interests and views of the party who had engaged them. So it is that rule 35.1 of the Civil Procedure Rules stipulates that expert evidence shall be restricted to that which is reasonably required to resolve the proceedings; that rule 35.2 defines an expert for the purposes of part 35 as an expert who has been instructed to give and prepare evidence for the purpose of court proceedings; that rule 35.3 provides that it is the duty of an expert to help the court on the matters within his expertise and that this duty overrides any obligation to the person from whom he has received instructions or by whom he is paid; that rule 35.10 provides that an expert's report must comply with the requirements set out in the relevant practice direction and contain at the end of it a statement that the expert understands his duty to the court and has complied with it; and that paragraph 1.2 of the Part 35 Practice Direction stipulates that the report of the expert should be the independent product of the expert, uninfluenced by the pressures of litigation. These requirements are, or should be, now well understood by those who act as expert witnesses in civil litigation. They necessarily mean that those who instruct experts to act for them in civil litigation authorise them to act as such in conformity with the rules.

2. Rule 35.12 adopted and refined a procedure for discussions between experts which had featured in a less developed form in Order 38, rule 38, of the former Rules of the Supreme Court, and which had its origin in procedures in the Official Referees' Court, now the Technology and Construction Court. Rule 35.12 provides as follows:

> *"(1) The court may, at any stage, direct a discussion between experts for the purpose of requiring the experts to -*
> *a) identify and discuss the expert issues in the proceedings; and*
> *b) where possible, reach agreed opinion on those issues;*
> *(2) The court may specify the issues which the experts must discuss.*
> *(3) The court may direct that following a discussion between the experts they must prepare a statement for the court showing -*
> *a) those issues on which they agree; and*
> *b) those issues on which they disagree and a summary of their reasons for disagreeing;*
> *(4) The content of the discussion between the experts shall not be referred to at the trial unless the parties agree.*
> *(5) Where experts reach agreement on an issue during their discussions, the agreement shall not bind the parties unless the parties expressly agree to be bound by the agreement."*

3. In my view, the structure of this rule is clear. It provides a balance between the need for the parties' experts to be able to have a free discussion about issues amenable to their expert opinion which are relevant in the case without the details of those discussions becoming material which can be used in the proceedings, with the court's need to have some proportionate and useful product of those discussions. The statement for the court for which rule 35.12(3) provides is a statement which, if it is directed, the experts must produce. It is a statement which, from the very wording of the rule, is available for use in the proceedings. It is not protected by privilege. One of its purposes is to define and narrow the contentious issues. An agreement of this kind is likely to influence any decision the court may reach and the court is likely to make findings consonant with what the experts have stated to be their agreement. But the court is not bound to do so and rule 35.12(5) expressly says that the experts' agreement shall not bind the parties unless they expressly agree so to be bound.

4. A stated agreement by the experts is not therefore, strictly speaking, an admission. It is certainly not an admission by the parties, because it is not their statement and they are not bound by it. It is not perhaps apt to characterise it as an admission by one or both of the experts, but rather as an expression of agreement or, as the case may be, disagreement by them in response to an order of the court and in performance of their overriding duty to the court. As I have said, by instructing experts in civil proceedings the parties authorise their experts to do this. It would no doubt be possible for a party instructing an expert in civil proceedings to instruct that expert not to proceed in accordance with an order under rule 35.12(3). But I think that, if this happened, the expert would have to decline to continue to act as an expert in the proceedings, or at least to seek the court's direction in that respect. For, in truth, the instruction would be an instruction not to perform the expert's duty to the court. It would be so because the postulated instruction would be an instruction to disobey an order of the court for which the Rules provide, and an instruction to the expert not to perform his overwriting duty to the court, for which again the Rules provide.

5. This appeal concerns the operation of rule 35.12 and its interrelation with an order staying the proceedings for alternative dispute resolution by means of mediation. The court will always encourage mediation in an appropriate case. It is well-known and uncontentious in this case that mediation takes the form of assisted "*without prejudice*" negotiation and that, with some exceptions not relevant to this appeal, what goes on in the course of mediation is privileged, so that it cannot be referred to or relied on in subsequent court proceedings if the mediation is unsuccessful. In the present case the parties reinforced this by including a provision in their mediation agreement that they would "keep confidential all information, whether oral or written or otherwise produced for or at the mediation". This cannot of course be taken absolutely literally, since it obviously would not apply to documents obviously produced for other purposes which were needed for and produced at the mediation; for

example, their building contract or the antecedent pleadings in the proceedings. There was also a note in the agreement to the effect that evidence otherwise admissible would not become inadmissible simply because it was used in mediation. But the general intent of the provision is clear and it accords with the generally understood "*without prejudice*" nature of mediation.

6. In the present case the court ordered and later extended a stay of the proceedings for mediation. The court did not order the parties to mediate. The court would never, I think, sensibly make such an order, since the court cannot, in the real world, compel a party who does not want to to participate in a mediation. The court can and does order a stay of proceedings for mediation, almost always when all parties have indicated that they are willing to try. The court may also perhaps, on occasions, consider making an adverse costs order against a party who is shown to have unreasonably refused to participate in mediation, although I personally regard that as a power to be exercised with caution. Since the court cannot order the parties to participate in mediation, neither can the court make orders stipulating the details of how the parties should conduct a mediation. The most the court can do is to encourage.

7. The claimants engaged the defendant to provide architectural services for the construction of a house. Things appear to have gone wrong and in these proceedings the claimants contend, in amended Particulars of Claim covering 45 pages, that the defendants were negligent and in breach of their professional duty in a large number of detailed respects. The proceedings in the Technology and Construction Court were under the case management of HHJ Thornton QC. There was eventually produced a schedule of damages, in the form of an Official Referee's schedule, produced by the claimants pursuant to an order of 28 January 2005, to which the respondents responded also in schedule form. Various orders were made to achieve this. The court also made an order staying the proceedings for alternative dispute resolution whose implementation was delayed while the schedules were prepared.

8. There was a further case management conference on 19 July 2005, at or after which Judge Thornton made an order which included an order in these terms:

   "By 23.9.05, the parties' architectural experts (Peter Blockley for the Claimants and Frank Cleveland for the defendants) do meet without prejudice and prepare a statement of the issues upon which they are agreed and those upon which they are not agreed with a brief statement of the reasons for the disagreement."

9. Mr Newbury took over from Mr Frank Cleveland as the defendants' expert. Mr Newbury and Mr Cleveland belong to the same firm. The experts met and produced a joint statement. It was used in the mediation. The mediation was unsuccessful and so the proceedings continued.

10. The defendants may have got wind of the idea that the claimants wanted to amend details of their case. But, in any event, the defendants wanted and want to use the joint statement of the experts in the proceedings. In essence, they say that it is a statement ordered by the court under rule 35.12 and is usable as such. The claimants say that it is a statement prepared for the purpose of and used in the mediation, and that therefore it is a privileged document which the defendants may not use in the proceedings.

11. This question came before Judge Thornton on 16 March 2006 and he gave a lengthy ruling on 3 April 2006. He made some observations relevant to his understanding of the purpose, meaning, and status of the original order, but he did not decide the question of privilege because he lacked the necessary evidence to do so. He suggested a way forward which included the sensible possibility that the question might be decided by a different judge to avoid the risk that Judge Thornton himself might become contaminated by information about the joint statement which, as the potential trial judge, he ought not to have.

12. The issue of privilege was eventually heard and decided by HHJ Coulson QC in the Technology and Construction Court. He gave a very careful judgment on 19 September 2006, holding and ordering that the joint statement was privileged for all purposes. He refused permission to appeal, explaining his view that his decision was ultimately not on a point of principle but a decision on the facts. Rix LJ gave permission to appeal, writing that the case was arguably replete with points of principle.

13. The critical part of the order which emerged in the hearing on 19 July 2005 came from discussions and e-mails between counsel as to the form that the order should take. Counsel had a mild disagreement about whether there should be an order for an expert joint statement. Counsel for the claimants agreed that the experts should meet and report back to their instructing solicitors. Counsel for the defendants contended that there should be an order for a joint statement pursuant to rule 35.12(3). He proposed the order in the form in which it was eventually made, with explicit reference to the rule. Judge Thornton was asked to rule on this and he did so, so the order was made in the form to which I have referred. The written request for this ruling including some e-mails, which themselves included an explicit reference to rule 35.12(3) of the Civil Procedure Rules.

14. In his ruling of 3 April 2006, Judge Thornton recounted of the case management conference on 19 July 2005 that both parties expressed a continuing desire to mediate and that they had agreed that a detailed *"without prejudice"* meeting or series of meetings should take place between the principal experts prior to any attempted mediation. He also made some observations recording his view of the effect and status of the order he made. Judge Coulson did not fully understand this part of what Judge Thornton had written. Judge Coulson found that the terms of the order which the judge made as proposed by the defendants was in a conventional form for an order under rule 35.12(3). I agree and would hold that it was an order made under rule 35.12(3). It could not, in the context, have been anything else since, as I have explained, the court can encourage mediation but has no

power to order the parties how to conduct a mediation. Judge Thornton's after the event views as to the effect of his order are interesting but not helpful to determine the meaning and effect of the order, which has to be judged and determined objectively. It is not in dispute but that the order was made with mediation in mind.

15. Judge Coulson had and considered written evidence from each party, it being agreed that the matter should proceed without the witnesses giving oral evidence and being cross-examined. The evidence relevant to the making of the experts' joint statement is summarised in paragraphs 20 to 24 of Judge Coulson's judgment, which can be found under the neutral citation number [2006] EWHC 2338 TCC.

16. Concern had been expressed by the claimants' solicitors and the defendants' original expert, Mr Cleveland, about whether there was enough time to produce a finalised joint statement in time for the mediation. In this context Mr Blockley told Mr Davidson, the claimants' solicitor, that the joint statement would almost certainly not be in a fit state "for filing with the court". Mr Davidson responded immediately saying:

"The proposal is not for a joint report to submit to the court but one which can be used in mediation. In those circumstances the report would not need to be in a form appropriate for the court at this stage, merely a working document to assist with mediation."

17. Mr Blockley replied again to confirm to Mr Davidson that he was aware that the joint statement was for the purposes of mediation. A statement marked *"without prejudice"* was agreed by Mr Blockley and Mr Newbury on 1 September 2005. The judge then proceeded in his judgment paragraph 23 as follows. Mr Newbury was advised by Mr Cleveland *"that it was normal for a final version of the statement to have this status removed because it had by then become the considered and agreed statement of both experts"*.

18. There is no dispute that Mr Blockley signed the statement along with Mr Newbury and agreed to the removal of the *"without prejudice"* status. These events were described by Mr Newbury in his statement, not contested by Mr Blockley, in the following terms:

> *"12. … Mr Blockley agreed to this during a telephone conversation. Later on 1 September 2005 I sent a copy of the signature page with 'without prejudice' duly removed. My covering fax sheet together with a covering letter with the posted copy of the joint statement clearly noted to Mr Blockley the agreed removal of the 'without prejudice' status … Mr Blockley signed and returned the signature page to me by e-mail …*
>
> *13. At no time since mutually agreeing our amendments did I understand that Mr Blockley regarded the agreement as merely provisional or merely for the purposes of mediation…"*

Then Judge Coulson said "*it is of course that last point which is at the heart of the dispute now between the parties*".

19. Significantly, Mr Blockley wrote to Mr Davidson on 2 September 2005, saying this:

"Dear Jonathan

Further to our e-mail correspondence yesterday, Frank Newbury and I have now reached agreement on the Joint Statement. As you will see we have used the Scott Schedules as the basis of the Statement which makes for a concise and easily comprehendible document by relating each item directly to the Particulars of Claim and Counterclaim.

I now enclose an original signed copy for filing with the court by 23 September in accordance with Judge Thornton's order."

20. Judge Coulson said that it was clear to him that Mr Newbury was operating on the basis that, although the imminent and initial use of the statement would be for the mediation between the parties, the statement might also be used for the purposes of CPR 35.12. He considered that a statement of the kind that was signed on 1 September 2005 would ordinarily not be privileged but in his view this was not a usual situation. The order for the experts' meeting only came about as a result of the imminent mediation. The whole purpose of the short period was to facilitate the mediation. Judge Thornton did not think he was making a conventional order. I have to say that in my view what Judge Thornton might have thought, but did not express, at the time is immaterial. Judge Coulson went on to say that the claimants' solicitor and the claimants' expert both believed that the purpose of the statement was for use in the mediation. That may be correct in general, but it does not take account of Mr Blockley's letter of 2 September 2005.

21. Judge Coulson further considered that the defendants' expert, to put it at its highest, believed the statement had a dual purpose. Accordingly, the judge decided that the primary function of the statement was to assist in the mediation. He considered that there was a wider point of fairness. Mr Blockley was concerned about time and cost. It would be unfair to the claimants to conclude that the statement was an open statement, since Mr Blockley would not have signed up to the statement if it were a document that could be referred to by all parties in the litigation. There was a degree of muddle on the part of Mr Blockley, but this did not alter the fact that his instructions and understanding of them were that the document was required for the mediation. Documents provided for mediation are normally privileged and that privilege should not be waived or otherwise lost, other than in clear and unequivocal circumstances. The order was admittedly clear but both the claimants' solicitor and their expert intended that the statement which was produced was intended for use in the mediation. The judge took account of the stage in the proceedings when the order was made. Mr Bacon points out that the order made on 19 July or 18 August 2005 rescinded an order for the exchange of experts' reports. The judge also took account of the short time frame for the experts' discussions.

22. I understand paragraph 31 of the judge's judgment, which I have just summarised, to include a decision that the order for the experts' meeting and statement should be read as if it were qualified by reference to mediation because the judge and the claimants' advisers intended it to be so qualified.

23. In my judgment, the judge's reasoning and conclusion were wrong and I would allow the appeal. In reaching this conclusion I take into account the submissions on behalf of the claimants made by Mr Bacon in support of the judge's conclusion, including that in the respondents' notice. I shall address those later in this judgment but for convenience I shall give my positive reasons first.

24. First, Judge Coulson was I think wrong to qualify, if he did so, the terms and effect of the crucial order. Judge Thornton's view, unexpressed at the time, is as I have said immaterial -- so too the views and intentions of the claimants' advisers. The order was made in the terms in which it was and is to be construed objectively. So construed, it is an order under rule 35.12, not least because the court would have no power to make an order in the terms of Judge Coulson's qualification. The order was also quite plainly made in response to a request by the defendants' counsel for an order under that particular rule. The fact that the order was made with an eye to assisting a contemplated mediation did not change the status and construction of the order, any more than this would have changed the status and effect of the antecedent orders to prepare schedules, which were also as I understand it ordered with a view to their preparation preceding a mediation and which, in all probability, were also used in mediation.

25. There was, in my judgment, therefore an order which obliged the experts to prepare a statement for the purpose of rule 35.12(3) and they would be in breach of their duty to the court if they did not do so. Claimants, through their solicitors, would be in breach of the court order if they instructed their relevant expert not to comply with the order. If there was such an instruction the expert would have strictly, perhaps, been obliged to decline to continue to act in the court proceedings or at least to seek the court's directions.

26. I do not think in fact that Mr Davidson's response to Mr Blockley, that the proposal was not for a joint experts' report to submit to the court but one which could be used in mediation, is to be seen as an instruction not to comply with the court order so much as a misstatement of what the court had in fact ordered. Equally, it was entirely open to the claimants through their solicitors to instruct the expert to do something different from and additional to that which the court had ordered. If this were done, such an instruction would not disoblige the expert from complying with the court order.

27. I emphasise that none of this precludes the possibility that the joint statement, which the experts in fact produced, was not that which the court had ordered. There may indeed have been a failure to comply with the court order and it would certainly have been possible for the experts jointly to produce documents for the mediation alone which were not a joint statement such as the court had ordered under rule 35.12(3). If, in doing so, they failed to comply with the court's order, the court might have had to deal with that breach, but it would not convert a document which was not a rule 35.12(3) joint statement into such a statement.

28. So there is a factual enquiry to be made. But the judge's factual enquiry proceeded from an incorrect premise as to the effect of the order or did not give its effect proper weight and he imported into his consideration of the effect of the order immaterial matters. A reassessment of the facts is therefore needed. The factual question is whether the joint statement which the experts produced was and should be regarded as that which the court had ordered.

29. So expressed and understood, there seems to me to be only one answer. The experts met and discussed, as they were obliged to do. They produced a joint statement originally marked "without prejudice". A final version of that statement was produced with the "*without prejudice*" marking removed. The impetus for this was Mr Cleveland's understanding, correct in my view, that it was normal -- I would say necessary -- for a final version of the statement to have the "without prejudice" marking removed because it had by then become the considered and agreed statement of both parties for the purpose, I would add, of doing that which the court had ordered. Mr Blockley agreed to what Mr Cleveland had suggested and he sent to the claimants' solicitors an original signed copy of the statement for filing with the court by 23 September in accordance with Judge Thornton's order, see his letter of 2 September 2005. Accordingly, in my judgment, what both experts had prepared was a joint part 35.12(3) statement which was not privileged. It did not acquire a privileged statement by being used in the mediation, any more than would the pleadings in the action, if they were so used. Judge Coulson's idea, that an originally privileged document did not lose the status of privilege, put the matter the wrong way round. This in my view being the correct analysis, I do not think that questions of general fairness, which would be factually debatable, really enter into it.

30. I turn to Mr Bacon's submissions on behalf of the claimants for upholding the judge's order, insofar as I have not already addressed them. He submits that this court should be extremely wary in disturbing findings of fact made by Judge Coulson. That is a usual position in this court, although since there was no oral evidence, this court is in as good a position as was the judge on questions of fact. However, the extent to which my assessment of the facts differs from the judge's is, so far as is material, small. I would discard material from Judge Thornton's 3 April 2006 ruling for the reasons I have given. Mr Blockley's letter of 2 September 2005 speaks for itself.

31. Mr Bacon made submissions in relation to particular points, both orally and in paragraph 33 of his skeleton, which do not affect my analysis. Mr Bacon submits that the involvement of the experts arose because of the agreed stay for mediation. The order was made to further that process. The discussions of the experts' meetings were without

prejudice. The discussion at the mediation about the experts' discussions and their statements were without prejudice. I agree with all of that but it does not affect my analysis or conclusion.

32. I have considered and dealt with Mr Bacon's submission that Mr Blockley was instructed that the purpose of the statement was for the mediation and not for the court. Mr Bacon points to Mr Blockley's evidence, when it was suggested and he agreed that the "*without prejudice*" marking should be removed from the statement he had in mind the position under rule 35.12. He did not revert to his instructions, nor speak to or seek guidance from the claimants' solicitors and he did not receive instructions to change his previous instructions that the purpose of the statement was for the mediation. That is also consonant with my analysis.

33. Mr Bacon emphasises public policy issues relating to mediation and refers to authorities in that respect. These are well-known and are not impeded by my analysis. Mr Bacon again emphasises that the experts were involved at the stage at which they were only because of the proposed mediation. That does not alter the fact that the order under rule 35.12(3) was made and complied with, as was the experts' duty to the court. Whilst it may or may not be that the order in the present case was made in circumstances earlier than might be the case otherwise, it is nevertheless of note that rule 35.12 empowers the court to make the orders to which it is directed "*at any stage*".

34. I have dealt with the question, adverted to by the judge, whether it would be fair and just to allow a party to rely on mediation material and that the court should only hold that that material loses its "without prejudice" statement in clear and unequivocal circumstances. The joint statement was not, in my judgment, mediation material in this context, although it was subsequently referred to in the mediation. It was an antecedent document, ordered by the court for the court. The judge put the matter the wrong way round. If it were necessary to do so, I would say that it was perfectly clear and unequivocal that the statement which had been marked "*without prejudice*" lost its "*without prejudice*" statement because both experts took a considered decision to remove the words "*without prejudice*". It is not necessary to do so both because Mr Bacon would derive a without prejudice status from the fact that the document was used in mediation and because we are concerned with the eventual open document, not with an earlier different without prejudice document.

35. Mr Bacon submits that rule 35.12 must be sensitive to and construed by reference to other relevant legal principles. The underlying submission is, I think, that if an order is made for an experts' joint statement under rule 35.12(3) with an eye to mediation the resulting statement should be regarded as privileged. I do not agree for the reasons I have given. The rule is not to be so construed both because its true construction and intent is that which I have described and because, in my view, the court has no power, nor would it be remotely sensible for it to have a power, to order parties to produce a privileged statement. This also covers Judge Coulson's idea that this was not a usual rule 35.12(3) order.

36. Mr Bacon emphasises that he, on behalf of the claimants, and Mr Ticciati, on behalf of the defendants, had and expressed different views about the need for an order for a joint statement. That is correct. What emerged from the disagreement was an order of the court for an experts' joint statement. Mr Bacon finally supports the judge's conclusion with reference to the point in the respondents' notice which refers to the terms of the written mediation agreement. This submission supposes that the experts' joint statement was, to put it colloquially, a mediation document. I have made clear my view that it was not: it was a court document prepared in compliance with an order of the court under rule 35.12(3).

37. For these reasons, I would allow the appeal.

38. **LADY JUSTICE SMITH**: I agree with the judgment of my Lord, Lord Justice May, and I too would allow the appeal. In the course of argument, I observed that in my experience it was unusual for a joint statement to be ordered, as it was here, before expert reports had been exchanged. We were told that this is not an uncommon practice in the Technology and Construction Court. It seems to me that there are dangers inherent in producing a joint statement until after expert reports have been exchanged. There is a danger that one expert might express agreement with the other expert which, on taking full instructions from his client after production of his report, he wishes to resile from. It appears that that is what has happened here.

39. However as my Lord has observed the court has power to make an order under part 35.12 at any stage of the proceedings. In this case the parties allowed the judge to consider making an order at a very early stage before the exchange of reports and I am afraid that the respondent must live with the consequences.

40. **SIR MARTIN NOURSE:** I also agree that the appeal should be allowed and cannot usefully add anything of my own.

Order: Appeal allowed.

MR O TICCIATI (instructed by Messrs Hill Dickinson Llp) appeared on behalf of the Appellant.
MR J BACON (instructed by Messrs Halliwell Llp) appeared on behalf of the Respondent