

THORNY ISSUES OF WPP

➔ KEY POINTS

WHAT IS THE ISSUE?

The extent to which without prejudice privilege (WPP) materials are admissible in the context of an application invoking the court's power to bless a trustee decision.

WHAT DOES IT MEAN FOR ME?

In the recent Guernsey case of *In the matter of the R Trusts*, the rule of WPP appears to have been applied with equal rigour to blessing applications.

WHAT CAN I TAKE AWAY?

The case law in England and Wales is arguably inconsistent on this point, and we query whether a similar case here would potentially result in a different outcome.

Emma McCall and Jennifer Corbett discuss 'without prejudice' in the light of an important Guernsey decision

In the recent case of *In the matter of the R Trusts*,¹ the Royal Court of Guernsey considered the status of various categories of 'without prejudice' materials. These issues arose in an application invoking the Court's power to bless a momentous decision of trustees under the second limb of the rule in *Public Trustee v Cooper*² (a blessing application) regarding division of trust assets.

The deceased settlor's widow and two sons (WSS) applied to adduce materials in response to the settlor's daughter (D) having applied for

far-reaching disclosure of evidence. D objected to WSS' application.

The materials were all marked 'without prejudice'. They included D's mediation position paper; a letter from the trustees' solicitors regarding valuations; and emails and a letter between the parties' solicitors, one of which referred to a without prejudice discussion (the Materials). The Court dismissed WSS' application, holding that the Materials were inadmissible according to the principle of without prejudice privilege (WPP).



WHEN DOES WPP APPLY?

WPP is applicable to contested blessing applications (the Court acknowledged that, if uncontested, the situation is different). Given that the outcome will fix the parties' subsequent substantive rights, there is potential for dispute as to whether or not the Court ought to bless the trustees' decision (even if they adopt a neutral position). Accordingly, without prejudice materials aimed at settlement should be protected from admissibility.³

Aside from addressing the contractual nature of the communications, the Court found that an ordinary, intelligent layman familiar with the concept of WPP would naturally and reasonably expect express without prejudice communications to be protected as such.

WERE CERTAIN OF THE MATERIALS SIMPLY A STATEMENT OF POSITION?

These arguments focused on a particular trustee letter. Notwithstanding that the trustees could have written the letter openly, the Court found that, by heading the letter 'without prejudice', they implicitly reserved their right to change the views expressed.

DOES AN EXCEPTION TO WPP APPLY?

WSS argued that the trustees should disclose all materials that were (potentially) material to their discretion (per *Pearson Education Ltd*)⁴ to avoid the Court being misled.⁵

The Court disagreed: 'The mere fact that a party is alleged to have put forward a position at a without prejudice meeting which is inconsistent with his open position is not sufficient to bring the case [within an exception].'⁶

Would an English court reach a similar conclusion? *Tamlin v Edgar*⁷ would, arguably, suggest not. Sir Andrew Morritt C said at para.25:

'The very fact that the decision of the trustees is momentous, taking that word from the description of the second category, and that the decision is that of the trustees, not of the court, makes it all the more important that the court is put in possession of all relevant facts so that it may be satisfied that the decision of the trustees is both proper and for the benefit of the appointees and advancees... All this requires the full and frank disclosure to the court of all relevant facts and documents.'

IS D ESTOPPED FROM ASSERTING WPP?

The Court found that, though the creation of an estoppel in without prejudice communications is a recognised (albeit narrow) exception to the application of WPP, the requisite elements were not present. In particular, there was no arguable allegation that the trustees had acted to their detriment.

CAN THE EXISTENCE OF WITHOUT PREJUDICE COMMUNICATIONS BE DISCLOSED?

Yes: 'Disclosing the mere existence of without prejudice communications is not, in fact, any breach of the [WPP] at all... It is difficult to see how revelation of that bare fact could ever prejudice the position of any party.'⁸

CAN THE CONTENT BE REPEATED OPENLY?

The Court held: 'Nor would it be an infringement... for a party who has made a communication under the "without prejudice" banner subsequently, if so advised, to repeat such communication, or the gist of it, on an expressly open basis, so long as this contained no reference, express or implied, direct or indirect, to the content of earlier without prejudice communications which have taken place'.⁹

¹ Judgment 43 of 2017 of the Royal Court of Guernsey (the Judgment) **2** [2001] WTLR 901 **3** The Judgment, para.25

⁴ *Pearson Education Ltd v Prentice Hall India Private Ltd* [2005] EWHC 655 (QB) **5** *Linsen International Ltd v Humpuss Sea Transport PTE Ltd* [2010] EWHC 303, para.55

⁶ The Judgment, para.42; see also para.48 **7** Decided in December 2011 but reported at [2015] WTLR 485 **8** The

Judgment, para.40 **9** The Judgment, para.57 **10** Addressed in *Avonwick Holdings Ltd v Webinvest List & Anor* [2014] EWCA Civ 1436 **11** *Civil Procedure Rules*, rule 1.4(2)(e)-(f) **12** [1984] Ch 290, 306-7 **13** *Avonwick Holdings Ltd v Webinvest List &*

Anor [2014] EWCA Civ 1436 **14** *Dixon Stores Group Ltd v Thames Television plc* [1993] 1 All ER 349 **15** *Barnetson v Framlington Group Ltd* [2007] EWCA Civ 502 **16** *Walker v Wisher* (1889) 23 QBD 335 (CA) **17** CA 4 No 1999

18 *Pearson Education Ltd v Prentice Hall India Private Ltd* [2005] EWHC 655 (QB) **19** *Rush & Tompkins Ltd v Greater London Council* [1989] 1 AC 1280, 1300 (HL)



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NAVIGATING WPP PITFALLS

1. What is the rationale for the rule?¹⁰

Public policy: It is in the public interest that disputing parties can negotiate freely in order to facilitate settlement, as per the *Civil Procedure Rules'* overriding objective.¹¹ The WPP rule encourages parties to put all their cards on the table (see *Cutts v Head*)¹² without worrying that those communications may be used against them during proceedings.

Contract: Parties can agree, expressly or implicitly, to extend the ambit of WPP (provided the usual contractual requirements are met) to their communications. Where communications are headed 'without prejudice subject to contract', the court is likely to find that a binding agreement has not been made.¹³

2. Will the 'without prejudice' banner suffice?

It is good practice to use the banner, because it makes clear your intentions to the other side and will be taken into account if contested.

However, if the communication is not a genuine attempt to settle, the mere use of labels will not afford any protection.¹⁴ The crucial question is whether, in the course of negotiation, the parties contemplated, or might reasonably have contemplated, litigation if they could not agree terms.¹⁵

If unconvinced that the communication is a genuine attempt to settle, immediately raise this with the other party and seek to agree that it is not without prejudice.

3. Can a party unilaterally waive privilege?

No. WPP is a form of joint privilege. Unless an exception to the WPP rule applies, only if both parties agree that WPP can be waived will such communications be admissible.¹⁶

4. What else can be done if there is a dispute regarding the admissibility of without prejudice materials?

Consider the eight exceptions to the WPP rule set out in *Unilever plc v The Proctor & Gamble Co.*¹⁷ and the ninth exception added in *Pearson Education Ltd.*¹⁸ Weigh up proportionality against probative value: would admitting such materials provoke disputes of fact immaterial to the merits of the case, militating against doing so at all?¹⁹ Finally, deal with any issues arising before trial by making an application (which should be dealt with by someone other than the trial judge).