

# Revisiting the narrow exceptions to the without prejudice privilege rule (Wired Orthodontics Ltd v HMRC)

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**Dispute Resolution analysis:** This case concerned an application for disclosure following an alleged interference with the evidence of an independent expert witness, who was employed in-house by HM Revenue and Customs (HMRC). HMRC objected to the application on the basis that the discussions leading up to the preparation of a joint experts' report were subject to without prejudice privilege (WPP). The tribunal gave a significant warning in respect of the manner in which HMRC's instructing solicitor had dealt with matters, but held that the evidence relied upon did not fall within the 'unambiguous proprietary' exception to such privilege. These exceptions were to be viewed narrowly given the fundamental importance of WPP to the justice system. Written by Georgia Whiting, barrister at 4 King's Bench Walk.

[Wired Orthodontics Ltd and Others v Revenue and Customs \(Procedure: application for disclosure of communications between HMRC instructing solicitor and HMRC expert\)](#) [2020] UKFTT 290 (TC)

## What are the practical implications of this case?

This case highlights the public policy underpinning the WPP rule—namely, it is one of the inherent foundations of our system of justice, and should only be overridden in exceptional circumstances and where doing so is required to ensure justice can be done.

The tribunal in this instance refused to waive WPP on the basis of a number of grounds, including the exception of 'unambiguous impropriety', which will only be applied in the clearest of occasions.

However, despite dismissing the case, the tribunal expressed some significant concerns. In particular, by reference to the material seen by the tribunal, there was evidence of, at the very least, potential inappropriate interference with the independent evidence of an expert witness. A difficulty faced by HMRC was that it was considered necessary to source experts internally, due to the need for independence from accounting firms. However, the judge warned that this must not lead to inappropriate interference and 'it is absolutely imperative that the independence of the expert is preserved, and that independence is seen to be preserved' (para [121]).

Accordingly, parties need to remain vigilant as to the risk that discussions and emails with experts which ordinarily attract WPP will be the subject of an application intended to undermine credibility. While the exceptions to the rule are narrow, any such perception can cause significant risk to parties and potentially significantly undermine their case.

## What was the background?

This was an application by Wired Orthodontics Ltd (Wired) made pursuant to rule 5(3) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, [SI 2009/273, r 5\(3\)](#) for disclosure of documents and information passing between the solicitors for HMRC and its appointed expert witness.

The application arose in the context of a dispute concerning a transaction in which Wired and two of its employees entered into a tripartite agreement with an employee benefit trust. Pursuant to that

agreement, Wired agreed to purchase an asset for the employees, subject to them undertaking an obligation to pay the value of the asset to the trust.

One of the key issues on appeal was whether or not Wired was entitled to a corporation tax deduction in respect of its expenditure in purchasing the asset for the employees. As such, central to that issue was Wired's profit and loss account and, specifically, whether or not the deduction in question was compliant with generally accepted accounting principles (the GAAP issue).

Critical to this decision was an understanding of the relevant GAAP treatment of the deduction, and both parties had appointed expert witnesses for the benefit of the tribunal. Having produced their reports, the experts subsequently held a meeting in order to prepare a joint statement. However, there was some disagreement in respect of this process, with the expert for HMRC seeking to amend various matters which had initially been included within the joint report.

By reference to the chronology and production of the various drafts of joint statements and two email exchanges between the experts and HMRC, Wired was concerned that there was impermissible interference by HMRC's instructing solicitors regarding the production of the joint statement. They sought the disclosure of communications passing between the solicitor and the expert with the stated purpose of establishing the credibility and, more specifically, the independence of HMRC's expert in order to determine whether to challenge the reliability of the expert's opinion on the GAAP issue.

HMRC raised a fundamental objection to the admissibility of the application, contending that the exchanges between the experts on which the application was founded were protected from disclosure by WPP and, as such, may only be referred to with their consent.

### **What did the tribunal decide?**

As per the provisions of [CPR 35.12\(4\)](#), [CPR PD 35, para 9.2](#) and the Guidance for the Instruction of Experts in Civil Claims 2014, and as confirmed in the case of *Robin Ellis Ltd v Malwright Ltd* [1999] All ER (D) 100, the discussions between experts and various drafts of joint expert statements are subject to WPP. The final agreed joint statement is not.

The tribunal outlined that it was, however, clear that public policy requiring WPP can be overridden and otherwise except where a countervailing public policy arises, or justice otherwise dictates. Of relevance to the case at hand were two potential bases on which WPP could be overridden as follows:

- what was termed as the *Family Housing* exception (derived from *Family Housing Association (Manchester) Ltd v Michael Hyde and Partners (a firm)* [1993] 2 All ER 567) is, in essence, the ability to refer to WPP material in an interlocutory application, where the purpose for which the WPP material was to be used was something other than evidence of the content of the discussions
- the 'unambiguous proprietary' exception

The tribunal outlined that they were extremely concerned as to the conduct of HMRC's instructing solicitor and the expert himself. However, they held that the *Family Housing* exception nonetheless did not apply. Had it not been for the present health crisis, the application would have been heard as part of the substantive listed hearing. While it was strictly an interlocutory application, its focus was ultimately to rely upon the material disclosed at trial, if it substantiated the concern of undue influence. It was the fact and content of the admissions allegedly made (and seemingly reversed)

on which the applicant sought to rely, such that the weight to be placed on HMRC's expert would be lessened at trial.

In terms of the unambiguous impropriety exception, in the case of *Unilever plc v Procter & Gamble Co* [1999] Lexis Citation 3337, the Court of Appeal confirmed that WPP material will be admissible if the exclusion of evidence 'would act as a cloak for perjury, blackmail or other "unambiguous impropriety"' and should be 'applied only in the clearest cases of abuse of a privileged occasion.'

After a careful analysis of the case law, the tribunal concluded that the scope of this exception was narrow. The public policy underpinning the WPP rule is one of the inherent foundations of our system of justice, and should only be overridden in exceptional circumstances, and where doing so is required to ensure justice can be done.

In the instant case, by reference to a review of the email exchanges between the expert and solicitor, the tribunal was unwilling and unable to determine that the parties deliberately behaved in a way that abused the WPP nature of the discussions. That being said, the circumstances giving rise to the application were cause for considerable concern to the tribunal.

**Case details:**

- Court: First-tier Tribunal (Tax Chamber)
- Judge: Judge Amanda Brown
- Date of judgment: 9 July 2020

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