

## Insights

# WITHOUT PREJUDICE, CONFIDENTIALITY AND PROFESSIONAL STANDARDS: REFLECTIONS ON HURST V SRA

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## SUMMARY

The High Court's decision in *Ashley Hurst v Solicitors Regulation Authority* [2026] EWHC 85 (Admin) marks a significant development for solicitors engaged in reputation management work. The case concerned disciplinary action taken by the Solicitors Regulation Authority (SRA) in relation to correspondence sent by Mr Hurst on behalf of former Chancellor Nadhim Zahawi during a dispute involving alleged defamation. The judgment contains useful guidance on the boundary between robust legal representation and conduct considered improper, particularly around the use of "without prejudice" and "confidential" labels.

## INTRODUCTION

Reputation management often requires solicitors to act swiftly and firmly when responding to potentially harmful publications. This can involve demands to desist from making further statements, requests for corrections, or the setting out of possible legal consequences. While such actions are legitimate when properly grounded, regulatory scrutiny has increased in recent years, particularly in light of concerns surrounding alleged SLAPP (Strategic Lawsuits Against Public Participation) activity.

The *Hurst* case arose against that backdrop. In 2022, tax commentator Dan Neidle published articles critical of the tax affairs of Mr Zahawi, and tweets alleging that Mr Zahawi had lied about those tax affairs. Mr Zahawi instructed Mr Hurst, a partner at Osborne Clarke, who engaged with Mr Neidle to seek retraction of that allegation. This included a 16 July email headed 'Confidential & Without Prejudice', seeking the retraction and stating that Mr Neidle was not entitled to publish or refer to that email other than for the purposes of seeking legal advice. Mr Hurst subsequently sent a letter written on an open basis but marked "Private and Confidential – Not for Publication", again disputing the allegation of dishonesty. Mr Neidle subsequently published both the email and the letter online and complained to the SRA.

## THE DECISION

The SRA alleged that Mr Hurst had engaged in professional misconduct. Initially, the allegations focused on the labelling of the email as “Confidential and Without Prejudice” and the letter as “Private and Confidential” / “Not for Publication”. The original formulation also called this labelling “*oppressive in nature and [bearing] the hallmarks of a SLAPP*”. In its formal statement for the disciplinary tribunal, the SRA instead alleged that Mr Hurst had “*improperly attempted to restrict Mr Neidle’s right to publish*” the email and “*improperly attempted to restrict*” publication of the letter.

The disciplinary tribunal found Mr Hurst had improperly attempted to restrict Mr Neidle’s ability to publish the email by marking it “Confidential & Without Prejudice” and asserting that it could not be published. It concluded that the email was not a genuine attempt at negotiation, did not contain confidential information, and that the use of the without prejudice and confidentiality labels was therefore improper and misleading.

Mr Hurst appealed against the disciplinary decision and the High Court allowed Mr Hurst’s appeal in full. The Court found the disciplinary tribunal had erred in law by approaching the case from the wrong starting point (an assumed “right to publish” on Mr Neidle’s part) and had not asked the correct threshold question of whether Mr Hurst’s assertions of without prejudice and confidentiality were properly arguable. The High Court concluded that the email was, at least arguably, a without prejudice communication and confidential. The Court concluded that the disciplinary tribunal’s decision was “*insufficiently analysed and reasoned, vitiated by misdirection and error of law, and unfair*”. Accordingly, the appeal was allowed and the orders of the disciplinary tribunal were set aside.

## USE OF “WITHOUT PREJUDICE”

The without prejudice rule (subject to some exceptions) makes inadmissible in subsequent litigation communications between parties which are made with a view genuinely to settling litigation or a legal dispute.

The Court found it “*entirely unapparent*” how the email in question could not at least arguably be a without prejudice communication: whether something was arguable was “*not an especially high hurdle to clear*”. The email:

- identified a legal dispute (that the allegations of lying were defamatory);
- contained some admissions as to Mr Neidle’s entitlement to publish other allegations against Mr Zahawi; and
- offered an alternative to litigation (retraction).

Further, the email stated that it was a “*confidential and genuine attempt to resolve a dispute with you before further damage is caused*”. The Court found that the email was, “*on the face of it, plainly and indisputably aimed at securing the retraction of the allegations of lying as an alternative to the possibility of defamation litigation*” and that the disciplinary tribunal’s finding that there was “*no real attempt at negotiation or resolution*” was unexplained. The Court noted that a document should be considered objectively and if it contained the recognisable elements of without prejudice correspondence, then it should be regarded as properly so labelled as a whole.

## CONFIDENTIALITY

The Court held that the proper question was not whether publication of the email would in fact have been actionable as a breach of confidence, but whether the assertion of confidentiality, taken as a whole, was properly arguable. That required analysis of the information conveyed and the circumstances of its communication, applying established principles such as those in *Coco v AN Clark (Engineers) Ltd*.

Considering these factors, the Court found that the email appeared “*comfortably to clear the arguability threshold*.” The email contained personal and financial information about Mr Zahawi and his father that was not in the public domain. The Court found that:

- this information was imparted in circumstances which made it clear that it was for a limited and specific purpose (i.e. to challenge Mr Neidle’s public allegations that Mr Zahawi had lied);
- more broadly, it had been included to persuade Mr Neidle to reconsider his allegations and withdraw them (the principal purpose of the email as a whole); and
- the purpose and limitation of the email were clearly stated on its face, including by asserting its confidentiality.

The Court noted that there was nothing in the disciplinary tribunal’s decision which appeared to apply the law relevant to these facts or explain a conclusion that Mr Hurst’s assertion of confidentiality was unarguable. It questioned: “*if the assertion of confidentiality was not unarguable, in what sense was it abusive, misleading, lacking in integrity or otherwise unprofessional?*”

## KEY TAKEAWAYS

The use of “without prejudice” and “confidential” labels in correspondence must always be considered carefully, and they must never be used improperly. This judgment provides clear guidance as to the threshold test for the legitimate use of such labels, which may be used where it is properly arguable that they are appropriately applied in the context of the strict legal meaning of such labels. The case also serves as a reminder that there must be a genuine attempt to resolve a dispute in order for correspondence to be protected by without prejudice privilege.

This case was heard against a background of growing public and regulatory focus on SLAPPs. The High Court observed that the new SLAPP regime places under scrutiny how the expression “properly conducted litigation” should be understood. Emails sent by lawyers acting for high-profile clients during periods of public scrutiny are likely to continue to attract publicity and controversy. This judgment is a key milestone in defining the boundaries of legitimate reputation management practice (albeit that the disciplinary tribunal specifically found that the 16 July email was not a SLAPP).

*BCLP advises corporates and individuals on reputation management matters, including those involving pre and post-publication issues with a range of publishers, including mainstream media. If you would like to discuss the issues in this piece or reputation management issues more generally, please get in contact with us.*

*This Insight was co-authored by Business & Commercial Disputes Partner, Andrew Street and Associate Hilary Baker*

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