Reference: UT/2022/000070

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

BETWEEN:

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS ("HMRC")

Appellant / Respondent

and

TAXPAYER

Respondent / Applicant

AUTHORITIES BUNDLE

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ARTICLE 6

RIGHT TO A FAIR TRIAL

1 In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2 Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3 Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

ARTICLE 8

RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE

1 Everyone has the right to respect for his private and family life, his home and his correspondence.

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of

the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

ARTICLE 10

FREEDOM OF EXPRESSION

1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2 The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Tribunal Procedure (Upper Tribunal) Rules 2008

20082698

SI 2008/2698 Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698)

UK Parliament SIs 2000-2009 > 2008 > 2651-2700 > Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) > Part 2 General Powers and Provisions

5 Case management powers

(1) Subject to the provisions of the 2007 Act and any other enactment, the Upper Tribunal may regulate its own procedure.

(2) The Upper Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.

(3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Upper Tribunal may—

(a) extend or shorten the time for complying with any rule, practice direction or direction;

(b) consolidate or hear together two or more sets of proceedings or parts of proceedings raising common issues, or treat a case as a lead case;

(c) permit or require a party to amend a document;

(d) permit or require a party or another person to provide documents, information, evidence or submissions to the Upper Tribunal or a party;

(e) deal with an issue in the proceedings as a preliminary issue;

(f) hold a hearing to consider any matter, including a case management issue;

(g) decide the form of any hearing;

(h) adjourn or postpone a hearing;

(i) require a party to produce a bundle for a hearing;

(j) stay (or, in Scotland, sist) proceedings;

(k) transfer proceedings to another court or tribunal if that other court or tribunal has jurisdiction in relation to the proceedings and—

(i) because of a change of circumstances since the proceedings were started, the Upper Tribunal no longer has jurisdiction in relation to the proceedings; or

(ii) the Upper Tribunal considers that the other court or tribunal is a more appropriate forum for the determination of the case;

(l) suspend the effect of its own decision pending an appeal or review of that decision;

(m) in an appeal, or an application for permission to appeal, against the decision of another tribunal, suspend the effect of that decision pending the determination of the application for permission to appeal, and any appeal;

[(n) require any person, body or other tribunal whose decision is the subject of proceedings before the Upper Tribunal to provide reasons for the decision, or other information or documents in relation to the decision or any proceedings before that person, body or tribunal].

[(4) . . .]

[(5) In a financial services case, the Upper Tribunal may direct that the effect of the decision in respect of which the reference has been made is to be suspended pending the determination of the reference, if it is satisfied that to do so would not prejudice—

(a) the interests of any persons (whether consumers, investors or otherwise) intended to be protected by that notice; . . .

(b) the smooth operation or integrity of any market intended to be protected by that notice[; or]

[(c) the stability of the financial system of the United Kingdom].

[(5A) In a financial sanctions case, the Upper Tribunal may direct that the payment of a monetary penalty that is the subject of an appeal be suspended pending the determination of the appeal or its withdrawal.]

(6) Paragraph (5) does not apply in the case of a reference in respect of a decision of the Pensions Regulator.]

[(7) In a wholesale energy case, the Upper Tribunal may direct that the effect of the decision in respect of which the reference has been made is to be suspended pending the determination of the reference.]

NOTES

Initial Commencement

Specified date

Specified date: 3 November 2008: see r 1(1).

Amendment

Para (3): sub-para (n) substituted by SI 2009/1975, rr 7, 9.

Date in force: 1 September 2009: see SI 2009/1975, r 1.

Para (4): inserted by SI 2010/44, rr 2, 4.

Date in force: 15 February 2010: see SI 2010/44, r 1.

Para (4): revoked by SI 2020/651, r 5(1), (4).

Date in force: 21 July 2020: see SI 2020/651, r 1(1).

Paras (5), (6): inserted by SI 2010/747, rr 2, 5.

Date in force: 6 April 2010: see SI 2010/747, r 1.

Para (5): in sub-para (a) word omitted revoked by SI 2013/606, r 2(1), (3)(a).

Date in force: 1 April 2013: see SI 2013/606, r 1.

Para (5): in sub-para (b) word “; or” in square brackets inserted by virtue of SI 2013/606, r 2(1), (3)(b).

Date in force: 1 April 2013: see SI 2013/606, r 1.

Para (5): sub-para (c) inserted by SI 2013/606, r 2(1), (3)(c).

Date in force: 1 April 2013: see SI 2013/606, r 1.

Para (5A): inserted by SI 2017/723, rr 5, 8.

Date in force: 27 July 2017: see SI 2017/723, r 1.

Para (7): inserted by SI 2014/514, rr 2, 5.

Date in force: 6 April 2014: see SI 2014/514, r 1.

Tribunal Procedure (Upper Tribunal) Rules 2008

20082698

SI 2008/2698 Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698)

14 Use of documents and information

(1) The Upper Tribunal may make an order prohibiting the disclosure or publication of—

(a) specified documents or information relating to the proceedings; or

(b) any matter likely to lead members of the public to identify any person whom the Upper Tribunal considers should not be identified.

(2) The Upper Tribunal may give a direction prohibiting the disclosure of a document or information to a person if—

(a) the Upper Tribunal is satisfied that such disclosure would be likely to cause that person or some other person serious harm; and

(b) the Upper Tribunal is satisfied, having regard to the interests of justice, that it is proportionate to give such a direction.

(3) If a party ("the first party") considers that the Upper Tribunal should give a direction under paragraph (2) prohibiting the disclosure of a document or information to another party ("the second party"), the first party must—

(a) exclude the relevant document or information from any documents that will be provided to the second party; and

(b) provide to the Upper Tribunal the excluded document or information, and the reason for its exclusion, so that the Upper Tribunal may decide whether the document or information should be disclosed to the second party or should be the subject of a direction under paragraph (2).

(4) . . .

(5) If the Upper Tribunal gives a direction under paragraph (2) which prevents disclosure to a party who has appointed a representative, the Upper Tribunal may give a direction that the documents or information be disclosed to that representative if the Upper Tribunal is satisfied that—

(a) disclosure to the representative would be in the interests of the party; and

(b) the representative will act in accordance with paragraph (6).

(6) Documents or information disclosed to a representative in accordance with a direction under paragraph (5) must not be disclosed either directly or indirectly to any other person without the Upper Tribunal's consent.

(7) Unless the Upper Tribunal gives a direction to the contrary, information about mental health cases and the names of any persons concerned in such cases must not be made public.

[(8) The Upper Tribunal may, on its own initiative or on the application of a party, give a direction that certain

documents or information must or may be disclosed to the Upper Tribunal on the basis that the Upper Tribunal will not disclose such documents or information to other persons, or specified other persons.

[(8A) In a trade remedies case, the Upper Tribunal may give a direction under paragraph (8) if the Upper Tribunal is satisfied that—

(a) where such documents or information have been supplied to the TRA, the TRA is treating such documents or information as confidential in accordance with—

(i) regulation 45 of the Trade Remedies (Dumping and Subsidisation) (EU Exit) Regulations 2019;

(ii) regulation 16 of the Trade Remedies (Increase in Imports Causing Serious Injury to UK Producers) (EU Exit) Regulations 2019; or

(iii) regulation 5 of the Trade Remedies (Reconsideration and Appeals) (EU Exit) Regulations 2019; or

(b) where such documents or information have not been supplied to the TRA, if such documents or information were to be supplied to the TRA in accordance with regulation 5 of the Trade Remedies (Reconsideration and Appeals) (EU Exit) Regulations 2019, the TRA would be entitled to treat such documents or information as confidential in accordance with that regulation,

and the Upper Tribunal is not precluded from considering such documents or information in making its decision in the case.]

(9) A party making an application for a direction under paragraph (8) may withhold the relevant documents or information from other parties until the Upper Tribunal has granted or refused the application.

(10) In a case involving matters relating to national security, the Upper Tribunal must ensure that information is not disclosed contrary to the interests of national security.

(11) The Upper Tribunal must conduct proceedings and record its decision and reasons appropriately so as not to undermine the effect of an order made under paragraph (1), a direction given under paragraph (2) or (8) or the duty imposed by paragraph (10).]

NOTES

Initial Commencement

Specified date

Specified date: 3 November 2008: see r 1(1).

Amendment

Para (4): revoked by SI 2009/1975, rr 7, 13(a).

Date in force: 1 September 2009: see SI 2009/1975, r 1.

Paras (8)–(11): inserted by SI 2009/1975, rr 7, 13(b).

Date in force: 1 September 2009: see SI 2009/1975, r 1.

Para (8A): inserted by SI 2019/925, r 2(1), (3).

Date in force: 3 June 2019: see SI 2019/925, r 1(2); for transitional provision see r 6(b).

End of Document

Tribunal Procedure (Upper Tribunal) Rules 2008

20082698

SI 2008/2698 Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698)

UK Parliament SIs 2000-2009 > 2008 > 2651-2700 > Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) > Part 5 Hearings

37 Public and private hearings

(1) Subject to the following paragraphs, all hearings must be held in public.

(2) The Upper Tribunal may give a direction that a hearing, or part of it, is to be held in private.

[(2A) In a national security certificate appeal, the Upper Tribunal must have regard to its duty under rule 14(10) (no disclosure of information contrary to the interests of national security) when considering whether to give a direction that a hearing, or part of it, is to be held in private.]

(3) Where a hearing, or part of it, is to be held in private, the Upper Tribunal may determine who is entitled to attend the hearing or part of it.

(4) The Upper Tribunal may give a direction excluding from any hearing, or part of it—

(a) any person whose conduct the Upper Tribunal considers is disrupting or is likely to disrupt the hearing;

(b) any person whose presence the Upper Tribunal considers is likely to prevent another person from giving evidence or making submissions freely;

(c) any person who the Upper Tribunal considers should be excluded in order to give effect to [the requirement at rule 14(11) (prevention of disclosure or publication of documents and information)]; . . .

(d) any person where the purpose of the hearing would be defeated by the attendance of that person[; or

(e) a person under] [18, other than a young person who is a party in a special educational needs case or a disability discrimination in schools case].

(5) The Upper Tribunal may give a direction excluding a witness from a hearing until that witness gives evidence.

NOTES

Initial Commencement

Specified date

Specified date: 3 November 2008: see r 1(1).

Amendment

Para (2A): inserted by SI 2010/43, rr 5, 12.

Date in force: 18 January 2010: see SI 2010/43, r 1.

Para (4): in sub-para (c) words from “the requirement at” to “documents and information)” in square brackets substituted by SI 2009/1975, rr 7, 20.

Date in force: 1 September 2009: see SI 2009/1975, r 1.

Para (4): in sub-para (c) word omitted revoked by SI 2009/274, rr 3, 19(a).

Date in force: 1 April 2009: see SI 2009/274, r 1.

Para (4): sub-para (e) and word “; or” immediately preceding it inserted by SI 2009/274, rr 3, 19(b).

Date in force: 1 April 2009: see SI 2009/274, r 1.

Para (4): in sun-para (e) words from “18” to “in schools case” in square brackets substituted by SI 2014/2128, rr 2, 13.

Date in force: 1 September 2014: see SI 2014/2128, rule 1(a).

End of Document

STATUTORY INSTRUMENTS

2009 No. 273

The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009

PART 3

Procedure before the Tribunal

CHAPTER 3

Hearings

Public and private hearings

32.—(1) Subject to the following paragraphs, all hearings must be held in public.

(2) The Tribunal may give a direction that a hearing, or part of it, is to be held in private if the Tribunal considers that restricting access to the hearing is justified—

(a) in the interests of public order or national security;

(b) in order to protect a person's right to respect for their private and family life;

(c) in order to maintain the confidentiality of sensitive information;

(d) in order to avoid serious harm to the public interest; or

(e) because not to do so would prejudice the interests of justice.

[[F1](2A) The Tribunal may direct that a hearing, or part of it, is to be held in private if—

(a) the Tribunal directs that the proceedings are to be conducted wholly or partly as video proceedings or audio proceedings;

(b) it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing;

(c) a media representative is not able to access the proceedings remotely while they are taking place; and

(d) such a direction is necessary to secure the proper administration of justice.**]**

(3) Where a hearing, or part of it, is to be held in private, the Tribunal may determine who is permitted to attend the hearing or part of it.

(4) The Tribunal may give a direction excluding from any hearing, or part of it—

(a) any person whose conduct the Tribunal considers is disrupting or is likely to disrupt the hearing;

(b) any person whose presence the Tribunal considers is likely to prevent another person from giving evidence or making submissions freely;

(c) any person where the purpose of the hearing would be defeated by the attendance of that person; or

(d) a person under the age of eighteen years.

(5) The Tribunal may give a direction excluding a witness from a hearing until that witness gives evidence.

(6) If the Tribunal publishes a report of a decision resulting from a hearing which was held wholly or partly in private, the Tribunal must, so far as practicable, ensure that the report does not disclose information which was referred to only in a part of the hearing that was held in private (including such information which enables the identification of any person whose affairs were dealt with in the part of the hearing that was held in private) if to do so would undermine the purpose of holding the hearing in private.

F1 Rule 32(2A) inserted (temp.) (10.4.2020) by virtue of The Tribunal Procedure (Coronavirus) (Amendment) Rules 2020 (S.I. 2020/416), rules 1(2), **7(3)** (with rule 1(2))

Changes to legislation:
There are currently no known outstanding effects for the The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, Section 32.

Section B
B. Case Law
Índice

[HOUSE OF LORDS.]

SCOTT (OTHERWISE MORGAN) AND ANOTHER . . APPELLANTS ; AND SCOTT . . . . . RESPONDENT.

H. L. (E.)* 1913 *May* 5.

Divorce—Practice—Nullity—Hearing in Camera—Publication of Proceedings after Decree—Contempt of Court—Committal—Appeal—Competency—Criminal Cause or Matter—Matrimonial Causes Act, 1857 (20 & 21 *Vict.* c. 85), *ss.* 2, 6, 22, 46—*Judicature Act*, 1873 (36 & 37 *Vict.* c. 66), *s.* 47.

The Probate, Divorce and Admiralty Division has no power, either with or without the consent of the parties, to hear a nullity suit or other matrimonial suit in camera in the interest of public decency.

Barnett v. *Barnett* (1859) 29 L. J. (P. & M.) 28, and *H.* (*falsely called C.*) v. *C.* (1859) 29 L. J. (P. & M.) 29 ; 1 Sw. & Tr. 605, followed and approved.

A. v. *A.* (1875) L. R. 3 P. & M. 230, overruled.

D. v. *D.* [1903] P. 144, considered.

Per Viscount Haldane L.C.: The general rule as to publicity must yield to the paramount duty of the Court to secure that justice is done; and it is open to a party in a matrimonial suit, upon proof that justice cannot be done otherwise, to apply for a hearing in camera, and even for the prohibition of subsequent publication of the proceedings, in exceptional cases.

Per Earl Loreburn: In cases where it is shewn that the administration of justice would be rendered impracticable by the presence of the public, as for example where a party would be reasonably deterred by publicity from seeking relief at the hands of the Court, an order for hearing a matrimonial suit in camera may be lawfully made. Subject to the above limitations rules may be made under the Matrimonial Causes Act, 1857, to regulate the hearing of causes in camera.

An order was made at the instance of the petitioner in a nullity suit, which was practically undefended, for the hearing of the cause in camera. After a decree nisi had been pronounced the petitioner, through her solicitor, obtained a transcript of the official shorthand writer's notes of the proceedings at the hearing of the cause and sent copies of this transcript to certain persons in defence of her reputation.

Upon a motion by the respondent to commit for contempt of Court the petitioner and her solicitor for publishing copies of this transcript, in contravention of the order directing that the cause should be heard in camera, Bargrave Deane J. found that the petitioner and her solicitor were guilty of a contempt of Court and ordered them to pay

* *Present:* VISCOUNT HALDANE L.C., EARL OF HALSBURY, EARL LOREBURN, LORD ATKINSON, and LORD SHAW OF DUNFERMLINE.

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the costs of the motion, and an appeal from this order was dismissed as incompetent:—

Held, (1.) that the order to hear in camera was made without jurisdiction; (2.) that the order, assuming that there was jurisdiction to make it, did not prevent the subsequent publication of the proceedings; (3.) that the order to pay costs was not a judgment in a "criminal cause or matter" within s. 47 of the Judicature Act, 1873, so that no appeal would lie from it.

Decision of the Court of Appeal [1912] P. 241, reversed.

APPEAL from an order of the Court of Appeal (1) affirming an order of Bargrave Deane J. (2)

On January 12, 1911, the appellant Annie Maria Scott, otherwise Annie Maria Morgan, filed a petition in the Probate, Divorce and Admiralty Division asking that the ceremony of marriage celebrated on July 8, 1899, at St. Mary's Church, Ealing, between herself and the respondent might be declared null and void by reason of the respondent's impotence.

The appellant Percy Braby acted as the petitioner's solicitor in this suit.

On February 14, 1911, an order was made in the cause by the registrar, on a summons issued by the petitioner, appointing medical inspectors for the examination of the parties and ordering "that this cause be heard in camera."

The petitioner attended for medical inspection in pursuance of this order and was reported to be a virgin. The respondent did not attend for inspection. The respondent had filed an answer denying that he was impotent, but the answer was by leave withdrawn.

On June 13, 1911, the cause was heard before the President in camera and a decree nisi was pronounced, the cause being undefended. On January 15, 1912, the decree nisi was made absolute. In August, 1911, the petitioner instructed her solicitor, the appellant Braby, to obtain for her from the Court a transcript of the proceedings at the hearing of the cause, and, at her instance, the solicitor had three copies made of this transcript. One copy the petitioner sent to Mr. Graham Scott, the respondent's father, the second she sent to Mrs. Westenra, a sister of the respondent, and the third to another person.

(1) [1912] P. 241. (2) [1912] P. 4.

On November 23, 1911, the respondent issued a notice of motion, intituled in the cause only, asking that the appellants might be committed to prison for their contempt of Court in circulating or otherwise publishing a copy of the transcript of the official shorthand writer's notes of the proceedings at the hearing of the cause "in contravention of an order dated the 14th day of February, 1911, directing that this cause be heard in camera."

The notice of motion further asked that the appellants might be restrained from making any similar or other communications either directly or indirectly concerning the subject-matter of the cause, and from otherwise molesting the respondent, his relatives and friends, doctors and patients and others; and that they might be directed to state on oath the names and addresses of the persons to whom similar communications had been made. The notice of motion was also addressed to Mr. Waller, Mr. Braby's partner, but at the hearing it was admitted that he had no part in the matter.

The petitioner, in an affidavit in opposition to the motion, stated that she sent the copies of the transcript to the three persons aboved named in consequence of reports issued by the respondent reflecting on her sanity and in defence of her reputation, and tendered an apology to the Court if it should be held that she had contravened the order of February 14, 1911.

On December 4, 1911, the motion was heard before Bargrave Deane J., who found that the appellants had been guilty of contempt of Court and ordered them to pay the costs of the motion.

The appellants appealed, and upon the appeal the preliminary objection was taken by the respondent that the appeal was incompetent on the ground that the order appealed from was made in a criminal cause or matter within s. 47 of the Judicature Act, 1873.

The appeal was originally argued before Cozens-Hardy M.R., Fletcher Moulton and Buckley L.JJ., but it was ultimately ordered to be re-argued before the Full Court of Appeal.

The Court (Cozens-Hardy M.R., Farwell, Buckley, and Kennedy L.JJ. (Vaughan Williams and Fletcher Moulton L.JJ.

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SCOTT v. SCOTT.

dissenting)) upheld the objection and dismissed the appeal as incompetent.

Having regard to the public importance of the questions involved in this appeal and to the probability that the respondent might not be represented by counsel, the Treasury, acting on the advice of the Attorney-General, provided counsel to argue the case from the respondent's point of view.

1913. March 3, 4, 7, 11. *Sir R. Finlay, K.C.*, and *Barnard, K.C.* (with them *W. O. Willis*), for the appellants. 1. The order of Bargrave Deane J., directing the appellants to pay the costs of the motion to commit, was not a judgment in a criminal cause or matter within s. 47 of the Judicature Act, 1873, so that no appeal lay from it. The form of the notice of motion shews that the respondent was really applying for civil relief. It is not intituled in the manner universally adopted in quasi-criminal proceedings, namely, in the suit and in the matter of an application to commit the respondents to the motion for contempt of Court, and, in addition to committal, it asks for an injunction and discovery. The motion was a mere step in the civil proceedings and was not a criminal matter at all.

The exception to the right of appeal in s. 47 is confined to causes or matters relating to crimes which are indictable or criminal offences which are punishable summarily. Mere disobedience to an order of the Court, though it may result in imprisonment, does not fall within the section : *Attorney-General* v. *Bradlaugh* (1); *Reg.* v. *Barnardo* (2); *O'Shea* v. *O'Shea and Parnell* (3); *In re Evans.* (4) [Upon this point they also referred to *Cox* v. *Hakes* (5); *Reg.* v. *Fletcher* (6); *Reg.* v. *Steel* (7); *Witt* v. *Corcoran* (8); *Stevens* v. *Metropolitan District Ry. Co.* (9); *Bristow* v. *Smyth* (10); *Mellor* v. *Denham* (11);

(1) 1885) 14 Q. B. D. 667, at p. 687.
(2) (1889) 23 Q. B. D. 305, at pp. 308, 309.
(3) (1890) 15 P. D. 59, at pp. 63, 64.
(4) [1893] 1 Ch. 252.
(5) (1890) 15 App. Cas. 506.
(6) (1876) 2 Q. B. D. 43.
(7) (1876) 2 Q. B. D. 37.
(8) (1876) 2 Ch. D. 69.
(9) (1885) 29 Ch. D. 60.
(10) (1885) 2 Times L. R. 36.
(11) (1880) 5 Q. B. D. 467.

Reg. v. *Whitchurch* (1); *Reg.* v. *Foote* (2); *In re Dudley* (3); *In re Hardwick* (4); *In re Freston* (5); *Seldon* v. *Wilde* (6); *Harvey* v. *Harvey* (7); *Helmore* v. *Smith* (8); *In re Johnson* (9); *Crowther* v. *Elgood* (10); *Preston* v. *Etherington* (11); *In re Wray* (12); *Reg.* v. *Jordan* (13); *Ex parte Woodhall* (14); *Hunt* v. *Clarke* (15); *Rex* v. *Tibbits* (16); *In re Ashwin* (17); *In re Eede* (18); *Ex parte Pulbrook* (19); *In re Armstrong* (20); *Attorney-General* v. *Kissane* (21); *Seaman* v. *Burley* (22); *Southwark and Vauxhall Water Co.* v. *Hampton Urban District Council* (23); *In re Edgcome* (24); *Robson* v. *Biggar* (25); *Ex parte Fernandez* (26); *Cobbett* v. *Slowman* (27); *Stark* v. *Stark*. (28)]

2. An order in a nullity suit for hearing in camera, assuming that there is jurisdiction to make it, does not prevent the subsequent publication of the proceeedings. The order of Bargrave Deane J. goes far beyond any jurisdiction ever claimed or exercised by the Ecclesiastical Courts, yet the respondent bases his case upon the practice of the Ecclesiastical Courts, which is preserved by s. 22 of the Matrimonial Causes Act, 1857, in suits which were formerly within the jurisdiction of those Courts. Take the case of an innocent man summoned to answer scandalous charges of such a nature that it is necessary that the case should be heard in camera. A bald statement of the dismissal of the action would not clear his character. Can it be said that there is a duty cast upon him not to divulge the evidence given at the hearing for the purpose of vindicating his conduct? Of course

(1) (1881) 7 Q. B. D. 534.
(2) (1883) 10 Q. B. D. 378.
(3) (1883) 12 Q. B. D. 44.
(4) (1883) 12 Q. B. D. 148.
(5) (1883) 11 Q. B. D. 545.
(6) [1911] 1 K. B. 701.
(7) (1884) 26 Ch. D. 644.
(8) (1886) 35 Ch. D. 449.
(9) (1887) 20 Q. B. D. 68.
(10) (1887) 34 Ch. D. 691.
(11) (1887) 36 W. R. 49.
(12) (1887) 36 Ch. D. 138.
(13) (1888) 36 W. R. 797.
(14) (1888) 20 Q. B. D. 832.
(15) (1889) 58 L. J. (Q.B.) 490.
(16) [1902] 1 K. B. 77.
(17) (1890) 25 Q. B. D. 271.
(18) (1890) 25 Q. B. D. 228.
(19) [1892] 1 Q. B. 86.
(20) [1892] 1 Q. B. 327.
(21) (1893) 32 L. R. Ir. 220.
(22) [1896] 2 Q. B. 344.
(23) [1899] 1 Q. B. 273.
(24) [1902] 2 K. B. 403.
(25) [1908] 1 K. B. 672.
(26) (1861) 10 C. B. (N.S.) 3; 30 L. J. (C.P.) 321.
(27) (1850) 4 Ex. 747; (1854) 9 Ex. 633.
(28) [1910] P. 190.

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a malicious disclosure of the evidence would be restrained; but any abuse of this right of publication could be effectively dealt with by the ordinary law. If the proprietor of a newspaper published the evidence of a nullity suit which had been heard in camera he would be criminally liable for an obscene libel. In *Lawrence* v. *Ambery* (1), which is the only previous case in which this point has arisen, Sir Francis Jeune appears to have expressed an opinion that there could be no disclosure of what had been heard in camera, but that dictum was obiter only, and the motion for attachment was dismissed. The effect of the practice of the Ecclesiastical Courts, as summed up in the judgment of Fletcher Moulton L.J., is that an order for hearing in camera related only to the mode of conducting the hearing and had no reference to subsequent publication, and that the Court never assumed power in matrimonial cases to enjoin perpetual silence upon the parties or others. *Rex* v. *Clement* (2), upon which Farwell L.J. relied, really supports the appellants' contention. There several persons charged with high treason by the same indictment severed in their challenges and were consequently tried seriatim. Abbott C.J. having stated publicly that he thought it necessary to prohibit any publication of the proceedings until they were completely terminated, it was held that the proprietor of a newspaper who had published an account of the trial of two of the prisoners whilst the others remained to be tried was properly found guilty of a contempt of Court; but the basis of the decision was that the trial of all the prisoners constituted one entire proceeding. Subsequent publication may be prohibited in cases relating to trade secrets and to wards of Court and lunatics, but those cases depend upon different principles and have no bearing on the present case.

3. The Court had no jurisdiction to make the order for hearing in camera. In the Court below the Master of the Rolls relied upon the view expressed by Sir Francis Jeune in *D.* v. *D.* (3) that the Court possessed an inherent jurisdiction to hear any case in private where it was necessary for the due administration of justice. But the rule of English law is that all cases must be

(1) (1891) 91 L. T. Jo. 230. (2) (1821) 4 B. & Ald. 218.
(3) [1903] P. 144.

heard in open Court subject to certain specified classes of exceptions. This is stated explicitly by Jessel M.R. in *Nagle-Gillman* v. *Christopher* (1), where he lays it down that the High Court has no power to hear cases in private, even with the consent of the parties, except (1.) in cases affecting lunatics and wards of Court or (2.) where a public trial would defeat the whole object of the action or (3.) where the practice of the old Ecclesiastical Courts in this respect is continued. The appellants submit that the last exception is not well founded, but they rely upon the general proposition of law there stated. The first exception depends upon the quasi-paternal jurisdiction which the Court, acting as the representative of the King as parens patriæ, exercises for the protection of the lunatic or ward of Court. Accordingly, in the case of a ward of Court, it has been held that the Court, without the consent of the parties, may make an order for hearing in private—*Ogle* v. *Brandling* (2)—and may treat as a contempt of Court the subsequent publication of the proceedings: *In re Martindale.* (3) The second exception relates primarily to cases of trade secrets, and in such cases also it may be necessary to prohibit disclosure after the trial in order to prevent the destruction of the property the subject-matter of the action: *Andrew* v. *Raeburn* (4); *Mellor* v. *Thompson* (5); *Badische Anilin und Soda Fabrik* v. *Levinstein.* (6) In *Malan* v. *Young* (7), the Sherborne School libel action, Denman J., with the consent of the parties, made an order for hearing in camera, notwithstanding the protest of a barrister, but during the progress of the trial the learned judge stated that considerable doubt existed amongst the judges as to his jurisdiction to make the order and invited the parties to elect whether they would take the risk of proceeding with the case in camera or would begin de novo in open Court; and in the result the case was heard in private before the judge as arbitrator. That case therefore is not an authority in support of the inherent jurisdiction of the Court to hear cases in camera.

(1) (1876) 4 Ch. D. 173; 46 L. J. (Ch.) 60.
(2) (1831) 2 Russ. & My. 688.
(3) [1894] 3 Ch. 193.
(4) (1874) L. R. 9 Ch. 522.
(5) (1885) 31 Ch. D. 55.
(6) (1883) 24 Ch. D. 156.
(7) (1889) 6 Times L. R. 38.

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[EARL OF HALSBURY referred to *Lord Portsmouth's Case.* (1)]

With regard to the third exception, s. 22 of the Matrimonial Causes Act, 1857, provides that in all suits other than a suit for dissolution, that is to say, in all suits which could have been entertained by the old Ecclesiastical Courts, the Court is to act upon the principles of the Ecclesiastical Courts, but subject to the provisions of the Act and the rules and orders thereunder. The proviso is important. Sect. 46 provides that, subject to any rules and regulations made under the Act, the witnesses are to be examined orally in open Court. Sect. 53 empowers the Court to make rules and regulations concerning the procedure under the Act, and by s. 67 these rules and regulations are to be laid before Parliament. The effect of these sections taken together is that all suits in the Divorce Court are to be heard in open Court, subject to any rules and regulations which may be made to the contrary. The only rule which relates to the mode of hearing is r. 205 of the Divorce Rules and Regulations, but that rule gives no authority to the Court to hear cases in camera. Therefore, if there ever was any power in the Ecclesiastical Courts to order proceedings in nullity suits to be heard in camera, that power has been taken away by the terms of the Act. The appellants admit that a practice supposed to be based upon the practice of the Ecclesiastical Courts has sprung up by which suits for nullity have been heard in camera, but it is submitted that there is no justification for that practice. In *Barnett* v. *Barnett* (2), which was decided very shortly after the passing of the Matrimonial Causes Act, 1857, Sir Cresswell Cresswell held that the Act did not confer upon the Court any power to order a matrimonial suit to be heard in camera. That was a suit for judicial separation, which could have been entertained by the Ecclesiastical Courts; and as regards the practice of the Ecclesiastical Courts there is no ground for distinguishing between a suit for nullity and any other suit which those Courts could have entertained—divorce a mensa et thoro, restitution, jactitation. That case was followed in the same year by *H. (falsely called C.)* v. *C.* (3), which was a nullity

(1) (1815) G. Coop. Ch. Ca. 106.
(2) 29 L. J. (P. & M.) 28.
(3) 29 L. J. (P. & M.) 29; 1 Sw. & Tr. 605.

suit, where the Full Court (Sir Cresswell Cresswell, Williams J., and Bramwell B.) held that the Divorce Court had no power to sit otherwise than with open doors. In *C.* v. *C.* (1) Lord Penzance held that he had no power to hear a suit for dissolution in camera, although he expressed the opinion obiter that nullity suits might be heard in private by virtue of s. 22 of the Matrimonial Causes Act, 1857. In *A.* v. *A.* (2) Sir James Hannen held that he had power, even without the consent of the parties, to hear a suit for restitution of conjugal rights in private, and he based his decision upon the practice of the Ecclesiastical Courts. In *D.* v. *D.* (3), where there were consolidated suits, namely, a suit by the wife for judicial separation and a suit by the husband for dissolution of marriage, Sir Francis Jeune, with the consent of the parties, ordered the suits to be heard in camera, and his judgment proceeded partly on the ground of the inherent jurisdiction of the Court, and partly on the ground that the Court had inherited the powers and practice of the Ecclesiastical Courts. Those cases are inconsistent with *H.* (*falsely called C.*) v. *C.* (4) and ought to be overruled. Further, it is a mistake to suppose that it ever was the practice of the Ecclesiastical Courts to hear nullity suits or any other matrimonial suits in private. Under that practice the witnesses on each side were examined in private, and in the absence of the parties, before an examiner, and the mode of cross-examination was by interrogatories previously delivered to the examiner by the adverse party, but after the publication of the depositions all causes were heard publicly in open Court: Shelford on Marriage and Divorce, pp. 520, 522, 524, 530. And see Conset's Ecclesiastical Practice, 3rd ed., p. 158, and Blackstone's Commentaries, 11th ed., vol. 3, pp. 448—450. Until 1843 nullity suits were reported with the full names of the parties, and until 1864 there never was any hearing of nullity suits in private. (5) The modern practice is founded upon a misapprehension of the powers of the Ecclesiastical Courts.

4. Assuming that the order of Bargrave Deane J. was within

(1) (1869) L. R. 1 P. & M. 640.
(2) L. R. 3 P. & M. 230.
(3) [1903] P. 144.
(4) 29 L. J. (P. & M.) 29; 1 Sw. & Tr. 605.
(5) See reporter's note to *A.* v. *A.*, 3 P. & M. at p. 232.

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his jurisdiction, the publication was privileged, and the appellants ought not to have been ordered to pay the costs of the motion: *In re Pollard.* (1)

Sir John Simon, S.-G., and *Danckwerts, K.C.* (with them *Bayford*), for the respondent 1. As to the question of jurisdiction, the appellants' contention with regard to the practice of the Ecclesiastical Courts is clearly wrong. In a note to *Briggs* v. *Morgan* (2) reference is made to a nullity suit (August 1, 1821) the medical evidence in which was heard "in camera." That reference shews not only that the evidence was taken in private, but that the presentation to the Court was also in private. In *Deane* v. *Aveling* (reported on hearing 1 Rob. Eccl. 279) on May 13, 1845, an application was made by letter for the hearing of a nullity suit in private (3), and the letter assumes that the matter was within the discretion of the judge. It does not appear whether the application was granted. Those cases are sufficient to shew that the Ecclesiastical Courts had the power to hear nullity suits in private, although that power was not universally exercised; and the existence of this power is recognized by the text-writers: Cockburn's Clerk's Assistant in the Practice of the Ecclesiastical Courts, c. 14, s. 10; Swabey's Law of Divorce and Matrimonial Causes, 2nd ed., p. 97. This was also the view of a number of very eminent judges,—Jessel M.R., Lord Penzance, Lord Hannen, and Lord St. Helier. As regards the getting in of the evidence, it was the invariable practice of the Ecclesiastical Courts to examine the witnesses in secret: *Herbert* v. *Herbert* (4), which is the foundation for the passage in Shelford on Marriage

(1) (1868) L. R. 2 P. C. 106.

(2) (1820) 2 Hagg. Cons. at p. 332.

(3) The following is a copy of this letter:—

"Doctors Commons,
"13th May, 1845.

"Dear Sir,

"*Deane agst. Aveling.*

"As this is a case of nullity of marriage by reason of malformation to avoid unnecessary publicity of the disclosures in the evidence we shall feel obliged by your intimating our wishes to the judge that *if he shall be so pleased* it may be heard in private.

"We are, Dear Sir,
"Yours faithfully,
"W. Rothery.
"Edwd. W. Crosse.

"Jno. Shephard, Esq."

(See addendum at p. 487.)

(4) (1819) 2 Hagg. Cons. 263, at p. 267.

and Divorce on p. 522; Conset's Ecclesiastical Practice (1685), pt. iii., s. 3; pt. vi., s. 4. When the evidence was complete publication was decreed, which meant, not publication to the world, but communication to the other party to the suit: see Coote's Ecclesiastical Practice, p. 806. Then as to the hearing and judgment or sentence, it is conceded that the sentence was required to be given in open Court: Burn's Ecclesiastical Law, tit. Marriage XI. (Divorce), s. 7. That is expressly provided by canon 106 of the Canons of 1603, and canon 108 imposes penalties for the violation of this rule. The reason for that rule was obviously that it was essential that in any proceedings affecting a question of status the result should be publicly known. But there is no corresponding provision as to the hearing of the suit, and the fact that it is expressly provided that the sentence shall be in open Court lends support to the inference that no such rule existed as to the hearing. The statement in Shelford on Marriage and Divorce, p. 530, that all causes are heard publicly in open Court was conveyed without acknowledgment from the report of an Ecclesiastical Commission appointed in 1830 to inquire into the practice of the Ecclesiastical Courts, and, divorced from its context, it is misleading. The main issue to be determined by that Commission was whether the method adopted by the Common Law Courts of viva voce evidence ought not also to be adopted by the Ecclesiastical Courts, and the Commission, when, in describing the practice of the Ecclesiastical Courts, it speaks of the hearing in open Court, was using the words in connection with that issue. It was not referring to the admission or non-admission of the public, but was contrasting the method of hearing, which was before the judge in Court in the presence of the parties, with the secret examination of witnesses which it had previously described: Parliamentary Papers 1831-32, vol. 24, pp. 18, 19. Moreover the Commission was not dealing with this special class of cases, namely, nullity suits, at all. [They referred to Burn's Ecclesiastical Practice (9th ed.), vol. 3, pp. 202, 207.] Therefore the passage in Shelford is not an authority against the respondent's contention.

Assuming then that the Ecclesiastical Courts had jurisdiction to

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hear causes in private, that power is preserved by s. 22 of the Matrimonial Causes Act, 1857. Sect. 46 is not opposed to this view. Until 1854 the Ecclesiastical Courts had no power to examine witnesses viva voce, but in that year an Act was passed (17 & 18 Vict. c. 47) conferring that power upon them. In that state of things s. 46 of the Act of 1857 says, not that the trial shall be in open Court, but that the witnesses shall be examined orally in open Court. That section is not aimed at the admission of the public to the Court, but is intended to secure that the method of taking evidence shall be by oral examination before the judge in Court as distinguished from the old method of examination in secret. But, whatever be the construction of s. 46, it is prefaced by the words "Subject to such rules and regulations as may be established as hereinafter provided" (see s. 53), and it is submitted that r. 205 of the Divorce Rules, though it contains no specific provision as to hearing in camera, is wide enough to create, if need be, the necessary exception to s. 46. As regards *H.* (*falsely called C.*) v. *C.* (1) the report contains no reference to s. 22 and the case must be read with the suspicion that that section was not before the Court. Further, Williams J., although he expresses his opinion that the Court, being a new Court, had no jurisdiction to hear cases in camera, admits that other judges had taken a different view, and he assumes that he had a discretion in the matter and declines to exercise it. Bramwell B. starts from the same point and, on the assumption that the Court is a new Court, says it has no jurisdiction to hear in private. There is, however, a stream of authority subsequent to that case shewing that the Court has such a jurisdiction. In *C.* v. *C.* (2) Lord Penzance says in terms that the Ecclesiastical Courts did hear nullity suits in private and that the Divorce Court had maintained and followed up that practice. In *A.* v. *A.* (3) Sir James Hannen puts the case higher and states that the power of the Ecclesiastical Courts was not limited to nullity suits and that the Divorce Court had the same power, and he adds that the rule laid down in *H.* (*falsely called C.*) v. *C.* (1) had not been acted upon. In

(1) 29 L. J. (P. & M.) 29; 1 Sw. & Tr. 605.
(2) L. R. 1 P. & M. 640.
(3) L. R. 3 P. & M. 230.

Nagle-Gillman v. *Christopher* (1) Jessel M.R. states distinctly that the practice of the Ecclesiastical Courts to hear suits for nullity or judicial separation in private was preserved by s. 22 of the Matrimonial Causes Act, 1857. Finally in *D.* v. *D.* (2) Sir Francis Jeune states not only that the Divorce Court had inherited the power of the Ecclesiastical Courts to hear cases in camera, but that the Court had an inherent power to hear a suit for dissolution in camera. He bases his decision upon the general power of the Court to hear in camera any case in which justice cannot be done otherwise and suggests that in many matrimonial cases a hearing in public would bring about a denial of justice because a modest woman would refuse to assert her rights. Such a power is required in the interests of justice and to enable the Court to maintain its own efficiency and its own dignity. Both the general rule as to hearing in open Court and the exceptions thereto are explicable upon the common principle that the Court will so conduct its business as to do justice efficiently. The gravity of the consequences of insisting upon a hearing in public in matrimonial cases may be just as great as in the case of a trade secret, for in both instances the result might be to defeat the ends of justice. Putting aside the cases of wards of Court and lunatics, hearing in camera is not confined to trade secrets, but may be ordered wherever the object of the suit would be defeated. Neither *Andrew* v. *Raeburn* (3) nor *Mellor* v. *Thompson* (4) was a case of a trade secret. It is an axiom of English law that prima facie the administration of justice should be open to all the world, but that is not an absolute rule of natural justice, and the cases which have been cited are illustrations of the general power of the Court to exclude the public wherever the interests of justice require it. See *Lewis* v. *Levy*. (5) This jurisdiction existed in the Divorce Court apart from the Judicature Act, but, if necessary, the respondent prays in aid the provisions of that Act. In the Children Act, 1908, s. 114, which expressly empowers the Court to exclude the public whilst a child or young person is giving

(1) 4 Ch. D. 173; 46 L. J. (Ch.) 60.
(2) [1903] P. 144.
(3) L. R. 9 Ch. 522.
(4) 31 Ch. D. 55.
(5) (1858) E. B. & E. 537, at p. 546, per Lord Campbell.

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evidence in any proceedings relating to an offence against decency or morality, the Legislature has been careful to preserve to the Court any power which it might have independently to hear cases in camera. [They also referred to the Summary Jurisdiction Act, 1848, s. 12.] Further, the jurisdiction of the Court to make the order for hearing in camera was not contested by the appellants in the Court of Appeal, and therefore the point is not now open to them : *Kay* v. *Marshall.* (1)

2. As to subsequent publication, the privilege of reporting what takes place in a Court of justice is based on the fact that the hearing is in public, and the publication of the proceedings is merely enlarging the area of the Court : *Macdougall* v. *Knight* (2); and see *Popham* v. *Pickburn.* (3) It follows that in cases where the public is excluded from audience the privilege of publication goes too, since the public has no right to this secondary form of audience, which stands on no higher ground than the right to attend in Court and hear. The maxim "Cessante ratione cessat lex" applies. In cases such as nullity suits the protection accorded by an order for hearing in camera ought as a matter of common sense to be extended to the subsequent publication of the proceedings : *Lawrence* v. *Ambery* (4) and see *In re Martindale.* (5)

[LORD ATKINSON referred to *M'Leod* v. *St. Aubyn.* (6)]

3. Assuming that a contempt was committed, the question whether it was a criminal contempt within s. 47 of the Judicature Act, 1873, depends upon whether the disobedience to the order was an interference with the course of justice or was merely an interference with the rights of the parties. The order for the hearing in camera was made not to secure a private right but for the efficient administration of justice, and disobedience to such an order is a misdemeanour punishable by fine and imprisonment. *Seaward* v. *Paterson* (7) illustrates the difference between

(1) (1841) 8 Cl. & F. 245.
(2) (1889) 14 App. Cas. 194, at pp. 200, 206.
(3) (1862) 31 L. J. (Ex.) 133, at p. 136.
(4) 91 L. T. Jo. 230.
(5) [1894] 3 Ch. 193, at p. 200.
(6) [1899] A. C. 549.
(7) [1897] 1 Ch. 545.

the two kinds of contempt. When once the matter is before the Court, the question whether or not a criminal contempt has been committed cannot depend upon the form of the application to commit. The Court of Appeal was therefore right in allowing the objection to the competency of the appeal. [Upon this point, in addition to the cases cited by the appellants, they referred to Russell on Crimes, 5th ed., vol. 1., p. 561; Chitty on Criminal Law, 2nd ed., vol. 2, p. 279; *Miller* v. *Knox* (1); *In re Clement* (2); *Wellesley* v. *Mornington* (3); *Reg.* v. *Rudge* (4); *Ex parte Savarkar.* (5)]

Sir R. Finlay, K.C., replied.

The House took time for consideration.

May 5. VISCOUNT HALDANE L.C. (6) My Lords, the facts in this case are not in controversy, but questions of law of considerable public importance are raised.

The appellant Mrs. Scott filed her petition against her husband, the respondent, for a declaration that their marriage was void because of his impotence. She then took out a summons asking for the appointment of medical inspectors, and that the petition should be heard in camera, and on this summons an order was made for such hearing. The petition duly came on in camera, and the appellant obtained a decree of nullity. The petition was practically undefended, and the evidence was very simple. There was nothing to differentiate the case from many others which are heard in open Court, and so far as the public were concerned it might quite well have been so heard. The decree was subsequently, on January 15, 1912, made absolute.

In August, 1911, the appellant Mrs. Scott, and the appellant Braby, who was her solicitor, sent copies of the shorthand notes of the proceedings at the hearing to Mr. Graham Scott, the father of the respondent, and to Mrs. Westenra, the respondent's sister, and also to a third person. Mrs. Scott appears to have been under the impression that an inaccurate account had been given by the respondent of the position of the parties to the case, and of what really took place.

(1) (1838) 4 Bing. N. C. 574.
(2) (1822) 11 Price, 68.
(3) (1848) 11 Beav. 181.
(4) (1886) 16 Q. B. D. 459.
(5) [1910] 2 K. B. 1056.
(6) Read by Lord Atkinson.

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In December, 1911, the respondent moved to commit the appellants and Mr. Waller, who was the appellant Braby's partner, for contempt in so sending the copies of the shorthand notes, in breach, as was alleged, of the order for hearing in camera, and he also moved for an injunction. The motion was heard by Bargrave Deane J., who decided that the two appellants had been guilty of contempt of Court, and ordered them to pay the costs of the motion. From this order they appealed. On the hearing of the appeal a preliminary objection was taken on behalf of the respondent that no appeal lay, inasmuch as the order of Bargrave Deane J. amounted to a judgment in a criminal cause or matter within the meaning of s. 47 of the Judicature Act of 1873. The Court of Appeal, consisting of the Master of the Rolls and Fletcher Moulton and Kennedy L.JJ., ordered the appeal to be re-argued before the Full Court of Appeal. It was in consequence so re-argued, and was finally dismissed. The Master of the Rolls and Farwell, Buckley, and Kennedy L.JJ. were of opinion that the order appealed from was right, while Vaughan Williams and Fletcher Moulton L.JJ. took a different view.

My Lords, the question which we have now to decide necessitates consideration of the jurisdiction to hear in camera in nullity proceedings, and of the power of the judge to make an order which not only excludes the public from the hearing, but restrains the parties from afterwards making public the details of what took place. Without such consideration it is not possible to arrive at a satisfactory conclusion as to whether such an order as was made in this case amounted to a judgment in a criminal cause or matter within the meaning of the section of the Judicature Act to which I have referred. We, therefore, invited counsel to address us more fully as to the history and character of the jurisdiction than appears to have been done in the Courts below.

My Lords, I think it is established that the Ecclesiastical Courts in the exercise of their jurisdiction in nullity suits, prior to the Act of 1857, which established the Divorce Court, did from time to time direct the hearing to take place in camera. But in estimating the significance of this fact it is necessary to remember that the procedure of these Courts was very

different from that of the High Court of Justice. Until shortly before the Divorce Court was set up it was not their practice to take evidence viva voce in open Court. The evidence was taken in the form of depositions before commissioners, who conducted their proceedings in private. The parties were not represented at this stage in the fashion with which we are familiar. When a witness was tendered for examination the commissioners could, in the course of taking his deposition, put to him interrogatories delivered by the other side, but there was no cross-examination, or, for that matter, examination-in-chief, of the parties. Each side could tender witnesses, but until the evidence was complete neither side was allowed to see the depositions which had been taken. After the commissioners had finished their work, what was called publication took place.

This did not mean that the evidence was published to the world, but only that the parties had access to it. The next stage was that arguments were heard by the judge of the Court, and finally he gave judgment and pronounced a sentence. So much of the proceedings took place before the commissioners that the modern distinction between hearing in camera and hearing in open Court obviously had nothing approaching to the importance which it possesses to-day. As a rule the proceedings in nullity suits, subsequent to what was called publication, appear to have been conducted in open Court. But sometimes this was not so, with the exception of the final stage at which sentence was pronounced. The sentence itself appears always to have been pronounced in open Court. As regards the arguments the Court seems to have exercised a discretion as to whether the public should be admitted while they took place.

In 1857 the jurisdiction of the Ecclesiastical Courts in matrimonial proceedings was terminated by the statute of that year, and a new Court was established with the title of the Court for Divorce and Matrimonial Causes. Decrees for judicial separation were substituted for the old decrees for divorce a mensa et thoro, and a wholly new power was given to entertain petitions for dissolution of marriage. Sect. 22 provided that in all suits and proceedings, other than proceedings for dissolution, the Court should proceed and act and give relief on

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principles and rules which in its opinion should be as nearly as might be conformable to the principles and rules on which the Ecclesiastical Courts acted, but this was to be done subject to the provisions of the statute itself, and of the rules and orders made under it. By s. 36 the Court was empowered to direct the trial to take place with a jury. By s. 46, subject to such rules and regulations as might be established, the witnesses in all proceedings before the Court were, where their attendance could be had, to be sworn and examined orally in open Court. A proviso to this section allowed the parties to verify their cases by affidavit, but subject to cross-examination on such affidavits in open Court, if the opposite party so desired. By s. 53 power was given to the Court to make rules and regulations, and by s. 67 any such rules or regulations were to be laid before Parliament.

My Lords, I think that the effect of s. 46 of the Divorce Act was substantially to put an end to the old procedure, and to enact that the new Court was to conduct its business on the general principles as regards publicity which regulated the other Courts of justice in this country. These general principles are of much public importance, and I think that the power to make rules, conferred by ss. 46 and 53, must be treated as given subject to their observance. They lay down that the administration of justice must so far as the trial of the case is concerned, with certain narrowly defined exceptions to which I will refer later on, be conducted in open Court. I think that s. 46 lays down this principle generally, and that s. 22 is, so far as publicity of hearing is concerned, to be read as making no exception in any class of suit or proceeding save in so far as ordinary Courts of justice might have power to make it. This appears to have been the view taken in the cases of *Barnett* v. *Barnett* (1) and *H.* (*falsely called C.*) v. *C.* (2), both decided in 1859, shortly after the Divorce Act had come into operation. The second case came before the Full Court, which included Bramwell B. In giving his judgment he observes that the Divorce Court "being a new Court was constituted with the ordinary incidents of other English Courts of justice, and, therefore, that its

(1) 29 L. J. (P. & M.) 28.
(2) 29 L. J. (P. & M.) 29; 1 Sw. & Tr. 605.

proceedings should be conducted in public." It is not easy to see how, the provision as to the making of rules notwithstanding, a different interpretation could have been put on the statute from that put by Bramwell B., and for some time this interpretation appears to have been adhered to.

In a note to the case of *A.* v. *A.* (1), decided in 1875, the reporter observes that down to July, 1864, nullity cases were always heard in open Court, but that in the case of *Marshall* v. *Hamilton* (2) the evidence was of such a character that Sir J. Wilde signified a desire that for the future such cases should be heard in camera, and, with the consent of counsel, ordered such a hearing. In *A.* v. *A.* (1), however, Sir James Hannen held that, notwithstanding the objection of the petitioner, he could direct the hearing to take place in camera, and he relied partly on a dictum in *C.* v. *C.* (3) to the effect that the Court had power, under s. 22 of the Divorce Act, to follow the old practice, and partly on a new practice which had begun to grow up.

My Lords, I think that Sir James Hannen laid down the law much too widely, for reasons which I have already given. Whatever may have been the power of the Ecclesiastical Courts, the power of an ordinary Court of justice to hear in private cannot rest merely on the discretion of the judge or on his individual view that it is desirable for the sake of public decency or morality that the hearing should take place in private. If there is any exception to the broad principle which requires the administration of justice to take place in open Court, that exception must be based on the application of some other and overriding principle which defines the field of exception and does not leave its limits to the individual discretion of the judge.

My Lords, it was not unnatural that the judges of the Divorce Court should have felt embarrassed by the want of the power which the old Ecclesiastical Courts possessed to hear in camera any case which for reasons of decency they thought ought to be so heard, and it is not surprising that Sir James Hannen's judgment was followed by Sir Francis Jeune in *D.* v. *D.* (4) But while that learned judge held, somewhat hesitatingly I think, that

(1) L. R. 3 P. & M. 230.
(2) (1864) 3 Sw. &. Tr. 517.
(3) L. R. 1 P. & M. 640.
(4) [1903] P. 144.

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the Divorce Court had in a suit for judicial separation inherited the power of the Ecclesiastical Courts to hear in camera, he went on to say that even in suits for dissolution this could be ordered if it was reasonably clear that justice could not be done unless the hearing was so conducted. My Lords, this second ground of decision is a very different one from the first. As to the proposition that the Divorce Court has inherited the power to hear in camera of the Ecclesiastical Courts, I am of opinion that, since the Divorce Act of 1857, it has been untrue of every class of case, and not merely of suits for divorce strictly so called. I am in accord with the reasoning of Bramwell B., in the case I have already referred to, which led him to the conclusion that the Court which the statute constituted is a new Court governed by the same principles, so far as publicity is concerned, as govern other Courts.

In cases in other Courts, where all that is at stake is the individual rights of the parties, which they are free to waive, a judge can exclude the public if he demits his capacity as a judge and sits as an arbitrator. The right to invoke the assistance of a Court of Appeal may be thereby affected, but the parties are at liberty to do what they please with their private rights. In proceedings, however, which, like those in the Matrimonial Court, affect status, the public has a general interest which the parties cannot exclude, and I am unable to see how their consent can justify the taking of an exceptional course. But Sir Francis Jeune does not appear to have thought that it could. He proceeds, in the final reasons for his judgment, on the ground that justice could not be done in the particular case before him if it were not heard in camera. This, he thought, was a general principle which applied to all Courts.

My Lords, provided that the principle is applied with great care and is not stretched to cases where there is not a strict necessity for invoking it, I do not dissent from this view of the existing law. To exclude it would, in certain classes of litigation, mean a denial of justice. In *Andrew* v. *Raeburn* (1) Lord Cairns and James and Mellish L.JJ. appear to express themselves in its favour, but in carefully guarded terms. In

(1) L. R. 9 Ch. 522.

interpreting their decision I think that North J. in *In re Martindale* (1), which was cited to us, went much too far, and, while I agree generally with the judgment of Sir George Jessel M.R. in *Nagle-Gillman* v. *Christopher* (2), from what I have already said it will be evident that if its concluding sentence is meant to do more than raise a question as to the continuance of the practice of the Ecclesiastical Courts, I cannot concur in it. The case of wards of Court and lunatics stands on a different footing. There the judge who is administering their affairs, in the exercise of what has been called a paternal jurisdiction delegated to him from the Crown through the Lord Chancellor, is not sitting merely to decide a contested question. His position as an administrator as well as judge may require the application of another and overriding principle to regulate his procedure in the interest of those whose affairs are in his charge.

In order to make my meaning distinct, I will put the proposition in another form. While the broad principle is that the Courts of this country must, as between parties, administer justice in public, this principle is subject to apparent exceptions, such as those to which I have referred. But the exceptions are themselves the outcome of a yet more fundamental principle that the chief object of Courts of justice must be to secure that justice is done. In the two cases of wards of Court and of lunatics the Court is really sitting primarily to guard the interests of the ward or the lunatic. Its jurisdiction is in this respect parental and administrative, and the disposal of controverted questions is an incident only in the jurisdiction. It may often be necessary, in order to attain its primary object, that the Court should exclude the public. The broad principle which ordinarily governs it therefore yields to the paramount duty, which is the care of the ward or the lunatic. The other case referred to, that of litigation as to a secret process, where the effect of publicity would be to destroy the subject-matter, illustrates a class which stands on a different footing. There it may well be that justice could not be done at all if it had to be done in public. As the paramount object must always be to do justice, the general rule as to publicity, after all only the means to an end, must accordingly

(1) [1894] 3 Ch. 193. (2) 4 Ch. D. 173.

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yield. But the burden lies on those seeking to displace its application in the particular case to make out that the ordinary rule must as of necessity be superseded by this paramount consideration. The question is by no means one which, consistently with the spirit of our jurisprudence, can be dealt with by the judge as resting in his mere discretion as to what is expedient. The latter must treat it as one of principle, and as turning, not on convenience, but on necessity.

I think that if the principle in cases of secret process be what I have stated, it affords guidance in other cases. In *Rex* v. *Clement* (1), where under special circumstances it was held that daily publication of the evidence in a particular criminal trial in defiance of the judge had impeded justice, and was, therefore, an offence against it, we have a different illustration of a rule which may have manifold application, and may cover cases of the class before us in this appeal. But unless it be strictly necessary for the attainment of justice, there can be no power in the Court to hear in camera either a matrimonial cause or any other where there is contest between parties. He who maintains that by no other means than by such a hearing can justice be done may apply for an unusual procedure. But he must make out his case strictly, and bring it up to the standard which the underlying principle requires. He may be able to shew that the evidence can be effectively brought before the Court in no other fashion. He may even be able to establish that subsequent publication must be prohibited for a time or altogether. But this further conclusion he will find more difficult in a matrimonial case than in the case of the secret process, where the objection to publication is not confined to the mere difficulty of giving testimony in open Court. In either case he must satisfy the Court that by nothing short of the exclusion of the public can justice be done. The mere consideration that the evidence is of an unsavoury character is not enough, any more than it would be in a criminal Court, and still less is it enough that the parties agree in being reluctant to have their case tried with open doors.

My Lords, it may well be that in proceedings in the Divorce Court, whether the proceedings be for divorce, or for declaration

(1) 4 B. & Ald. 218.

of nullity, or for judicial separation, a case may come before the judge in which it is evident that the choice must be between a hearing in public and a defeat of the ends of justice. Such cases do not occur every day. If the evidence to be given is of such a character that it would be impracticable to force an unwilling witness to give it in public, the case may come within the exception to the principle that in these proceedings, and not the less because they involve an adjudication on status as distinguished from mere private right, a public hearing must be insisted on in accordance with the rules which govern the general procedure in English Courts of justice. A mere desire to consider feelings of delicacy or to exclude from publicity details which it would be desirable not to publish is not, I repeat, enough as the law now stands. I think that to justify an order for hearing in camera it must be shewn that the paramount object of securing that justice is done would really be rendered doubtful of attainment if the order were not made. Whether this state of the law is satisfactory is a question not for a Court of justice but for the Legislature. I observe that in the Incest Act of 1908 the principle has been altered in cases coming under that Act, and in the report of the recent Royal Commission on Divorce recommendations are made which, if Parliament gives effect to them, will materially modify the law as I conceive it to stand to-day. But it is with that law, as I have endeavoured to define it, that we are concerned in the present case.

My Lords, in my opinion the facts before Bargrave Deane J. fell short of what was requisite to justify departure from the principle which requires the hearing, in all but exceptional cases of the class I have indicated, to take place in open Court. No doubt the petitioner and the respondent preferred to give their evidence in private. But the evidence actually given was of a brief and simple character, and it might without difficulty have been tendered in open Court. In my opinion there was no valid reason for hearing the case in camera and the order was made in reality for the benefit of the parties who concurred in asking for it, and was therefore made under a mistaken impression as to the law. And if that be the substance of the matter it disposes of the appeal. The order was wrong, and it could not effect the

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abrogation of the prima facie right, excluded only in exceptional cases such as I have already spoken of, which the parties and the public possess to make known what takes place at the hearing and to discuss it.

Even if the order had been validly made by reason of the consent of the parties, it could have provided nothing more than an instrument for enforcing an agreement come to as to the mode in which the hearing should take place. A breach of the order would, therefore, have in substance been punishable only on the same footing as a breach of an ordinary order in a civil case for an injunction; and a punitive order made with reference to the breach falls, in such cases, outside the language of s. 47 of the Judicature Act of 1873, which provides that no appeal shall lie from a judgment of the High Court in any criminal cause or matter. If the principle which governs the jurisdiction of the Divorce Court to hear in camera is that which I have sought to explain, this conclusion is the only one which is consistent with the section and the decisions which interpret it.

I am, therefore, of opinion that the judgment of the Court of Appeal should be reversed and the order of Bargrave Deane J. discharged, and that the respondent should pay the costs here and in the Courts below. I move accordingly.

EARL OF HALSBURY. My Lords, the facts out of which this question arises have been sufficiently explained by the Lord Chancellor, and I will not waste time by repeating them; but the case raises such important issues of law that I am unwilling that there should appear to be any doubt about them.

I am of opinion that every Court of justice is open to every subject of the King. I will deal presently with what have been called exceptions to that rule, though I think it is a mistake as to some of the so-called exceptions thus to describe them, but I want in the first instance to emphasize the broad rule I believe to be the law.

I believe this has been the rule, at all events, for some centuries, but, as I will attempt to shew presently, it has been the unquestioned rule since 1857, unquestioned by anything that I can recognize as an authority. My Lords, if this were

merely an antiquarian investigation I might point to the treatise of Mr. Emlyn in 1730, as a preface to the second edition of the State Trials, in six volumes folio. "In other countries," Mr. Emlyn says (at p. iv.), "the Courts of justice are held in secret; with us publicly and in open view."

He is there speaking of criminal trials, but he certainly has no good word to say of the Ecclesiastical Courts of his time, and if he could have added that they claimed a right to sit in secret he certainly would not have omitted to do so.

Mr. Daines Barrington, writing in 1766, and suggesting that the Courts were not open as of right in the time of Edward I., even in England (1), says "In the modern sense of an open Court the Legislature could never have allowed any fees to be taken for admittance." "I do not recollect," he adds, "to have met in any of the European laws with any injunction that all Courts should be held ostiis apertis, except in those of the republic of Lucca." At all events Mr. Daines Barrington and Mr. Emlyn (both learned lawyers) were under the impression that the law of England required in their days that Courts should be open; this may be a matter for legal research, but the law as it now stands requires no such investigation. It has been settled by statute, and the exception supposed to have been introduced as to the Ecclesiastical Courts under the statute is, I think, completely disposed of by the learned exposition of the practice of those Courts by Lord Moulton in his judgment in the Court of Appeal and the instructive judgment of the noble lord, Lord Shaw, which I have had the privilege of reading.

There are three different exceptions commonly so called, though in my judgment two of them are no exceptions at all. The first is wardship and the relation between guardian and ward, and the second is the care and treatment of lunatics.

My Lords, neither of these, for a reason that hardly requires

(1) [Observations on Statutes, ed. 1796, p. 144. Barrington's comment is on the Statute of Westminster the Second, cc. 42, 44, which he seems to have misunderstood. The excessive fees there in question were taken from parties, not from the public, and "pro ingressu *vel egressu*." But Barrington wanted to air his own opinion that the idle spectators who crowded the Courts might well be kept down by a moderate fee for admission.—F. P.]

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to be stated, forms part of the public administration of justice at all.

Again, the acceptance of the aid of a judge as arbitrator to deal with private family disputes has, by the express nature of it, no relation to the public administration of justice, and it will be observed how careful Lord Eldon was when intervening in such a case (*In the Matter of Lord Portsmouth* (1)) to point out that it was only by consent of the parties on both sides that he consented so to hear it, and in the Sherborne School case, *Malan* v. *Young* (2), it was clearly recognized that it was only heard in private when a regular agreement of the parties that it should be so heard was entered into.

My Lords, while I agree with the Lord Chancellor in the result which he has arrived at in this case, and generally in the principles he has laid down, I wish to guard myself against the proposition that a judge may bring a case within the category of enforced secrecy because he thinks that justice cannot be done unless it is heard in secret. I do not deny it, because it is impossible to prove what cases might or might not be brought within that category, but I should require to have brought before me the concrete case before I could express an opinion upon it. Your Lordship has said that a mere desire to consider feelings of delicacy or to exclude from public hearing details which it would not be desirable to publish is not, in your Lordship's opinion, enough to prevent a public hearing, which must be insisted on in accordance with the rule which governs the general procedure in English Courts of justice, and that to justify an order for hearing in camera it must be shewn that the paramount object of securing that justice is done would really be rendered doubtful of attainment.

The difficulty I have in accepting this as a sufficient exposition of the law is that the words in which your Lordship has laid down the rule are of such wide application that individual judges may apply them in a way that, in my opinion, the law does not warrant.

I am not venturing to criticize your Lordship's language, which, as your Lordship understands it, and as I venture to say

(1) G. Coop. Cas. in Ch. 106. (2) 6 Times L. R. 38.

I myself understand it, is probably enough to secure the observance of the rule of public hearing, but what I venture to point out is that it is not so definite in its application but that an individual judge might think that, in his view, the paramount object could not be attained without a secret hearing. Although I am very far from saying that such a case may not arise, I hesitate to accede to the width of the language, which, as I say, might be applied to what, in my view, would be an unlawful extension.

I confess I am amazed to find three such learned judges as Sir Cresswell Cresswell, Williams J., and Bramwell B. (in *H.* (*falsely called C.*) v. *C.* (1)) overruled by any single judge, and especially when it is remembered that this was a judgment given after consultation upon this very point—after consultation with the Judge Ordinary—and determining that "the Court had no power to sit otherwise than with open doors."

My Lords, from that judgment there was no appeal, and I should have thought until it was brought before this House it would have been accepted as the law, but considering that Lord St. Helier's decision (*D.* v. *D.* (2)) has never been challenged, I do not wonder that the order was made apparently as a matter of course in this case.

My Lords, as to the injunction of perpetual secrecy, there is not a judgment of authority to justify it. The supposed analogy of trade secrets or private correspondence is no analogy at all.

In the one case the trade secret is being protected as a species of property, and, indeed, the other is in the same category. In either it might be protected by injunction, and it would be the height of absurdity as well as of injustice to allow a trial at law to protect either to be made the instrument of destroying the very thing it was intended to protect. I cannot agree with the Court of Appeal that this is a criminal case in the sense in which these words are used in the Judicature Act, and I think they ought to have heard the appeal, and I entirely agree to the motion which the Lord Chancellor has proposed.

EARL LOREBURN. My Lords, I concur in holding that the Court of Appeal had jurisdiction to entertain this case. The test

(1) 1 Sw. & Tr. 605. (2) [1903] P. 144.

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of their jurisdiction under s. 47 of the Judicature Act is not whether criminal proceedings could (if they could) have been taken for disobedience to the order, but whether the cause or matter in which the order was made was in point of fact a criminal cause or matter. I can see nothing here except the penal enforcement of a direction for hearing in camera obtained at the request of Mrs. Scott, and for her protection, in a petition for nullity, and interpreted by the learned judge to be equivalent to an order for perpetual silence. If that is a criminal matter, then an action for assault is so also (for a man may be indicted for assault), a position which no one has ever attempted to maintain. I further think that, even assuming Bargrave Deane J. had full power to direct a hearing in camera and to treat it as an order for perpetual silence, he was wrong in treating as a contempt of Court the publication by Mrs. Scott in good faith of the true evidence in justifiable defence of her own reputation and happiness. If this be so, then the Court of Appeal ought to have heard and reversed Bargrave Deane J.'s decision, and in the circumstances of this case we ought to end the litigation by making the order which they should have made, though in ordinary circumstances, I apprehend, the case would be remitted to the Court of Appeal.

Here I would prefer to take leave of this litigation altogether, for the function of a Court is simply to do justice between the parties who come before it. But, in view of the far-reaching statements of law which are to be found in some of the judgments in the Courts below, I feel constrained to say something, as little as possible.

In the argument here and below, or in the judgments, a number of most important questions were raised. In what circumstances can a judge direct a case to be heard with closed doors? When a case has been so heard, has any one, and if so, who and to whom, and in what circumstances, a right to repeat what was said in the secrecy of the trial? What were the powers and what the practice of the old Ecclesiastical Courts in this respect, and has the present Divorce Court inherited those powers? When is contempt of Court criminal and when merely civil, so as to admit of an appeal to the Court of Appeal? Is

there any power, and over whom, to prohibit repetition of what happens in chambers as well as of what happens in a closed Court? It would require a treatise to expound the law upon all these subjects, and it would be a treatise without authority, liable to the risk of error or misconception which inevitably attends judicial efforts to declare the law at large and in general terms outside of the points really raised by the facts of the case, instead of following the method by which the common law of this country has been gradually built up into a coherent though irregular structure. I will advert only to the points raised by the facts here.

I cannot think that the High Court has an unqualified power in its discretion to hear civil proceedings with closed doors. The inveterate rule is that justice shall be administered in open Court. I do not speak of the parental jurisdiction regarding lunatics or wards of Court, or of what may be done in chambers, which is a distinct and by no means short subject, or of special statutory restrictions. I speak of the trial of actions including petitions for divorce or nullity in the High Court. To this rule of publicity there are exceptions, and we must see whether any principle can be deduced from the cases in which the exception has been allowed.

It has been held that when the subject-matter of the action would be destroyed by a hearing in open Court, as in a case of some secret process of manufacture, the doors may be closed. I think this may be justified upon wider ground. Farwell L.J. aptly cites Lord Eldon as saying, in a case of quite a different kind, that he dispensed with the presence of some of the parties "in order to do all that can be done for the purposes of justice rather than hold that no justice shall subsist among persons who may have entered into these contracts." An aggrieved person, entitled to protection against one man who had stolen his secret, would not ask for it on the terms that the secret was to be communicated to all the world. There would be in effect a denial of justice.

Again, the Court may be closed or cleared if such a precaution is necessary for the administration of justice. Tumult or disorder, or the just apprehension of it, would certainly justify the

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exclusion of all from whom such interruption is expected, and, if discrimination is impracticable, the exclusion of the public in general. Or witnesses may be ordered to withdraw, lest they trim their evidence by hearing the evidence of others. Or, to use the language of Fletcher Moulton L.J., in very exceptional cases, such as *D.* v. *D.* (1), where a judge finds that a portion of the trial is rendered impracticable by the presence of the public, he may exclude them so far as to enable the trial to proceed. It would be impossible to enumerate or anticipate all possible contingencies, but in all cases where the public has been excluded with admitted propriety the underlying principle, as it seems to me, is that the administration of justice would be rendered impracticable by their presence, whether because the case could not be effectively tried, or the parties entitled to justice would be reasonably deterred from seeking it at the hands of the Court.

Applying this principle to proceedings for nullity, if the Court is satisfied that to insist upon publicity would in the circumstances reasonably deter a party from seeking redress, or interfere with the effective trial of the cause, in my opinion an order for hearing or partial hearing in camera may lawfully be made. But I cannot think that it may be made as a matter of course, though my own view is that the power ought to be liberally exercised, because justice will be frustrated or declined if the Court is made a place of moral torture. Very learned judges of the Divorce Court have acted upon the view that they possess peculiarly extensive powers in this respect, inherited from the old Ecclesiastical Courts. I do not think so. The 46th section of the Matrimonial Causes Act, 1857, requires evidence to be given in open Court, an expression so clear that I was surprised to hear its meaning contested, and this provision overrides the old practice of secret hearing in the Ecclesiastical Courts. I do not, however, read s. 46 of the Matrimonial Causes Act, 1857, as prohibiting a trial in camera where such considerations may require it as in other Courts equally bound to sit in public. That section almost invites the framing of rules under the Act to regulate hearings otherwise than in open Court. Such rules would, in my opinion, be valid if they did not go beyond the

(1) [1903] P. 144.

limitations indicated. But no rules to that effect have been made, and the Divorce Court is bound by the general rule of publicity applicable to the High Court and subject to the same exception. I incline to the opinion that the High Court also may make such rules, but this was not argued.

In this connection there remains one other matter upon which comment is necessary. Some passages in various judgments in this and other cases indicate that the Court has a right to close its doors in the interest of public decency. Apart from some Act of Parliament authorizing such a course in particular cases, I regret that I cannot find warrant for this opinion. However true it may be that the publicity given to obscene or bestial matter by trial in open Court stimulates and suggests imitation, as many judges have learned from experience at assizes, and however deplorable it may be that they have no power to prevent it, the remedy must be found by the Legislature or not at all. It is a great evil. And though the traditional law, that English justice must be administered openly in the face of all men, is an almost priceless inheritance, it does seem strange that it may be relaxed in order to save property, but cannot be relaxed in order to safeguard public decency against even the foulest contamination. I feel certain that considerations of this kind have influenced judges, especially in the Divorce Court, and I wish that I could agree with their view of the law.

Another main question raised by the judgments under review is, what power has the High Court to prevent or punish disclosure of what has taken place in camera after the hearing is over? It is almost an uncharted sea. Until this case hardly any direct authority can be cited. Yet nothing can be more clear than that an order for a hearing in camera of a trial involving a secret process might be utterly illusory if the evidence could be published afterwards with impunity. There must be some power to prevent that, or the undoubted assertion by the very highest authorities of a right to close the Court in such cases would be reduced to an idle mockery. I think that after such an order has been made no one has a right to be present on terms of defying the order. It is not a bargain to maintain secrecy. It is a duty to obey the order for secrecy so far as the order lawfully

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goes. The authority of the Court to treat disobedience in this matter as a contempt rests on the same basis as its authority to treat as a contempt the wilful intrusion of a witness after an order has been made that all witnesses shall leave the Court. But what is the degree and duration of secrecy which the Court can impose?

Confining myself for the moment simply to cases of secret process, it seems to me that the limitations of the jurisdiction to impose silence or secrecy must be commensurate with the purpose for which the jurisdiction exists. That purpose is to keep the Court available for the enforcement of rights or the redress of wrongs, and it would not be so available if it could be made a vehicle for publishing the secret after the hearing is over. I think we are driven to say that there is jurisdiction to treat as a contempt of Court any wilful and malicious publication of such a kind as that, if it were known to be allowed, ordinary sensible people would not come to the Court at all.

This conclusion appears to me the inevitable corollary once you admit that a case of trade secret can be heard in camera. And I think it is equally an inevitable corollary in any other class of case so heard. In nullity and in divorce cases it may be that justice would be frustrated as much by the terror of publicity after trial as by publicity at the hearing. But to say that all subsequent publication can be forbidden and every one can be ordained to keep perpetual silence as to what passed at the trial is far in excess of the jurisdiction, and is indeed an unwarrantable interference with the rights of the subject. It is not that a Court ought to refrain from exercising its power in such a way. It is that the Court does not possess such a power. The jurisdiction must surely be limited to wilful and malicious publications going beyond the necessity. To take the present case as an illustration. The right of this lady to tell the truth and to furnish the best evidence of the truth in defence of her own character and reputation is inalienable, and cannot lawfully be taken away by any judge. It is but an elementary right, though if the claim of right be merely put forward as a pretext to cover some malicious communication it could not prevail. There is no more difficulty in deciding whether a particular case comes

within this line or lies outside it than in deciding whether there has been express malice in uttering defamatory matter on an occasion of privilege. If the communication be made in good faith and in fulfilment of any social or moral duty to oneself or any one else, it cannot be either prohibited or punished.

I have felt very strongly in this case the duty so admirably expressed by Fletcher Moulton L.J., that Courts of justice, who are the guardians of public liberties, ought to be doubly vigilant against encroachments by themselves. But when a Court has to decide either that there shall be no justice available for people suffering under wrong or that malicious publication shall be prevented, I believe that the second is the right alternative, and that so to hold is merely to apply a principle acted upon by high authorities and indispensable in itself. There does, indeed, remain a danger that a Court may not be so jealous to do right when its proceedings are not subject to full public criticism. I acknowledge that this is always possible, and it is not an adequate answer to say that the judges can be trusted, though I believe entirely that they can be trusted. It comes to a choice between the administration of justice in some cases without the safeguard, on the one hand, and on the other hand no administration of justice in such cases at all. That is not to be considered here as a matter of policy but as a matter of law, and in my interpretation of it the law is in principle what I have endeavoured to state.

LORD ATKINSON. My Lords, I concur. The argument in this case has ranged over a very wide field: many topics have been discussed, principles of vast importance have been laid down, principles which in their application might, I think, involve a serious encroachment on the liberty of the subject, but the fundamental proposition upon which the respondent's case in the ultimate result rests is, in my view, this, that an order to hear a cause in camera enjoins perpetual silence upon everybody as to what transpired at the hearing, except perhaps the result of it. If this proposition be unsound then the respondent's whole case collapses like a house of cards; neither the petitioner nor her solicitor have been guilty of any contempt of Court, nor disobeyed any order of Court, nor committed any crime, and the order

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of Bargrave Deane J. was not, and could not have been, made in any criminal cause or matter. In my view the proposition is unsustained by authority and is in itself unsound. Two arguments, and in reality only two, have been urged before your Lordships in support of it. The first is I think based on a false analogy, and the second involves a fallacy. Cases such as *Badische Anilin und Soda Fabrik* v. *Levinstein* (1), *Andrew* v. *Raeburn* (2), and *Mellor* v. *Thompson* (3) were cited, and it was sought to apply the principles on which they were decided to suits brought to have a marriage annulled on the ground of the impotence of one of the parties. But the first of these suits was wholly different in character and nature from a nullity suit; there is no similarity whatever between them. In it a secret process was involved. The whole value of the property in the process in most, if not all, of such cases depends on the details of the process being kept secret. If the secret be disclosed the value of the property vanishes. It would be manifestly unjust to allow a disclosure of a secret, made during the hearing of such a suit in camera, either under the compulsion of the presiding judge or at his invitation, in order to enable him to decide the points at issue, to be made use of at any time thereafter to destroy the value of the property.

Perpetual silence as to what transpired at the hearing of such a case in camera may become absolutely essential in order to avoid the perpetration of this wrong; otherwise the whole object of a suit brought to protect property might be defeated by the form of procedure adopted by the tribunal from which the relief desired was sought to be obtained.

Andrew v. *Raeburn* (2) was a suit for an injunction to restrain the publication of certain letters which passed between one or other of the plaintiffs in the suit and a third party. The application with which Lord Cairns dealt in the judgment so much relied upon was an application to hear the appeal in camera. The application was refused on the ground that the case was not one "which would cause an entire destruction of the matter in dispute."

(1) 24 Ch. D. 156. (2) L. R. 9 Ch. 522.
(3) 31 Ch. D. 55

Lord Cairns, in giving judgment, said: "If it had appeared to me that this was a case in which a hearing in public would cause an entire destruction of the whole matter in dispute, I should have taken time to consider whether it was consistent with the practice of the Court to hear it in private, even without the consent of both parties, in order to prevent an entire destruction of the matter in dispute. But from the nature of the case it appears to me impossible to say that the subject of the suit would be destroyed by a public hearing." This is the very principle upon which the cases dealing with secret processes were decided. *Mellor* v. *Thompson* (1) is to the same effect. Nullity suits are not instituted to protect property. The publication of the evidence taken in camera in such a suit even after the cause has ended may, no doubt, cause pain, but it cannot render property valueless or cause the destruction of the whole matter of dispute. The relief prayed for will have been granted or refused, the issues in the suit decided, subsequent publication of the evidence could not have an effect at all resembling that mentioned in these cases respectively.

Even, therefore, if it should be held to be the law that in the former class of suits all persons should, for the special reasons indicated, be enjoined to perpetual silence touching everything disclosed during a hearing in camera, it would, in my view, be quite illegitimate to attempt to extend a practice springing in these cases from the very necessity of things, and adopted for a special and peculiar object, to suits of the latter kind, in which such a disclosure, if made after the cause had ended, could not inflict any of those wrongs the practice was designed to guard against.

These authorities, therefore, afford, in my opinion, no support to the respondent's first proposition. The second argument urged in support of it appears to me to be fallacious in this respect: it is said that it would be futile to order a nullity suit to be heard in camera if every one were free, after the hearing, to publish an account of the proceedings. The answer to that is, that this is not so; first, because the order would have secured that which is now, apparently, regarded as the great desideratum, without which, according to Sir Francis Jeune, justice cannot be

(1) 31 Ch. D. 55.

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done, namely, this, that the parties concerned, especially the woman, should be examined in private; and, secondly, because if anything which took place in camera were published it must be published without the privilege which protects the publication of a full and fair report of proceedings in public open Courts of justice, and would subject the publishers to all the risks attending the publication of anything which takes place in a private house or at a private meeting. If the matter published amounted to a libel or to a slander, the person defamed could sue for damages, or, possibly in the former case, prosecute for criminal libel. If the printed matter published were, in addition, indecent, the public authority might prosecute for the publication of an obscene libel, &c. To say, therefore, that an order to hear a cause in camera would be futile if people were left free to publish what took place there after the cause had ended involves an entirely inaccurate and misleading use of the word "free," quite as inaccurate and misleading as if one were to lay it down that according to the law of this country every man is free to libel or slander his neighbour.

An argument founded, as this appears to be, upon a lack of appreciation of the value of the privacy secured by such an order, and upon this rather misleading use of the word "free," is, to my mind, entirely unconvincing. Your Lordships have not been referred to any direct authority in support of the proposition contended for. And what makes the lack of direct authority all the more strange, if the proposition be sound, is this, that the records of the old Ecclesiastical Courts have been searched; passages from several old books on the practice of those Courts have been quoted; a parliamentary report, dealing, amongst other things, with the practice of the Ecclesiastical Courts, has been referred to; and the statements of many most distinguished judges made since 1857 have been dwelt upon, all in order to shew that not only had those Courts power to order nullity suits to be tried in camera, but that they frequently exercised that power, and yet nothing has been found to convey even the faintest suggestion that these orders when made had the perpetual operation and effect contended for in the present case. It is scarcely conceivable, I think, that if the respondent's contention

were sound, some reference to the matter would not have been found, or some case discovered where the restraint proved too much for human nature, and the transgressor who dared to speak was punished for his delinquency.

Speaking for myself I must therefore decline to give to the order of the learned judge, that this nullity suit be heard in camera, a meaning and operation for which, as I conceive, there is no true analogy, no precedent, no authority direct or implied, and no imperative necessity.

I think the order in its true interpretation means what on its face it plainly says, and nothing more, namely, this, that the place where the case is to be heard shall be a private chamber, not a public Court. All the consequences I have indicated follow from that alteration of the place of hearing. The order was, I think, spent when the case terminated, and had no further operation beyond that date. One of the strangest things in this strange case is that the case of *Rex* v. *Clement* (1) should be cited as an authority for the proposition that a Court of Assize or one of the Divisions of the High Court has power to prohibit the publication, after a trial has ended, of a report of the proceeding which took place at that trial.

That case is a weighty authority having regard to the eminence of the learned judges who decided it, but it is an authority against, rather than in favour of, the proposition in support of which it was cited. In that case Thistlewood and several others were jointly indicted for high treason. They pleaded not guilty. The issue knit on that plea between the Crown and the prisoners was whether they were guilty or not. In effect it was whether they, or any, and which of them were guilty, since it was quite competent for the jury to have acquitted some of them and convicted others. They would have been all tried together had they joined in their challenges. They severed in their challenges, however, with the consequence that of necessity this single issue was split up into several branches, and they were tried seriatim; but, to use the language of Bayley J. (2), these several trials constituted one entire proceeding. Abbott C.J., as he then was, knowing that the evidence in each trial would be very much the same, and

(1) 4 B. & Ald. 218. (2) Ibid. p. 229.

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fearing that if a report of each trial were published in the Press as it took place an opportunity would be given to the witnesses to trim their evidence, to the sacrifice, perhaps, of truth and the possible defeat of justice, made an order that no report of the proceedings should be published till all the trials had concluded. A report of the trials of Thistlewood and another who had been convicted was published by Clement in his newspaper, before the trial of any of the other prisoners had commenced. He was brought up before the Chief Justice and punished for contempt of Court in having acted " contrary to the order of this Court, and to the obstruction of public justice," not merely the first. The order prohibiting publication was impeached upon the ground that it prohibited the publication of a fair and accurate report of proceedings taking place in a public Court of justice after these proceedings had terminated, and it was successfully defended on the ground that all the trials formed together one entire proceeding, and that Clement's newspaper was published in the middle, and not at the end of that proceeding.

Bayley J. (1) is reported to have expressed himself thus: "But, it is argued, that if the Court has this power of prohibiting publication, there is no limit to it, and they may prohibit altogether any publication of the trial. I think that that does not follow. All that has been done in this case is very different; for the prohibition, here, has only been till the whole trial was completed." And Holroyd J., the only other judge who gave at length reasons for his decision, is (2) reported to have said: "The object for which it (the order) was made was clearly, as it appears to me, one within their jurisdiction, viz. the furtherance of justice in proceedings then pending before the Court; and it was made to remain in force so long, and so long only, as those proceedings should be pending before them. . . . . It appears to me, that the arguments as to a further power of continuing such orders in force for a longer period, do not apply. It is sufficient for the present case, that the Court have that power during the pendency of the proceedings."

The second proposition for which the respondent contends is,

(1) 4 B. & Ald. at p. 230. (2) Ibid. at pp. 232, 233.

as I understand it, this: that if a superior Court or a judge of such a Court should make a valid order in a civil suit prohibiting the doing of a particular act, not per se a crime, the doing of that act in disobedience to the order becomes a crime, a criminal contempt of Court. Even though the first proposition put forward by the respondent should, contrary to my view, be held to be sustainable, it would still be necessary for him to establish this second proposition in order to succeed on this appeal, because the act of the petitioner, in sending at the time she did copies of the shorthand writer's notes of the medical evidence given in camera to her father-in-law, sister-in-law, and a lady friend, even if not done, as she swears it was, in defence of her character and good repute, was not per se a crime. If it became a crime at all it must be because she was by the order of the Court prohibited from doing it. The same considerations apply to the act of her solicitor, who aided and abetted her in doing this forbidden act. Her contempt of Court does not appear to me, however, to fall within any of the classes of criminal contempt of Court mentioned by Lord Hardwicke in *Roach* v. *Garvan* (1), or by Lord Cottenham in *Lechmere Charlton's Case* (2), or by Lord Blackburn in *Skipworth's Case*. (3) It did not involve the scandalizing of a judge, such as was dealt with in *McLeod* v. *St. Aubyn* (4) or in *Reg.* v. *Gray*. (5) It did not involve the intimidation or corruption of jurors or witnesses in any pending or prospective suit, nor the prejudicing of the case of any litigant in any pending suit, such as was attempted in *O'Shea* v. *O'Shea and Parnell*. (6) Still less was it directed or calculated to interfere with the due course of justice in any pending litigation. It is not enough, I think, to bring it under this last head of criminal contempt of Court, that men or women may exist who, though their evidence and that of all their witnesses should be taken in camera, would prefer to suffer under the wrong nullity suits are designed to redress, rather

(1) (1742) 2 Atk. 469, at pp. 471, 472.
(2) (1836) 2 My. & Cr. 316, at p. 342.
(3) (1873) L. R. 9 Q. B. 230, at pp. 232, 233.
(4) [1899] A. C. 549.
(5) [1900] 2 Q. B. 36.
(6) 15 P. D. 59.

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than have that evidence published even after the case has ended. But the deterring of such people from seeking redress in a Court of justice is not the kind of interference with the course of justice which Lord Cottenham had in mind in the case above mentioned, when he said that its essence consisted in the doing of something calculated or designed to obtain a result of legal proceedings different from that which would follow in the ordinary course.

Of course, if the act prohibited be in itself a crime, the fact that it has been done in defiance of the prohibition would necessarily, one would suppose, aggravate the culprit's guilt. But if it be the law that disobedience of the order in itself constitutes a crime, then this result seems necessarily to follow, that all orders of Court punishing persons in any way for disobedience of this kind cannot be reviewed in the Court of Appeal inasmuch as each of them would have been made in "a criminal cause or matter" within the meaning of the 47th section of the Judicature Act of 1873. The following cases (in addition to those dealing with orders of justices made at sessions to be presently referred to) may be taken as fair specimens of those cited on behalf of the respondent in support of this, his second proposition: *Lord Wellesley* v. *Earl of Mornington* (1), *Seaward* v. *Paterson* (2), *Avory* v. *Andrews* (3), and *In re Freston.* (4)

It was contended that these cases shew that the disobedience of an order of Court constitutes in itself a crime, a criminal contempt of Court. Unfortunately for this contention, however, they do something more than that; they shew I think, conclusively, that if a person be expressly enjoined by injunction, a most solemn and authoritative form of order, from doing a particular thing, and he deliberately, in breach of that injunction, does that thing, he is not guilty of any crime whatever, but only of a civil contempt of Court. It would appear to me to be almost inconceivable that the law should tolerate such an absurd anomaly as this: that a principal who does an act he is expressly prohibited by injunction from doing should only be guilty of a civil contempt of Court, while a person not expressly or at all

(1) 11 Beav. 181.
(2) [1897] 1 Ch. 545.
(3) (1882) 30 W. R. 564.
(4) 11 Q. B. D. 545.

prohibited who aids and abets the principal in doing that very act should be held guilty of a crime, a criminal contempt of Court, with the result that the more flagrant transgressor of the two, the principal, would have a right to appeal to the Court of Appeal against any order punishing him for his misdeed, while the accessory would have no right of appeal from the order punishing him for aiding and abetting the principal to commit the forbidden act. The disrespect to the Court which made the order that was disobeyed, and the defiance of its authority, would seem to be greater in the case of the principal than in that of the accessory. The interference with the course of justice if that resulted would probably be the same in both. It can hardly be that the fact that the principal was named in the order he has disobeyed is to palliate rather than aggravate his guilt, and if not, on what principles are the cases to be differentiated? In the first of the before-mentioned cases, one Batley, the unnamed aider and abettor of the named principal who disobeyed the order of the Court, submitted, when brought before the Court, to answer for his contempt. The plaintiff in the suit did not press for punishment. The Master of the Rolls said that had he been pressed it would have been his duty to commit Batley, but he does not say for what form of contempt of Court, whether the civil contempt of Court for which the principal was found to have been guilty, or a criminal contempt of Court. The case is rather a blind one, therefore, on this point as to the nature of the contempt.

In *Seaward* v. *Paterson* (1), a case much relied upon by the respondent, the principal, Paterson, his agents and servants were restrained by injunction from, amongst other things, having, or permitting to be held, exhibitions of boxing on his premises. He held, or permitted to be held there, such an exhibition in breach of this injunction. One Murray, who was neither his agent nor servant, was present at the exhibition, aiding and abetting Paterson in holding it. The plaintiff moved that both principal and accessory should be committed for breach of the injunction. The whole controversy before North J. was whether Murray could be committed, as he was not a party to the suits, and was

(1) [1897] 1 Ch. 545.

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not named in the injunction. The learned judge held that he could be committed, not indeed for breach of the injunction, but for contempt of Court in aiding and abetting Paterson in doing an act which the latter was by the injunction prohibited from doing, and committed both Paterson and Murray to prison. Murray alone appealed from this order to the Court of Appeal. The appeal was entertained and the order appealed from upheld, but neither on the hearing before North J. nor in the Court of Appeal was it ever suggested that Murray's contempt of Court was a criminal contempt of Court. Sect. 47 of the Judicature Act of 1873 was not referred to. The points discussed were those raised in the Court below. Lord Lindley is, at p. 555, reported to have expressed himself thus: "A motion to commit a man for breach of an injunction, which is technically wrong unless he is bound by the injunction, is one thing; and a motion to commit a man for contempt of Court, not because he is bound by the injunction by being a party to the cause, but because he is conducting himself so as to obstruct the course of justice, is another and a totally different thing. The difference is very marked. In the one case the party who is bound by the injunction is proceeded against for the purpose of enforcing the order for the benefit of the person who got it. In the other case the Court will not allow its process to be set at naught and treated with contempt. In the one case the person who is interested in enforcing the order enforces it for his own benefit; in the other case, if the order of the Court has been contumaciously set at naught the offender cannot square it with the person who has obtained the order and save himself from the consequences of his act. The distinction between the two kinds of contempt is perfectly well known, although in some cases there may be a little difficulty in saying on which side of the line a case falls." The motive and object of the person who brings the offender before the Court may be different in the one case from the other. That, however, one would think could not change the nature of the offence. Lord Lindley did not grapple with the absurdity of a man who does a certain thing which he was not prohibited from doing thereby becoming a criminal, and a man who does the same thing, though he was prohibited from doing it, not

becoming a criminal. It is difficult to conceive that a judge of Lord Lindley's well-known knowledge, ability, and acuteness of mind would have gone through this long analysis of the subject without ever suggesting that either, or both, of the kinds of contempt of Court with which he dealt was necessarily criminal, if he had so regarded it.

In *Avory* v. *Andrews* (1) trustees of a friendly society were restrained by injunction from disposing of certain funds of the society in a certain way. They resigned, and new trustees were appointed in their stead. These latter did the prohibited act. Kay J. held they were guilty of contempt of Court because, though not named in the injunction, they stepped into the place of those who were named and did what the former were forbidden to do, but it was not suggested that the new trustees were guilty of any contempt of Court differing in kind from that of which the old trustees would have been guilty had they disobeyed the injunction, or that the new trustees, though not the old ones, were guilty of a criminal offence.

In the case of *In re Freston* (2) a solicitor (Freston) was, by an order of the Court of which he was an officer, required to deliver up certain documents, and also pay to a person named a sum of 10*l.* and the costs of an application made against himself. He delivered the documents, but refused or omitted to pay the sum of 10*l.* or the costs. Thereupon Denman J. made an order that an attachment should issue against him, and he was arrested while he was returning home from the police office, where he had been professionally engaged, and imprisoned. He applied to be discharged on the ground that at the time of his arrest he was privileged as an advocate from arrest. The Queen's Bench Division refused this application. Thereupon Freston appealed to the Court of Appeal. In this case, as in that of *Seaward* v. *Paterson* (3), the appeal was entertained. It was not suggested that under s. 47 of the Judicature Act the Court of Appeal had no power to hear the appeal. Lord Esher, at p. 554 of the report, lays down that where an attachment is issued for a breach of the law, or as a remedy for something that

(1) 30 W. R. 564. (2) 11 Q. B. D. 545.
(3) [1897] 1 Ch. 545.

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is a breach of the law and in the nature of an offence, no privilege can be claimed, but where it is issued for the purpose of enforcing judgments in civil disputes, and where the breach of the order cannot be said to be an offence, the privilege can be claimed. He apparently relied much on the 4th sub-section of the Debtors Act of 1869 and s. 1 of the Debtors Act of 1878, and came to the conclusion that Freston's contempt was in the nature of an offence, but whether or not this was because of the disciplinary jurisdiction which Courts exercise over solicitors as their own officers it is rather difficult to discover. Later on the the same page he says: "The rights of those employing solicitors are not merely of a civil nature; and the Courts dealt with defaulting solicitors on the ground, that they had been guilty of breaches of duty and breaches of the law."

Lord Lindley, at p. 556, says, "Is this attachment simply in the nature of civil process? If it is, this solicitor ought to be discharged. In *McWilliams' Case* (1) Lord Redesdale L.C. has pointed out that all contempts are not the same; they are of different kinds; some contempts are merely theoretical, but others are wilful, such as disobedience to injunctions or to orders to deliver up documents—in these cases there is no privilege from arrest. In this case the attachment was granted for something more than a mere theoretical contempt, and therefore it was something more than merely civil process: there was therefore no privilege. This view is strengthened by the language of the Debtors Act, 1869, s. 4, sub-s. 4: it assumes that a solicitor who fails to pay a sum of money when ordered by the Court, is guilty of misconduct and also of an offence for which he may be punished by imprisonment; and this tends to shew that the attachment was not upon civil process." And Fry L.J., at p. 557, says, "The attachment was something more than process; it was punitive or disciplinary, for the Court was proceeding against its own officer." The appeal was dismissed.

There is not a suggestion in this case that Freston had done anything for which he could have been indicted, as every person can be who is guilty of criminal contempt of Court. Nothing

(1) (1803) 1 Sch. & Lef. 169, at p. 174.

would have been easier for the members of the Court than to have said that he was guilty of a crime if they had thought so. That would at once have solved the difficulty as to whether or not the attachment order was merely civil process. The fair inference is that they did not think so. I am, therefore, of opinion that this case, so far from being an authority that disobedience per se of an order of Court, irrespective of the nature of the thing ordered to be done, is a criminal offence, is an authority to the contrary. Some reliance was, in argument, placed upon authorities not cited in the Court of Appeal, such as *Reg.* v. *Ferrall* (1), to shew that the disobedience of an order made by justices of the peace constitutes an indictable offence. These cases are dealt with in Russell on Crimes, 7th ed., vol. 1, p. 543, and Chitty's Criminal Law, 2nd ed., vol. 2, p. 279, and are all collected in Archbold's Criminal Pleading and Evidence, 23rd ed., p. 1088. The orders referred to are usually made upon the treasurer of a county to pay the costs of prosecutions, or upon a person to pay under the poor law the costs of maintenance of a relative, or upon putative fathers to pay the cost of the maintenance of their illegitimate children. In *Rex* v. *Robinson* (2) Lord Mansfield lays it down broadly that disobedience of an order of sessions is an indictable offence at common law. *Rex* v. *Bristow* (3) is to a similar effect. In *Rex* v. *Johnson* (4) the order was made by the justices on the county treasurer to pay the expenses of a prosecution, and it was held this officer might be indicted if he refused or omitted to do so. The same result would apparently follow if a similar order had been made by the going judge of assize: *Rex* v. *Jeyes*. (5)

The observations of Pollock C.B. in giving judgment in *Reg.* v. *Ferrall* (6) are very significant. He says: "The authorities are clear upon the point, that an indictment will lie for a refusal to comply with an order of justices for the payment of money; and although I individually should not be disposed to hold, for the first time, that such a refusal was indictable since a like refusal to comply with an order of a superior Court is not so, yet, I feel

(1) (1850) 2 Den. C. C. 51.
(2) (1759) 2 Burr. 799, at p. 804.
(3) (1795) 6 T. R. 168.
(4) (1816) 4 M. & S. 515.
(5) (1835) 3 Ad. & E. 416.
(6) 2 Den. C. C. at p. 56.

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bound by the authorities to concur with the rest of the Court in this view of the law."

This rule of the common law would appear to have sprung out of the necessities of such cases as these. The money ordered to be paid could not be sued for and recovered as a debt, specialty or simple contract, due to the person to whom it was ordered to be paid, and justices had no power to issue writs of attachment to compel obedience to their orders. Indictment was, therefore, the only remedy available. But these orders were not orders made inter partes in civil suits, such as orders to hear a civil cause in camera, and do not support in any way, in my view, the respondent's second proposition. In my opinion that proposition is unsound. The burden of establishing it lay upon the respondent. He has, I think, failed to discharge that burden. Lord Moulton, in his able and elaborate judgment in the Court of Appeal in this case at p. 268 of the report, lays down in the following passage what, in my opinion, is the true and sound principle of the law. "It is only the Legislature that can render criminal an act which is not so by the common law of the land. An order of the Court in a civil action or suit creates an obligation upon the parties to whom it applies, the breach of which can be and in general will be punished by the Court, and in proper cases such punishment may include imprisonment. But it does no more. It does not make such disobedience a criminal act, and therefore it is that the Court of Appeal has consistently and without any exception held that orders punishing persons for disobedience to an order of the Court are subject to appeal." This view of the law is not, I think, in conflict with authority, and is logical and rational in itself.

In my opinion the cases cited in reference to wards of Court afford no assistance upon any of the points in controversy on this appeal, inasmuch as judges in these cases act as the representatives of the Sovereign as parens patriæ, and exercise on his behalf a paternal and quasi-domestic jurisdiction over the person and property of the wards for the benefit of the latter. Even if it be assumed that the Ecclesiastical Courts had jurisdiction to order nullity suits to be tried in camera, that power is now only to be exercised by the Court for Divorce and Matrimonial Causes,

according to the provisions of the 22nd section of the Matrimonial Causes Act of 1857, subject to the provisions of that Act and the rules and orders made thereunder. The words "rules and regulations" not "rules and orders" are used in the 46th and 67th sections. I think these two expressions mean the same thing. No such rules, regulations, or orders having been made, the provisions of the 46th section operate directly with their full force and effect on suits of this character. And it certainly appears to me that the hearing of these suits in camera is opposed not only to the policy of this statute, but is prohibited by the express and positive enactments of its 46th section. These provisions may to some extent be modified by "rules and orders" framed and published in the mode provided, but they cannot be modified by the order of a judge.

It is not necessary in the present case to determine whether the broad proposition laid down by Sir Francis Jeune (as he then was) in *D.* v. *D.* (1) is well founded. The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses, and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trial is to found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect. I am inclined to think that the practice of which the learned judge approved and in this case inaugurated would restrict this wholesome publicity more than is warranted by authority. And I desire to point out that, if the practice were adopted, and if orders to hear a cause in camera were to have the effect contended for in the present case, this rather injurious result might follow. If perpetual silence were enjoined upon every one touching what takes place at a hearing in camera, the conduct and action of the judge at the trial, his rulings, directions, or decisions on questions of law or fact, could never be reviewed in a Court of Appeal at the instance of a party aggrieved, unless indeed upon the terms that that party should consent to become a criminal

(1) [1903] P. 144.

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and render himself liable to be fined and imprisoned for criminal contempt of Court, a serious invasion of the rights of the subject.

Even if the party aggrieved might be able to obtain from the Court that made the order permission to violate it to the extent necessary to prosecute the appeal, the secrecy enjoined could only be secured by the appeal to the Court of Appeal, and, possibly, from that Court to this House, being also heard in camera, a serious alteration, I think, of the present practice.

It only remains for me to deal with the form of the proceedings adopted in this case taken in connection with the construction of the 47th section of the Judicature Act. If a certain act may be viewed in either of two aspects, the one criminal and the other simply tortious, it is, I think, essential, in order to bring a judgment or order dealing with it within this section, that it should clearly appear on the face of the judgment or order that the act is dealt with in its criminal, and not in its civil, aspect. Were it otherwise a judgment for damages in a case of wilful and deliberate assault could not be reviewed by a Court of Appeal since wilful assault is a crime. Now Lindley L.J., in *O'Shea* v. *O'Shea and Parnell* (1), is reported as having expressed himself thus: "There are obviously contempts and contempts; there is an ambiguity in the word; and an attachment may sometimes be regarded as a civil proceeding. For instance, where an order was made by the Court of Chancery in former days there was no mode of enforcing such an order but by attachment. We must not, therefore, be misled by the words 'contempt' and 'attachment,' but we must look at the substance of the thing. In the present case I have no doubt that the proceeding is a summary conviction for a criminal offence, and therefore no appeal lies." To accuse one, therefore, of being guilty of a contempt of Court does not, I think, necessarily imply that he has committed a crime, nor is the criminality of the act necessarily implied by the added allegation that the contempt consisted in the violation of an order of Court.

In this case the order alleged to have been disobeyed was

(1) 15 P. D. 59, at p. 64.

simply an order "that the cause should be heard in camera," nothing more. If one turns to the notice of November 23, 1911, of the motion upon which the order appealed from was made, it is obvious that the person who framed it never thought he was making any criminal charge whatever. The notice is not entitled in any separate cause or matter, as it should have been according to the judgment of the Court of Appeal in *O'Shea* v. *O'Shea and Parnell* (1), in order to shew that it dealt, to use the words of Lopes L.J., with something outside the cause, and was not a mere step in the cause. On the contrary it is entitled just as any notice of a motion which was a step in the cause would be entitled. The charge made was that the petitioner (a party to the suit bound by the orders made in it) and her solicitor (over whom as an officer of the Court the judge had disciplinary powers) had been guilty of contempt of Court in publishing a transcript of the shorthand writer's notes of the medical evidence in contradiction of the order of February 11, 1911, directing the cause to be heard in camera. The relief prayed for is, in substance, this: (1.) That the petitioner and her solicitor should be committed to prison; (2.) that they should be restrained from making any similar or other communication either directly or indirectly concerning or relating to the subject of the suit; (3.) that they should be restrained from molesting in this or in any other way the respondent and friends, doctors, patients, or others (the others not being identified in any way); (4.) that the petitioner and her solicitor should be required to state on oath the names and addresses of the persons to whom they have made similar communications.

All these different kinds of relief might possibly be rightly and rationally asked for (I express no opinion upon that point) if what was complained of was a civil contempt of Court, like the mere breach of an injunction, but if it was meant to charge these two persons with a criminal offence, and to ask for their summary conviction for it, the notice of motion is grotesque in its absurdity. Who ever heard of a criminal being restrained by an order similar to an injunction from the repetition of his crime, or the commission of some other and different though

(1) 15 P. D. 59.

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similar crime, not to speak of a criminal having been asked to discover on oath the evidence to secure his own conviction of the crime of which he is accused, or of some other crime of a similar character?

There is a well-known procedure in the nature of preventive justice, by which it may be sought to prevent the commission of crime, but it is not this. It consists in requiring the person likely to commit the crime to enter into recognizances to keep the peace and be of good behaviour to all His Majesty's subjects, and in default to be committed to prison. It is impossible to think that Bargrave Deane J. should have consciously taken a part in such a travesty of criminal procedure as this notice invites him to embark in. Yet he makes no allusion to the absurdities of the notice of motion. The curial part of his order runs thus: "The judge found that the petitioner and her solicitor had been guilty of contempt of Court, and thereupon ordered that the petitioner and her solicitor, Mr. Percy Braby, do pay the costs of this application." But of what kind of contempt, civil or criminal, he has found them to have been guilty the order does not disclose.

In the absence of any allegation expressed or implied to the contrary, it must, I think, be assumed that the contempt of Court for which the parties were condemned was the particular kind of contempt charged in the notice of motion. I quite admit it was competent for the learned judge to have put aside all the nonsense contained in the notice of motion, to have had its title amended, and to have had entitled his own order in conformity with the amended notice, but he has not done so. The relevant portion of his judgment leaves one still in doubt as to the sense in which he used those words, "of ambiguous meaning," according to Lord Lindley. It runs thus:

"It must be clearly understood in future that the whole object of trying these unhappy cases in camera is that they should be kept secret and private. The result may be known, but none of the details; and it is a gross contempt of Court when the Court says, 'I will try this case in my private room,' for people to go spreading about the country the shorthand notes of what took place in the private room. It must be understood in future

that anything done in chambers is private. Even summonses are not reported without leave of the Court when there is something important." (1)

It puts everything done in chambers on a level with nullity suits heard in camera, and, if the respondents are right in their first contention, announces that perpetual silence shall be enjoined in the one class of cases as well as in the other.

I concur, therefore, with Vaughan Williams L.J. in thinking that the order appealed from to the Court of Appeal was an order in a civil proceeding, and not an order in a criminal cause or matter within the meaning of the 47th section of the Judicature Act of 1873, and for this, as well as for the other reasons I have mentioned, am of opinion that this appeal should be allowed, with costs.

I am further of opinion that the decision of Bargrave Deane J. was erroneous, and that, as your Lordships have now before you all the materials necessary to enable you to do complete justice between the parties, the order should now be made which your Lordships are of opinion the Court of Appeal ought to have made had they not yielded to the preliminary objection and had heard the appeal, namely, an order that the order appealed from to the Court of Appeal be set aside and vacated, and the applicant be ordered to pay the costs of the motion to commit the petitioner to prison, and also the costs in the Court of Appeal and the costs of this appeal.

LORD SHAW OF DUNFERMLINE. (2) My Lords, the appellant, Annie Maria Scott, and the respondent, Kenneth Mackenzie Scott, were married on July 8, 1899. On January 12, 1911, the appellant instituted this suit for a declaration of nullity of marriage. On February 14 an order was pronounced, of the character familiar in such cases, for the medical examination of the parties and for report. The concluding words of that order were as follows: "And I do further order that this cause be heard in camera."

(1) This passage appears in a somewhat different form in the report of the judgment of Bargrave Deane J. in the *Law Reports*.

(2) Read by Lord Atkinson.

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Thereafter the respondent withdrew an answer which he had put in to the case—which accordingly proceeded undefended. The evidence was given and the hearing took place in camera, and on June 13, 1911, the President pronounced a decree nisi with costs. So far as the hearing of the case in camera was concerned, the order made was obeyed.

Towards the end of the year 1911, however, Mrs. Scott obtained an official transcript of the shorthand notes of the proceedings, and sent to the respondent's father, to his sister, and to one other person, typewritten copies thereof. She swears in her affidavit that she did this with a view to vindicate herself in the eyes of those persons, and to prevent their being prejudiced against her by false reports. There is no question in this case that the three copies issued were accurate, or that the report of the proceedings was true.

The respondent founds upon this action by the appellant as a contempt of Court, and in his notice of motion for December 4, 1911, he asks that the appellant, Annie Maria Scott, and her solicitor, Mr. Percy Braby, and his partner, Mr. Waller (who on her instructions had obtained the copies of the proceedings), be committed to prison for their contempt of Court; secondly, that they be restrained "from making any similar or other communications, either directly or indirectly, concerning or relating to the subject-matter of this cause," and, thirdly, "from otherwise molesting the respondent, his relatives and friends, doctors, patients, and others"; while fourthly, he moves that the appellants "be directed to state on oath the names of the persons and their addresses to whom similar communications have been made."

If this motion be, as was contended, a motion in a criminal cause or matter, it is manifest that it was also much more, for it was not a motion merely for commitment in respect of the alleged contempt, but it was also a motion for an injunction of perpetual silence with regard to what had transpired in the proceedings in camera. In the next place, it was an injunction against molestation; and, lastly, it was a discovery, and a discovery sought from the alleged criminals by their stating on oath the names, addresses, and particulars of their criminal contempt. These

and particularly the last, are singular accompaniments of a step in a criminal cause or matter. The last seems to be an abrogation of the elementary principle that an accused person is not bound to incriminate himself. The majority of the Court of Appeal, holding that the question arose in a criminal cause or matter, have declared a civil appeal incompetent. Against this judgment the present appeal to this House is brought.

But the argument before your Lordships was not confined to this point of competency—of civil or criminal; it ranged over the whole merits of the occurrence and was full and elaborate; it included a discussion of the powers of the old Ecclesiastical Courts and necessitated a reference to the question of the open administration of English justice as a whole.

On the actual case before the House there are two substantial matters falling to be dealt with. In the first place, did the communication of a transcript of the Court proceedings—after the actual proceedings had come to an end—constitute a contemptuous disobedience to the order that they should be heard in camera? In the second place, was that order itself properly and legitimately pronounced? Both of these matters, my Lords, appear to me to be deserving of grave and serious consideration. And I observe of both, but particularly of the latter, that I think them to be closely connected with questions of the deepest import affecting the powers of Courts of justice and the liberty of the subjects of the Crown.

After a not inconsiderable study of the authorities and history in relation to this subject, I will venture to enter, notwithstanding the dicta to which I am about to refer, my respectful protest against the assumption of any general power by the present English Courts of law to administer this branch of justice and to try suits for declaration of nullity of marriage, or indeed to hold any Courts of justice with closed doors. Nor do I confine my rejection of this assumption merely to the existing High Court under the Judicature Act of 1873, nor even to the Matrimonial Court set up by the statute of 1857. For I think it right to make some examination in the first place of the power of the old Ecclesiastical Courts, as to which I humbly think that much misapprehension has prevailed.

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My Lords, the forms of the old Ecclesiastical Courts were manifestly derived from those in use under the general body of canon law, which, as Stair expresses it in a passage adopted by the Ecclesiastical Commissioners of 1832, "extended to all persons and things belonging to the Roman Church, and separate from the Laity; to all things relating to pious uses; to the guardianship of orphans; the wills of defuncts; and matters of marriage and divorce; all which were exempted from the civil authority of the Sovereigns, who were devoted to the See of Rome. So deeply has this law been rooted, that even where the Pope's authority has been rejected, yet consideration has been had to these laws, not only as those by which Church benefices have been erected and ordered, but as likewise containing many equitable and profitable laws, which because of their weighty matter, and their being received, may more fitly be retained than rejected."

In the early stages of the suit, the Ecclesiastical Court, charging itself with the interests of both parties, took upon itself the inquiry into the facts, not in foro contentioso nor in foro aperto, but by way of obtaining, first from the one side, and then, if there was a denial or a counter case, from the other side, and from each apart from the other, the testimony of witnesses, this testimony to lie in retentis until, according to modern ideas, the real trial of the case should begin.

The true meaning of these preliminary inquiries was substantially this, that the story of each side was told without either the fear or the presence of the other, and without the knowledge or the desire to evade or mitigate the force of opposing evidence. They constituted an official precognition; I think they are referred to under that name. When these private and preliminary inquiries were ended, and after that stage of precognition was completed, the stage of "publication" was reached; and publication meant the opening of the documents—up to that point sealed—and the disclosure of their contents to the other party and to the judge. (1)

The true question to be determined as to the procedure of the

(1) [Such was also the course of the old Court of Chancery, which was founded on the "summary" ecclesiastical procedure.—F. P.]

Ecclesiastical Courts is not what had been done up to that stage, but what was done after that stage. For my own part I incline to the opinion that, after the stage of publication was reached, the Ecclesiastical Courts conducted their proceedings openly, and that there is no real ground for the suggestion that this subsequent procedure was secret. I accordingly enter my respectful dissent against observations—mostly made obiter—which have been cited from learned judges, that a continuance of the old ecclesiastical procedure justifies any inference that this department of justice was to be optionally secret.

These observations, although made from the Bench, were in point of fact cited by the learned counsel for the respondent, not as observations made in judicio but rather in testimonio. It was said that when Lord Penzance, Sir James Hannen, and Sir Francis Jeune made allusions to the old practice of the Ecclesiastical Court, they may have felt justified in their language by their own recollections. There is force in this view; although, of course, it would be improper to attach too serious weight to these references, which are, with one exception, of a slender and almost casual kind. But they have induced me, after an independent investigation, to trouble your Lordships with more than a passing reference to the practice of the Ecclesiastical Court. Its procedure is detailed with the utmost minuteness in Oughton's "Ordo Judiciorum," published in London in 1738; and it will be found from such a text-book that no support can be obtained for the view that subsequent to the stage of "publication" to which I have referred, the Ecclesiastical Courts, either as a matter of practice or in the exercise of a power, acted as secret tribunals.

But it is in truth unnecessary to go through the text-books—Conset and the others; because testimony of the greatest weight on this topic is obtained from the report of the Commissioners appointed to inquire into the practice and jurisdiction of the Ecclesiastical Courts in 1832. The personnel of the Commission gives this unanimous report the highest authority. For, in addition to the Archbishop of Canterbury and several members of the Episcopal Bench, the Commission included Lord Tenterden, Lord Wynford, and Chief Justice Tindal, together with other men

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of great accomplishments and learning, including Mr. Stephen Lushington.

The course of proceeding of the Ecclesiastical Courts is dealt with in detail, including the mode of taking evidence by depositions, and the examination and cross-examination of witnesses by the examiners of the Court, who were employed for that purpose by the registrars. So far up to the stage of publication. The report then proceeds as follows :—

"The evidence on both sides being published, the cause is set down for hearing. All the papers, the pleas, exhibits, interrogatories and depositions, are delivered to the judge; who, having them in his possession for some days before the cause is opened, has a full opportunity of perusing, and carefully considering, the whole evidence, and all the circumstances of the case, and of preparing himself for hearing it fully discussed by counsel. All causes are heard publicly, in open Court; and on the day appointed for the hearing, the cause is opened by the counsel on both sides, who state the points of law and fact which they mean to maintain in argument; the evidence is then read, unless the judge signifies that he has already read it, and even then particular parts are read again, if necessary, and the whole case is argued and discussed by the counsel.

"The judgment of the Court is then pronounced upon the law and facts of the case; and in discharging this very responsible duty, the judge publicly, in open Court, assigns the reasons for his decisions, stating the principles and authorities on which he decides the matters of law, and reciting or adverting to the various parts of the evidence from which he deduces his conclusions of fact; and thus the matter in controversy between the parties becomes adjudged. Reports of decisions in the Ecclesiastical Courts were not in former times laid before the public, like those of the Courts of Westminster Hall; but for the last twenty years and upwards, the judgments of these Courts have been regularly reported. These reports are not only useful in the jurisdiction itself, and the inferior Courts, but they also serve to explain to the Temporal Courts the principles of ecclesiastical decisions, so as to enable them to form a more correct

judgment of the proceedings, when they may have occasion to refer to them."

My Lords, accepting, as I do, this account of ecclesiastical procedure in England, I do not entertain any real doubt that the Ecclesiastical Courts, from the moment when they sat to open the depositions of the witnesses, and throughout the whole course of the trial thereafter, were open Courts of the realm. They did not presume to pursue a practice or exercise a power inconsistent with that fact.

This state of matters may, no doubt, have been occasionally, and perhaps with increasing frequency, in the fourth and fifth decades of last century, departed from; but it was, I incline to believe, never departed from under challenge, and this undermining of what was, in my view, a sound and very sacred part of the constitution of the country and the administration of justice did not take place under legislative sanction, nor did it do so by the authority of the judges, on any occasion where the point of power to exclude the public was argued pro and contra.

And so far as regards even cases thus tried in camera by request or without objection, the large body of Consistorial Reports forms a comprehensive and complete refutation of the suggestion that such an order for a private trial was equivalent to a decree of perpetual silence on the subject of what had transpired within the doors of a Court thus closed. Until this case occurred I never suspected that parties, witnesses, solicitors, or counsel were put under such a disability or restraint; nor did it ever occur to me that the learned reporters of consistorial causes have by a series of contempts of Court continued to instruct the world.

My Lords, I am aware that the view which I now put forward as to the old practice and power of the Ecclesiastical Courts is not shared to the full by the judges of the Court below, but after the full argument at your Lordships' Bar I see no reason to doubt its substantial accuracy. I think the state of matters when the Divorce and Matrimonial Causes Act of 1857 became law was what I have ventured to describe. Occasional lapses had occurred from the wholesome rule of open justice in this country—lapses accounted for in all possibility sometimes by a

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feeling of delicacy, and sometimes, I do not myself doubt, by the idea that the rule of open justice might be occasionally obscured in the interests of judicial decorum. I mention this last idea because its recrudescence, even after the statute of 1857, is one of the striking historical developments of this branch of the law.

By s. 22 of the statute of 1857 it was provided, "In all suits and proceedings, other than proceedings to dissolve any marriage, the said Court shall proceed and act and give relief on principles and rules which in the opinion of the said Court shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have heretofore acted and given relief, but subject to the provisions herein contained and to the rules and orders under this Act." My Lords, there is nothing in that section which sanctions the idea that the Ecclesiastical Court had either a principle or a rule of sitting with closed doors. It had undoubtedly a principle of having the witnesses interrogated by examiners representing the Court registrars, but beyond that, and from the stage of publication onwards, there was no principle or rule for a secret tribunal.

The new Court set up would have remained accordingly free to deal with the taking of evidence itself as a preliminary and in private. But this was specifically the subject of s. 46, which is to the following effect: "Subject to such rules and regulations as may be established as herein provided, the witnesses in all proceedings before the Court where their attendance can be had shall be sworn and examined orally in open Court: Provided that parties, except as hereinafter provided, shall be at liberty to verify their respective cases in whole or in part by affidavit, but so that the deponent in every such affidavit shall, on the application of the opposite party or by direction of the Court, be subject to be cross-examined by or on behalf of the opposite party orally in open Court, and after such cross-examination may be re-examined orally in open Court as aforesaid by or on behalf of the party by whom such affidavit was filed."

This section of the Act of 1857, my Lords, although no doubt it may have been meant incidentally as a useful corrective to dangerous ideas which were appearing to invade little by little the open administration of justice, was substantially a declaratory

section, for, once the preliminary inquiries had been brought within the range of judicial proceedings, then the proceedings as a whole were by a statute declared to be in open Court throughout.

I may observe that, although the law and practice of Scotland are far less dependent on statute than in England, yet in the particular under discussion Scotland had anticipated the Act of 1857 by express statutory enactment passed in the year 1693. The two Acts of June 12 of that year were in truth a part of the emphatic testimony borne to the determination of the nation to reap the full fruit of the Revolution Settlement and to secure against judges, as well as against the Sovereign, the liberties of the realm. The one Act affects civil procedure; the other statute affecting criminal procedure is to the same effect, with an excepting declaration applicable to cases "of rapt, adultery, and the like."

And, my Lords, in my humble opinion these sections of the Act of 1857 were declaratory in another sense. They brought the matrimonial and divorce procedure exactly up to the level of the common law of England. I cannot bring myself to believe that they prescribed a standard of open justice for these cases either higher or lower than that for all other causes whatsoever. And it is to this point accordingly that the discussion must come. The historical examination clears the ground. So that the tests of whether we are in the region of constitutional right or of judicial discretion—of openness or of optional secrecy in justice—are general tests.

As to the Act of 1857, my Lords, I repeat that I make no excuse for founding upon the terms of these two sections—ss. 22 and 46—in combination. For if the view which I have taken be correct, namely, that all was open in the Ecclesiastical Courts except the examination of witnesses, then these two sections put together mean this, that all was to be open in future in the Ecclesiastical Courts, without any such exception whatsoever. When a cause is begun in the Divorce Court a contract of litis contestatio is entered into in short upon the ordinary terms. The old private examination of witnesses is abolished; the new system is an open system.

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I am of opinion that the order to hear this case in camera was beyond the power of the judge to pronounce. I am further of opinion that, even on the assumption that such an order had been within his power, it was beyond his power to impose a suppression of all reports of what passed at the trial after the trial had come to an end. But in order to see the true gravity of what has occurred, these two things must be taken together. So taken, my Lords, they appear to me to constitute a violation of that publicity in the administration of justice which is one of the surest guarantees of our liberties, and an attack upon the very foundations of public and private security. The Court of Appeal has by its majority declared a review of this judgment by it to be incompetent. I therefore make no apology for treating the situation thus reached as most serious for the citizens of this country.

Consider for a moment the position of the appellants. The case of *Scott* v. *Scott* was heard in camera. All interruption or impediment either to the elucidation of truth, or the dignity or decorum of the proceedings,—conceived to be possible by the presence of the public—had been avoided. The Court had passed judgment in private and the case was at an end. And now judgment has been passed upon the appellants in respect of disclosing what transpired in Court by exhibiting an accurate transcript of what had actually occurred, and the appellants are enjoined to perpetual silence. And against this—which is a declaration that the proceedings in an English Court of justice shall remain for ever shrouded in impenetrable secrecy—there is, it is said, no appeal. I candidly confess, my Lords, that the whole proceeding shocks me. I admit the embarrassment produced to the learned judge of first instance and to the majority of the Court of Appeal by the state of the decisions; but those decisions, in my humble judgment, or rather,—for it is in nearly all the instances only so,—these expressions of opinion by the way, have signified not alone an encroachment upon and suppression of private right, but the gradual invasion and undermining of constitutional security. This result, which is declared by the Courts below to have been legitimately reached under a free Constitution, is exactly the same result which would have been achieved

under, and have accorded with, the genius and practice of despotism.

What has happened is a usurpation—a usurpation which could not have been allowed even as a prerogative of the Crown, and most certainly must be denied to the judges of the land. To remit the maintenance of constitutional right to the region of judicial discretion is to shift the foundations of freedom from the rock to the sand.

It is needless to quote authority on this topic from legal, philosophical, or historical writers. It moves Bentham over and over again. "In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice." "Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial." "The security of securities is publicity." But amongst historians the grave and enlightened verdict of Hallam, in which he ranks the publicity of judicial proceedings even higher than the rights of Parliament as a guarantee of public security, is not likely to be forgotten: "Civil liberty in this kingdom has two direct guarantees; the open administration of justice according to known laws truly interpreted, and fair constructions of evidence; and the right of Parliament, without let or interruption, to inquire into, and obtain redress of, public grievances. Of these, the first is by far the most indispensable; nor can the subjects of any State be reckoned to enjoy a real freedom, where this condition is not found both in its judicial institutions and in their constant exercise."

I myself should be very slow indeed (I shall speak of the exceptions hereafter) to throw any doubt upon this topic. The right of the citizen and the working of the Constitution in the sense which I have described have upon the whole since the fall of the Stuart dynasty received from the judiciary—and they appear to me still to demand of it—a constant and most watchful respect. There is no greater danger of usurpation than that which proceeds little by little, under cover of rules of procedure,

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and at the instance of judges themselves. I must say frankly that I think these encroachments have taken place by way of judicial procedure in such a way as, insensibly at first, but now culminating in this decision most sensibly, to impair the rights, safety, and freedom of the citizen and the open administration of the law.

To begin with it was not so. No encroachment upon the broad stipulations of the statute of 1857 may have at first occurred. But two years after the Act was passed the cases of *Barnett* v. *Barnett* (1) and of *H.* (*falsely called C.*) v. *C.* (2) were tried. In the former, which was a suit by a wife for judicial separation on the ground of cruelty, her counsel asked that the evidence might be taken before an examiner. The meaning of that, my Lords, was that it was a motion almost in express terms that the secret procedure which had been ended by Parliament should be resumed by the Court. The motion was refused by Sir Cresswell Cresswell. In the latter, which was a suit to declare a nullity of marriage, on the same ground as in the present case, counsel asked that the cause might be heard in camera. The cause came on for hearing before the Full Court, namely, Sir Cresswell Cresswell, the Judge Ordinary, Williams J., and Bramwell B. The judgment of Bramwell B. was conclusive, none the less so that he indicates that he knew already that the practice, which he was condemning as illegal, was already creeping in. The learned judge said: "If this had been the first application of the kind, I also should have thought it perfectly clear that this being a new Court was constituted with the ordinary incidents of other English Courts of justice, and, therefore, that its proceedings should be conducted in public. Upon that question I should not have felt the slightest doubt; and the only doubt I now entertain is in consequence of this Court having since it was established, on two occasions, sat in private. But in those cases I understand that that course was adopted with the consent of both parties, and that no discussion took place. In my opinion the Court possesses no such power."

My Lords, I think it would have been better had those

(1) 29 L. J. (P. & M.) 28. (2) 29 L. J. (P. & M.) 29.

attempts to evade the publicity commanded by the statute then ceased and the judgment of Bramwell B. been accepted as law. But the respondents found upon expressions of opinion such as those to which I now refer. In *C.* v. *C.* (1), in the year 1869, Lord Penzance, dealing with a case which was not a suit for nullity, made this observation: "The only causes which have been heard in private are suits for nullity of marriage, and in doing so, the Court has followed the practice of the Ecclesiastical Courts, which it is expressly empowered to do in such suits by the 22nd section of 20 & 21 Vict. c. 85." My Lords, that point was not a point of decision. I do not see that any argument upon the subject was presented to the Court. I cannot take the learned judge as having laid down that the practice of the Ecclesiastical Court was anything other than what is recorded with much authority by the Ecclesiastical Commissioners in the passage which I have cited.

The next expression founded upon is that by Sir James Hannen. (2) It is clear that that learned judge was much exercised upon the subject; for, having cited the judgments of Sir Cresswell Cresswell and Williams J. and Bramwell B., to which I have just referred, "that the Court had no power to sit otherwise than with open doors," the learned judge adds: "It would seem, however, that that rule has not been acted upon. On the contrary, such cases have been heard in camera both by my predecessor and myself, and I therefore think it must be taken that the impression which was entertained by Sir Cresswell Cresswell was afterwards abandoned." I must say, my Lords, that, accepting this as historically accurate, it appears to me to be a confession of a progressive departure from the law. No doubt it bound the learned judge, but it is an illustration of that to which I have already alluded, namely, the liability, unless the most vigorous vigilance is practised, to have constitutional rights, and even the imperative of Parliament, whittled away by the practice of the judiciary. It was no wonder that in the later case in 1876 (3) even the Master of the Rolls, Jessel, made an exception to the rule of open Courts of justice of "those cases

(1) L. R. 1 P. & M. 640. (2) *A.* v. *A.*, L. R. 3 P. & M. 230.
(3) *Nagle-Gillman* v. *Christopher*, 4 Ch. D. 173.

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where the practice of the old Ecclesiastical Courts in this respect is continued." But it is perfectly manifest that the practice of the old Ecclesiastical Courts was not continued. Taking evidence under private examination was stopped. What was continued was the remainder of the practice, which was open, and the closed portion was by statute declared also to be open. But while this observation was made by Sir George Jessel, obiter in that case, his judgment upon the main question was one that must command respect. He "considered that the High Court of Justice had no power to hear cases in private, even with the consent of the parties, except cases affecting lunatics or wards of Court, or where a public trial would defeat the object of the action." These, my Lords, constitute the exceptions, definite in character and founded upon definite principles, to which I shall in a little allude.

But in the year 1903, in *D.* v. *D.* (1), Sir Francis Jeune brought these dicta to this culmination: "I believe that the reason why the Ecclesiastical Courts were accustomed to hear suits for nullity in private was not merely because they were suits for nullity; but because, in the exercise of the general powers which those Courts possessed, they were of opinion that those suits ought not to be heard in public. In my view, they might have heard every suit in private." My Lords, I respectfully differ from this dictum. It appears to me to be historically and legally indefensible.

I cannot do justice to this subject without a reference to two cases which were much discussed. One of these was a test case which occurred so late as the year 1889. I refer to *Malan* v. *Young*. (2) By this time undoubtedly the occasional usurpation —for I call it no less—by the Courts of a power to hear cases in camera was beginning to grow into at least the semblance of a practice; and Denman J. held that he had power to hear the Sherborne School case in camera. Mr. Gould, a member of the Bar, objected to leave the Court, and only retired therefrom upon express order by the judge and under protest. But the case had a sequel which is described in the judgment of Vaughan Williams L.J., who ratifies with his authority and on his own knowledge and recollection the following account in the Annual

(1) [1903] P. 144. (2) 6 Times L. R. 38.

Practice of 1912:—"The following subsequent occurrence is, however, unreported:—The trial proceeded in camera on 11th, 12th, and 13th November, 1889, and was adjourned to 15th January, 1890, when the judge stated that, in view of the fact that there was considerable doubt among the judges as to the power to hear cases in camera, even by consent, he would ask the parties to elect to take the risk of going on with the case before him in camera, or begin it de novo in public. The parties elected to go on with the case before the judge as arbitrator, and to accept his decision as final, subject to the condition that judgment should be given in public, which was done (extracted from the Associate's recorded note of the case)."

The other case referred to was that of *Andrew* v. *Raeburn*. (1) But, my Lords, there was there no decision whatsoever of the point to be now determined. It was an action to prevent the disclosure of documents alleged to be private and confidential. In the course of his judgment Earl Cairns said: "If it had appeared to me that this was a case in which a hearing in public would cause an entire destruction of the whole matter in dispute," (a matter not of the rule but of an exception to the rule, as I shall hereafter explain) "I should have taken time to consider whether it was consistent with the practice of the Court to hear it in private even without the consent of both parties, in order to prevent such entire destruction of the matter in dispute. But from the nature of this case it appears to me impossible to say that the subject of the suit would be destroyed by a public hearing." Thus far for the decision. But in a concluding sentence the learned Earl said, "Under these circumstances I do not think it would be right to deviate from what has undoubtedly been the practice of the Court—not to hear a case in private except with the consent of both parties." To infer from this sentence, not adopted or concurred in by either James L.J. or Sir John Mellish, that it was open to the judges of England to turn their Courts into secret tribunals, if both parties to any suits asked or consented to that being done, is to make an inference from which I feel certain that the noble Earl would himself have shrunk, and against which, indeed, my belief is that he

(1) L. R. 9 Ch. 522.

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would have strongly protested. For myself, I think such an inference to be contrary to one of the elements which constitute our true security for justice under the Constitution, and to form no warrant for an invasion and inversion of that security, such as has been made in the present case.

My Lords, it is very necessary, indeed, to make, in the matter of contempts of Court, clear distinctions. One has, for instance, to distinguish acts external to the administration of justice and truly subversive of it. These are essentially of a criminal character. They tend to prejudice a party to a suit in the eyes of the public, the Court, or the jury, or to intimidate witnesses, or interfere with the course or achievement of justice in a pending action. The case of *O'Shea* (1) was of this class. One has also to distinguish acts—also essentially criminal in their nature—acts of disturbance, or riot, which prevent the business of a Court of justice being duly or decorously conducted.

In both of these cases a Court can protect its administration and all those who share or are convened to its labours. And in both cases the authors of the prejudice or intimidation, on the one hand, or the participators in the disturbance or riot, on the other, are guilty of a contempt: and a Court of justice can protect itself against these things both by suppression and by punishment.

But here, my Lords, the question affects not such a power, namely, to see to it that justice shall be conducted in order and without interruption or fear, but a power—for that is what is really claimed—to make the proceedings of an English Court of justice secret because of something in the nature of the case before it.

Upon this head it is true that to the application of the general rule of publicity there are three well recognized exceptions which arise out of the nature of the proceedings themselves.

The three exceptions which are acknowledged to the application of the rule prescribing the publicity of Courts of justice are, first, in suits affecting wards; secondly, in lunacy proceedings; and, thirdly, in those cases where secrecy, as, for instance, the secrecy of a process of manufacture or discovery or invention—trade secrets—is of the essence of the cause. The first two of these

(1) 15 P. D. 59.

cases, my Lords, depend upon the familiar principle that the jurisdiction over wards and lunatics is exercised by the judges as representing His Majesty as parens patriæ. The affairs are truly private affairs; the transactions are transactions truly intra familiam; and it has long been recognized that an appeal for the protection of the Court in the case of such persons does not involve the consequence of placing in the light of publicity their truly domestic affairs. The third case—that of secret processes, inventions, documents, or the like—depends upon this: that the rights of the subject are bound up with the preservation of the secret. To divulge that to the world, under the excuse of a report of proceedings in a Court of law, would be to destroy that very protection which the subject seeks at the Court's hands. It has long been undoubted that the right to have judicial proceedings in public does not extend to a violation of that secret which the Court may judicially determine to be of patrimonial value and to maintain.

But I desire to add this further observation with regard to all of these cases, my Lords, that, when respect has thus been paid to the object of the suit, the rule of publicity may be resumed. I know of no principle which would entitle a Court to compel a ward to remain silent for life in regard to judicial proceedings which occurred during his tutelage, nor a person who was temporarily insane—after he had fully recovered his sanity and his liberty—to remain perpetually silent with regard to judicial proceedings which occurred during the period of his incapacity. And even in the last case, namely, that of trade secrets, I should be surprised to learn that any proceedings for contempt of Court could be taken against a person for divulging what had happened in a litigation after the secrecy or confidentiality had been abandoned and the secrets had become public property.

The present case, my Lords, is not within any of these exceptions, and is not within the ratio or principle which underlies them. The learned judge himself, following certain encroachments of authority, made a general exercise of power concerning proceedings of a certain nature in his Court, and really bringing the denial of the open administration of this part of the law within the range of ordinary judicial discretion.

H. L. (E.) 1913 SCOTT v. SCOTT. Lord Shaw of Dunfermline.

For the reasons which I have given, I am of opinion that the judgment of Bargrave Deane J. cannot be sustained. It was, in my opinion, an exercise of judicial power violating the freedom of Mrs. Scott in the exercise of those elementary and constitutional rights which she possessed, and in suppression of the security which by our Constitution has been found to be best guaranteed by the open administration of justice. I think, further, that the order to hear the case in camera was not only a mistake, but was beyond the judge's power; while, on the other hand, the extension of the restrictive operation of any ruling—that a case should be heard in camera—to the actions of parties, witnesses, counsel, or solicitors, in a case, after that case has come to an end, seems to me to have really nothing to do with the administration of justice. Justice has been done and its task is ended; and I know of no warrant for such an extension beyond the time when that result has been achieved. It is no longer possible to interfere with it, to impede it, to render its proceedings nugatory. To extend the powers of a judge so as to restrain or forbid a narrative of the proceedings either by speech or by writing, seems to me to be an unwarrantable stretch of judicial authority.

I may be allowed to add that I should most deeply regret if the law were other than what I have stated it to be. If the judgments, first, declaring that the cause should be heard in camera, and, secondly, finding Mrs. Scott guilty of contempt, were to stand, then an easy way would be open for judges to remove their proceedings from the light and to silence for ever the voice of the critic, and hide the knowledge of the truth. Such an impairment of right would be intolerable in a free country, and I do not think it has any warrant in our law. Had this occurred in France, I suppose Frenchmen would have said that the age of Louis Quatorze and the practice of lettres de cachet had returned.

There remains this point. Granted that the principle of openness of justice may yield to compulsory secrecy in cases involving patrimonial interest and property, such as those affecting trade secrets, or confidential documents, may not the fear of giving evidence in public, on questions of status like the present, deter

witnesses of delicate feeling from giving testimony, and rather induce the abandonment of their just right by sensitive suitors? And may not that be a sound reason for administering justice in such cases with closed doors? For otherwise justice, it is argued, would thus be in some cases defeated. My Lords, this ground is very dangerous ground. One's experience shews that the reluctance to intrude one's private affairs upon public notice induces many citizens to forgo their just claims. It is no doubt true that many of such cases might have been brought before tribunals if only the tribunals were secret. But the concession to these feelings would, in my opinion, tend to bring about those very dangers to liberty in general, and to society at large, against which publicity tends to keeps us secure: and it must further be remembered that, in questions of status, society as such—of which marriage is one of the primary institutions—has also a real and grave interest as well as have the parties to the individual cause.

The cases of positive indecency remain; but they remain exactly, my Lords, where statute has put them. Rules and regulations can be framed under s. 53 by the judges to deal with gross and highly exceptional cases. Until that has been done, or until Parliament itself interferes, as it has done in recent years by the Punishment of Incest Act, and also in the Children Act, both of the year 1908, Courts of justice must stand by constitutional rule. The policy of widening the area of secrecy is always a serious one; but this is for Parliament, and those to whom the subject has been consigned by Parliament, to consider. As an instance of the watchful attention of the Legislature in regard to any possible exceptions to the rule of publicity, s. 114 of the latter Act may be referred to. It provides for the exclusion of the general public in the trial of offences contrary to decency or morality, but this exclusion is to be only during the giving of evidence of a child or young person, and under this proviso, that "nothing in this section shall authorise the exclusion of bona fide representatives of a newspaper or news agency." I may add that for myself I could hardly conceive it a likely thing that a general rule consigning a simple and inoffensive case like the present to be tried in camera could ever be made; but that is a consideration which is beyond our range as a Court administering

H. L. (E.) 1913

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Lord Shaw of Dunfermline.

the existing law. Upon the basis of that law I am humbly of opinion that the judgments of the Courts below cannot stand.

My Lords, I am relieved to think that in the opinion of all your Lordships the judgment of Bargrave Deane J. was not pronounced in a criminal cause or matter. For, notwithstanding all the discussion, I confess even yet to some inability to understand what is meant. The learned Solicitor-General, in answer to a question by me, answered from the Bar that his case implied that not only was the conduct of the appellants criminal, but that his argument demanded that he should say it was indictable. My Lords, the breach by a party of an order made against him or her in the course of a civil case is a perfectly familiar thing. Cases for breach of injunction are tried every day. But I have never yet heard that they were anything but subject to trial by the civil judges as in a civil cause or matter. And in the course of that trial it is open to the person accused of breach to establish upon the facts that what has been done was not a breach in fact, but was a legitimate and defensible action. That is precisely analogous to the present case. Mrs. Scott, for instance, maintains that, even granted that the order for hearing the case in camera was properly made, it was an order only that the trial should be conducted in camera, and that she was guilty of no violation of that order whatsoever. The proper Court to try that was undoubtedly the Court which tried the civil proceeding and made the order. As I say, my difficulty still remains of understanding how these two things can be differentiated, and what, in an infringement of patent case or the like would be notoriously a civil matter, becomes a step in a criminal cause or matter in a case like the present.

I will only add that, if the respondent's argument and the judgment of the majority of the Court of Appeal were right, this singular result would follow: In the year 1908 Parliament interposed to give a right of appeal in criminal causes. The Court of Appeal in the present case has held that no appeal lies from the judgment of Bargrave Deane J., because the decision of the learned judge is in a criminal cause or matter. Grant, accordingly, that this is so; yet, nevertheless, the Criminal Appeal Act, 1907, affords no remedy to the unfortunate appellants.

Under the argument against them they have been denied a civil appeal because their conduct was indictable, and under the Act of 1907 they can obtain no remedy by way of criminal appeal because they have not been convicted on indictment. In juggles of that kind the rights of the citizen are lost.

I concur.

Sir John Simon, S.-G., asked whether in the peculiar circumstances of this case the House would not depart from its ordinary rule and allow the appeal without costs.

EARL OF HALSBURY, in moving that the order appealed from be reversed and that the respondent do pay the costs both here and below, said that in his opinion the ordinary order should be made, but intimated that that which was most properly done by the Treasury and by the Attorney-General ought not to be at the expense of the private parties, because the judgment had established a most important principle and one which it was most important the public should have the benefit of, and therefore private individuals should not be at the expense of establishing it.

Order of the Court of Appeal reversed: the respondent to pay the costs in the Courts below and also the costs of the appeal to this House.

Lords' Journals, May 5, 1913.

Solicitors for appellants: *Braby & Waller.*

Solicitors for respondent: *Treasury Solicitor* (1); *W. S. Jerome.*

ADDENDUM.

Mr. Harold Moore, of the Divorce Registry, during the course of the hearing in the House of Lords looked up the papers in the Registry in a number of nullity cases from 1820 to 1857. In a letter to the Treasury Solicitor he stated the result of his search as follows: "The papers in cases tried in the Consistory Court of London were handed over to the Probate and Divorce Court in the last-named year and we have an index of them. My search established the fact that it was the practice to hear such suits in camera and that informal application was made to the judge or his clerk by the proctors concerned either by letter or verbally. I think I found three letters—the cases are not very numerous—and in one instance where there was no letter there was a pencil note 'to be heard in the dining hall by order of the judge.'"

(1) The Treasury Solicitor was put on the record, after the appeal was presented, to enable him to instruct counsel.

Revenue and Customs Commissioners v Banerjee (No 2)

Note

[2009] EWHC 1229 (Ch)

CHANCERY DIVISION

HENDERSON J

19 JUNE 2009

Judgment – Handed down judgments – Judgments in advance of hearing – Draft judgments – Anonymisation – General principles – Tax appeals.

Notes

For the general rule that hearings are to be in public, see 11 *Halsbury's Laws* (5th edn) (2009) para 6.

Cases referred to in judgment

A-G v Leveller Magazine Ltd [1979] 1 All ER 745, [1979] AC 440, HL.

Bunn v BBC [1998] 3 All ER 552.

Campbell v Mirror Group Newspapers Ltd [2004] UKHL 22, [2004] 2 All ER 995, [2004] 2 AC 457.

Derby & Co Ltd v Weldon (1988) Times, 20 October.

Diennet v France (1995) 21 EHRR 554, [1995] ECHR 18160/91, ECt HR.

IRC v National Federation of Self-Employed and Small Businesses Ltd [1981] 2 All ER 93, [1982] AC 617, [1981] 2 WLR 722, HL.

Ivereigh v Associated Newspapers Ltd [2008] EWHC 339 (QB).

Lord Browne of Madingley v Associated Newspapers Ltd [2007] EWCA Civ 295, [2007] 3 WLR 289.

Murray v Express Newspapers plc sub nom *Murray v Big Pictures (UK) Ltd* [2008] EWCA Civ 446, [2008] 3 FCR 661, [2008] 3 WLR 1360.

R v Legal Aid Board, ex p Kaim Todner (a firm) [1998] 3 All ER 541, [1999] QB 966, CA.

R v Registrar of Building Societies, ex p a building society [1960] 2 All ER 549, [1960] 1 WLR 669, CA.

S (a child) (identification: restriction on publication), Re [2004] UKHL 47, [2004] 4 All ER 683, [2005] 1 AC 593.

Scott v Scott [1913] AC 417, [1911–13] All ER Rep 1, HL.

W v H [2008] EWHC 399 (QB), [2009] EMLR 200.

Wakefield (t/a Wills Probate and Trusts of Weybridge) v Ford [2009] EWHC 122 (QB), [2009] All ER (D) 242 (Jan).

Z v Finland (1997) 25 EHRR 371, [1997] ECHR 22009/93, ECt HR.

Application

Following the circulation by Henderson J to the parties of a draft judgment on 14 January 2009 on an appeal by way of case stated brought by the Revenue and Customs Commissioners against a decision of the General Commissioners for the Purposes of Income Tax given at a hearing on 1 August 2005, allowing the appeal of the taxpayer, Dr Piu Banerjee, against amendments to her self-assessment tax return (see [2009] EWHC 62 (Ch), [2009] 3 All ER 915), Dr Banerjee applied for orders (i) anonymising the judgment and (ii) preventing the Revenue from disclosing to the public, or any section of the public, any information about Dr Banerjee that would be likely to lead to her identification as respondent to the appeal. The application was dealt with by way of written submissions. The facts are set out in the judgment.

Mark Warby QC made written submissions for Dr Banerjee.

Sam Grodzinkski (instructed by the *Solicitor for the Revenue and Customs*) made written submissions for the Revenue.

19 June 2009. The following judgment was delivered.

HENDERSON J.

SHOULD THE MAIN JUDGMENT BE ANONYMISED? INTRODUCTION

[**1**] The Revenue's appeal to the High Court was heard in public, in the usual way, on 5 December 2008. No application was made by or on behalf of Dr Banerjee, either before or during the hearing, for the hearing to take place in private. Her previous appeal to the General Commissioners had likewise been heard in public, no direction to the contrary having been made by the tribunal either upon the application of Dr Banerjee or of its own motion: see reg 13 of the General Commissioners (Jurisdiction and Procedure) Regulations 1994, SI 1994/1812, as substituted with effect from 31 December 2002 by the General Commissioners and Special Commissioners (Jurisdiction and Procedure) (Amendment) Regulations 2002, SI 2002/2976. On each occasion Dr Banerjee was professionally represented, before the General Commissioners by Stanbridge Associates Ltd and before me by Mr Julian Hickey and Berwin Leighton Paisner LLP ('BLP'): see paras [3] and [4] of the main judgment.

[**2**] I circulated my judgment to the parties in draft on 14 January 2009, saying that I intended to hand it down on 20 January and asking for lists of typing corrections and other obvious errors to be submitted to my clerk by 16 January.

[**3**] On 16 January BLP forwarded to my clerk a written submission from Dr Banerjee, in which she gave a number of reasons for requesting anonymity in the judgment for herself and the senior medical colleagues who had written the letters appended to the case stated. In his covering letter, the partner of BLP with conduct of the appeal, Mr Jonathan Levy, said that Mr Hickey and he had 'explained the consequences, in terms of publicity, that pursuing litigation in the High Court might have when we were first instructed', but the issue was clearly troubling Dr Banerjee, and he was therefore taking the liberty of drawing it to my attention. I have no doubt that he was right to do so.

[**4**] The reasons given by Dr Banerjee for requesting anonymity were, in essence, that any publicity would be detrimental to her professional reputation

and career, and that she had no choice in bringing the matter to the High Court, because she was the respondent to the Revenue's appeal. She drew attention to her position as a single woman, working in the public sector in a public place, where 'anyone can easily find me and walk in through the door'. She said that she had recently been a victim of identity theft, and was feeling extremely anxious as a result. Her name was an unusual one, she had no receptionist, and there were no 'barriers of protection' between herself and the public or the press. She had no resources to deal with public or press enquiries regarding her tax affairs.

[**5**] Dr Banerjee went on to say that she oversees the care of several hundred patients each week in her department, who cover the whole spectrum of society including convicted criminals. She does not want them to know about her personal tax affairs, and publicity for them could give rise to unforeseen consequences. There have already been attacks on staff at the inner city London hospital where she works, and she has faced aggression from patients on several occasions. She also expressed the fear that any publicity would harm her professional reputation. Senior doctors are expected to keep a low profile outside the academic and professional spheres, and publicity for her tax affairs would be 'frowned upon by those in positions of power over my career'. She cited the example of a doctor in her speciality who had recently been named in a press article, and who had been formally disciplined as a result.

[**6**] Dr Banerjee went on to submit that her confidential personal details were not relevant to the issues of legal principle discussed in the judgment, and made various suggestions about how the judgment could be anonymised.

[**7**] On 19 January I sent a letter in reply to BLP and copied it to the Revenue. I said that, although I had considerable sympathy with many of the reasons which Dr Banerjee had given for wishing to preserve her anonymity, my firm provisional view was that it was now too late for me to anonymise the judgment, even if the circumstances might have justified a prior request that the High Court hearing should be held in private. My letter continued:

> 'The hearing on 5 December 2008 took place in open court and in public, and the findings of fact in the case stated were the subject of submissions on both sides and questioning by myself. Any interested member of the public would be able to obtain a transcript of that hearing, and it seems to me that any rights to privacy and confidentiality that Dr Banerjee might have wished to assert were irretrievably lost at that stage.
>
> I would add that, as I am sure you are aware, it has always been the invariable practice (to the best of my knowledge) for tax appeals by way of case stated to be heard in public, and for the full text of the case to be reported together with the judgment. There is a strong public interest in the precise facts upon which the judgment is based being known, and perhaps particularly so in an area as fact-sensitive as the deductibility of expenses for income tax. Any form of anonymising places the facts at one remove, and may reduce the value of the case as an authority as well as making it harder for an interested reader to follow the judgment. Moreover, I am not clear what jurisdiction, if any, I would have to direct redaction of the case stated now that it has been transmitted to the High Court and been the subject of a public hearing.'

[**8**] I went on to note that the consequences, in terms of publicity, of pursuing litigation in the High Court had been explained to Dr Banerjee by

Mr Hickey and Mr Levy when they were first instructed, but no application had been made for the hearing to be held in private. Dr Banerjee was of course the respondent to the appeal to the High Court, but she had initially appealed against the amendments to her self-assessments, and she had professional representation at the time. I added:

> 'I would have thought it was generally understood by all taxpayers that, if they appeal to Commissioners, there is a possibility that the case may proceed to the High Court or beyond, and at that stage their right to confidentiality in relation to that part of their tax affairs will be lost.'

I therefore said that I still proposed to hand down the judgment on the following day in its existing form unless I heard that Dr Banerjee still wished to pursue her application, in which case it would be necessary to arrange a further hearing at which I could hear full argument on the point from both sides.

[**9**] My letter prompted a further urgent communication from Dr Banerjee, in which she asked me to delay handing down judgment until she had had an opportunity to seek independent advice on the question and to consult her union. She made it clear that BLP were unable to continue to represent her. In the event, a short hearing took place on 20 January, at which I was addressed by Mr Hickey, who confirmed that BLP felt unable to represent Dr Banerjee in her quest for anonymity, and by Mr Grodzinski, who said that if Dr Banerjee, having taken advice, did pursue her application, the Revenue would oppose it. This represented a hardening of the Revenue's stance, because they had previously indicated that their attitude might be one of neutrality. In the circumstances, and in view of the strength, and evident sincerity, of Dr Banerjee's concerns, I decided to postpone handing down my judgment until she had taken independent advice, and (if she was advised to pursue the application) until it had been determined. My initial reluctance at taking this course, with the inevitable delay that it would occasion, was outweighed by the potential importance of the question and the risk of unfairness to Dr Banerjee in rejecting her application out of hand, despite the very late stage at which it had been raised.

[**10**] In due course Dr Banerjee was able to secure the services, on a direct access basis, of Mr Mark Warby QC, and a timetable was agreed between counsel, with my approval, for the service of sequential written submissions by Mr Warby for Dr Banerjee and Mr Grodzinski for the Revenue. I have had the benefit of an initial submission from Mr Warby dated 17 February 2009, a submission in response from Mr Grodzinski dated 25 March, and a submission in reply from Mr Warby dated 30 March, supplemented briefly on 7 April. In addition, on 25 February 2009 Dr Banerjee issued a formal application notice asking the court to make two orders. The first order that she seeks is that the judgment should be anonymised, in order to protect her private life. The second order sought is described as a 'supplemental direction', forbidding the Revenue from disclosing to the public, or any section of the public, any information about Dr Banerjee (such as her name, address, professional status, or details of her medical career or qualifications) which would be likely to lead to her identification as the respondent to the appeal. Dr Banerjee supported her application with a written statement, which repeats and in some respects amplifies the points already made in her earlier submissions to me of 16 and 19 January, and with a proposed anonymised version of the judgment.

[**11**] The application notice requested that I should deal with the matter without a hearing, and in his written submissions Mr Grodzinski made it clear that the Revenue did not positively seek an oral hearing, while indicating their willingness to attend one if the court so wished. In the light of the very full written submissions and citation of authority which I have now received, and for which I express my gratitude to both counsel, I do not consider that an oral hearing is necessary. I therefore accede to Dr Banerjee's request for her application to be dealt with on paper.

THE SUBMISSIONS FOR DR BANERJEE

[**12**] Mr Warby begins by making it clear that Dr Banerjee does not seek a general prohibition on her identification. No order is sought against any third party, and it is accepted that a general reporting restriction prohibiting the use of her name or identity in connection with the case would be a step too far, the case having already been heard in public. Her objective is, rather, to protect her privacy to the extent that is now practicable. If the judgment is anonymised, this will minimise the risk of her being named or identified in reporting of and comment on the court's decision. If she is named or identified, the inevitable consequence is that her private and confidential financial and tax affairs will become public knowledge, and her name will be associated on the internet and elsewhere with a well known tax case. The hearing of the appeal on 5 December 2008 did not in fact attract the interest of the media, and it has not yet been publicised. Accordingly, so it is argued, anonymising the judgment has good prospects in practice of achieving Dr Banerjee's objective, which is a legitimate one, and which can be achieved without compromising the principle of open justice.

[**13**] Turning to the relevant law, the starting point is that a person's financial and tax affairs are private and confidential in nature. Public authorities, such as the Revenue, which come into possession of such information, by compulsion or otherwise, owe the individual a duty of confidence: see, for example, *IRC v National Federation of Self-Employed and Small Businesses Ltd* [1981] 2 All ER 93 at 111, [1982] AC 617 at 651 per Lord Scarman, referring to the 'very significant duty of confidence' owed by the Revenue 'in investigating, and dealing with, the affairs of the individual taxpayers'. This obligation of confidentiality is now underpinned by the duty laid on public authorities by s 6(1) of the Human Rights Act 1998 not to act in a way which is incompatible with art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the 1998 Act) ('the convention'). Article 8 provides as follows:

> '*Right to respect for private and family life*
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, or the protection of health or morals, or for the protection of the rights and freedoms of others.'

[**14**] These rights and obligations of privacy and confidence are not automatically overridden merely because a person's financial and tax affairs

become the subject of litigation. Both the common law and the convention generally require a hearing to be in public, and judgment to be given in public. However, they do not require that everything the court comes to know about a party or other participant in litigation should be made public. The jurisprudence of the European Court of Human Rights makes clear that the court is obliged to strike a fair balance between the interest of publicity for court proceedings and the interest of a party or third person in maintaining confidentiality of personal data: see, for example, *Z v Finland* (1997) 25 EHRR 371, [1997] ECHR 22009/93 at paras 94 and following. The Strasbourg Court held in that case that disclosure in a judgment of the Swedish Court of Appeal of the name and sensitive medical data of the accused's wife infringed her art 8 rights.

[**15**] In the domestic context, CPR 39.2(4) empowers the court to order that the identity of any party must not be disclosed 'if it considers non-disclosure necessary in order to protect the interests of that party'. This is a broad power, and the 'interests' involved may include, although they are not limited to, privacy and confidentiality. It is now common, says Mr Warby, for privacy claims to be anonymised, and for judgments in such cases to be reported in a form such as AB v CD. He cites a recent unreported decision of Eady J, *Ivereigh v Associated Newspapers Ltd* [2008] EWHC 339 (QB), where anonymity was granted to a witness in a sensitive libel trial, and the judge said with reference to the exercise of the court's discretion under CPR 39.2(4), at para [7] of his judgment:

> 'Plainly, that discretion is to be exercised judicially and the modern approach, where competing Convention rights are engaged (as they plainly are here), is to apply an intense focus to the particular circumstances and then, being so informed, to carry out the ultimate balancing exercise …'

Eady J went on to say, in para [10], that the matter could not be determined merely by voicing the mantra of 'open justice', and '[t]he importance to be attached to that public policy consideration will depend upon the particular circumstances'. One of the reasons why the public and the media need to have access to court proceedings, Eady J added, is that people are entitled to understand the issues which have come before the court and the reasoning processes which have led to the ultimate decision. In the context of the application before him, Eady J commented that only very rarely would the need for such understanding require the identification of a child involved in proceedings. More generally, Mr Warby submits that the identities of parties and witnesses are normally immaterial for this purpose, and that the issues can usually be understood without knowing the identities of the parties.

[**16**] The court will often anonymise its judgment following a hearing in private. Cases of that nature are common, where there is a continuing need to protect the interests which justified the hearing being held in private in the first place. However, submits Mr Warby, the court can in appropriate circumstances anonymise its judgment even after a public hearing, and he refers to two recent cases where this has apparently been done. The first case is an interim ruling in a libel action handed down by Tugendhat J on 5 March 2008, *W v H* [2008] EWHC 399 (QB), [2009] EMLR 200. According to information supplied to Mr Warby by junior counsel for the defendants in the case, the claimant sued the defendants over allegations that he had been guilty of sexual harassment, and the judge heard applications by the defendants for summary judgment and

other rulings. The hearing took place in public, but did not attract publicity. No application was made by either side for a hearing in private or for any form of anonymity. Nevertheless, the judge decided to, and did, anonymise his judgment, although without making any order to that effect. There was apparently no argument on the point, and the judgment therefore does not set out the judge's reasoning. However, his decision to anonymise must have been based on the sensitive nature of the content of the alleged libel. As Mr Warby puts it, the anonymisation of the judgment spares the claimant's blushes, but in no way detracts from the value of the judgment to the public as a statement of the issues before the court and how and why they were resolved by the judge.

[17] The second case concerns a judgment handed down on 29 January 2009 by Eady J in another libel action, *Wakefield (t/a Wills Probate and Trusts of Weybridge) v Ford* [2009] EWHC 122 (QB), [2009] All ER (D) 242 (Jan). The claimant, who traded as 'Wills Probate and Trusts of Weybridge' and wrote and advised on the preparation of wills, sued in respect of an allegedly defamatory allegation made against him. Shortly before the matter was due to go to trial, he decided to drop the case. Having rejected a submission that the parties had come to a contractual settlement, the judge then had to deal with the basis upon which costs should be paid on a discontinuance of the action. He held that costs should be paid on an indemnity basis throughout. For present purposes, the significant point is that in the judgment which he handed down, following a hearing in public on 12 January 2009, the judge referred in two places by name to a specialist chancery barrister and to certain advice given by that barrister. The judge subsequently received a request from the barrister, who was in no way implicated in the case, that her name should be redacted from the judgment, to prevent any possible inference of implication being drawn in the future. He acceded to the request, and on 10 February 2009, 12 days after the original judgment was handed down, he issued a revised version.

[18] There is no hard and fast rule, submits Mr Warby, that information deployed in court during a public hearing automatically loses its qualities of privacy and confidentiality. Everything depends on the precise circumstances, and the 'public domain' doctrine does not operate in this sphere in the same way as it does in relation to issues of commercial confidence or state secrecy. In the case of confidential information of a private and personal nature, the case law establishes that: (a) confidentiality is not lost merely because information could be accessed in some way; (b) nor is it lost merely because some people do in fact know the information; and (c) the key criterion is whether publicity (or further publicity) would cause harm. See generally Tugendhat & Christie *The Law of Privacy and the Media* (2002) pp 239–241 and 244–245 (paras 6.90, 6.93 and 6.98 to 6.99).

[19] In the light of these principles, Mr Warby invites the court to apply the 'intense focus' referred to by Eady J in *Ivereigh v Associated Newspapers Ltd* to the peculiar circumstances of the present case. He relies in particular on the following points. (1) The information at stake is personal, financial and confidential. It forms part of Dr Banerjee's private life. The information was disclosed to the Revenue privately in connection with her taxation affairs. (2) Although the information has been deployed, and referred to, in proceedings in open court, it has not in fact received any publicity. It is not yet in the public domain, nor has it lost its attributes of privacy and confidentiality. (3) Identification of Dr Banerjee in the judgment, and through reporting of it, would result in public disclosure of these personal and private matters, and

embarrassment to her. (4) She has in no way sought such publicity. The Revenue initiated the present proceedings, by appealing from the decision of the Commissioners. Furthermore, the Revenue started the whole process by denying Dr Banerjee relief from taxation in respect of the expenses in issue. It was that act which led to her original appeal. (5) Far from seeking publicity, Dr Banerjee has at various stages made open offers to settle the case which were not accepted. In the event, she has been successful, but why should publicity for her private financial affairs be the price of that success? (6) The Revenue's concern, in pursuing the case, is obviously not with the modest amount of tax at stake, but with the general principles affecting the deduction of expenses for taxpayers in employment. The identification of the particular taxpayer in the court's judgment should be a matter of indifference to the Revenue, and her public identification would confer no legitimate benefit or advantage on the Revenue. (7) Nor would her identification confer any benefit on the public at large, because the court's judgment is readily comprehensible if anonymised in the way that she suggests.

THE SUBMISSIONS FOR THE REVENUE

[**20**] The Revenue submit, in summary, that: (a) it would not have been appropriate for the court to direct the appeal to be heard in private, nor to have granted Dr Banerjee anonymity, even if such an application had been made before the hearing of the appeal; and (b) her present application is even less tenable, given that no such application was made and the hearing took place in public.

[**21**] The starting point is the long established general principle of English law that justice must be done in public. The general rule may yield to the requirements of justice, but the burden lies on anybody who seeks to displace the general rule: see *Scott v Scott* [1913] AC 417, [1911–13] All ER Rep 1, especially per Viscount Haldane LC [1913] AC 417 at 437–438, [1911–13] All ER Rep 1 at 9. Similarly, in *A-G v Leveller Magazine Ltd* [1979] 1 All ER 745, [1979] AC 440, Lord Diplock, having referred to *Scott v Scott* and the requirements of open justice, continued as follows:

> 'However, since the purpose of the general rule is to serve the ends of justice it may be necessary to depart from it where the nature or circumstances of the particular proceedings are such that the application of the general rule in its entirety would frustrate or render impracticable the administration of justice or would damage some other public interest for whose protection Parliament has made some statutory derogation from the rule. Apart from statutory exceptions, however, where a court in the exercise of its inherent power to control the conduct of proceedings before it departs in any way from the general rule, the departure is justified to the extent and to no more than the extent that the court reasonably believes it to be necessary in order to serve the ends of justice.'

In *R v Legal Aid Board, ex p Kaim Todner (a firm)* [1998] 3 All ER 541, [1999] QB 966, the Court of Appeal said that the speeches in *Scott v Scott* and *A-G v Leveller Magazine Ltd* 'make it clear that an exception can only be justified if it is necessary in the interests of the proper administration of justice': see per Lord Woolf MR [1998] 3 All ER 541 at 549, [1999] QB 966 at 976, delivering the judgment of the court.

[**22**] The Court of Appeal recognised in *Ex p Kaim Todner* [1998] 3 All ER 541 at 549, [1999] QB 966 at 977 that 'there is an immense variety of situations in which it is appropriate to restrict the general rule', and that these situations depend very much on their individual circumstances. However, as the court went on to note ([1998] 3 All ER 541 at 549–550, [1999] QB 966 at 977):

> 'The need to be vigilant arises from the natural tendency for the general principle to be eroded and for exceptions to grow by accretion as the exceptions are applied by analogy to existing cases. This is the reason it is so important not to forget why proceedings are required to be subjected to the full glare of a public hearing. It is necessary because the public nature of proceedings deters inappropriate behaviour on the part of the court. It also maintains the public's confidence in the administration of justice. It enables the public to know that justice is being administered impartially … It makes uninformed and inaccurate comment about the proceedings less likely. If secrecy is restricted to those situations where justice would be frustrated if the cloak of anonymity is not provided, this reduces the risk of the sanction of contempt having to be invoked, with the expense and the interference with the administration of justice which this can involve.'

[**23**] For similar reasons, the court will generally refuse to conceal the name of a party to an appeal: see *R v Registrar of Building Societies, ex p a building society* [1960] 2 All ER 549 at 565, [1960] 1 WLR 669 at 687–689 and *Lord Browne of Madingley v Associated Newspapers Ltd* [2007] EWCA Civ 295 at [3], [2007] 3 WLR 289 at [3] per Sir Anthony Clarke MR giving the judgment of the court.

[**24**] These principles of English law are now also reflected in art 6(1) of the convention, which provides:

> 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.'

[**25**] In *Diennet v France* (1995) 21 EHRR 554, [1995] ECHR 18160/91, the Strasbourg Court at para 33 reiterated—

> 'that the holding of court hearings in public constitutes a fundamental principle enshrined in Article 6. This public character protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of Article 6(1), namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society …'

See too *Re S* (*a child*) (*identification: restriction on publication*) [2004] UKHL 47 at [15], [2004] 4 All ER 683 at [15], [2005] 1 AC 593, where Lord Steyn said that

the above statement 'reiterates the consistent earlier jurisprudence of the European Court of Human Rights' and has subsequently been reaffirmed by the European Court of Human Rights on numerous occasions.

[**26**] In determining whether it is necessary to hold a hearing in private, or to grant anonymity to a party, the court will consider whether, and if so to what extent, such an order is necessary to protect the privacy of confidential information relating to the party, or (in terms of art 8 of the convention) the extent to which the party's right to respect for his or her private life would be interfered with. The relevant test to be applied in deciding whether a person's art 8(1) rights would be interfered with in the first place, or in other words whether the article is engaged so as to require justification under art 8(2), is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy: see *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22 at [21], [2004] 2 All ER 995 at [21], [2004] 2 AC 457 per Lord Nicholls of Birkenhead, and *Murray v Express Newspapers plc* [2008] EWCA Civ 446 at [24], [2008] 3 FCR 661 at [24], [2008] 3 WLR 1360 of the judgment of the court. If art 8(1) is engaged, the court will then need to conduct a balancing exercise on the facts, weighing the extent of the interference with the individual's privacy on the one hand against the general interest at issue on the other hand. In cases involving the media, the competing general interest will normally be the right of freedom of expression under art 10 of the convention. In cases of the present type, the competing interest is the general imperative for justice to be done in public, as confirmed by art 6(1) of the convention.

[**27**] Turning to the facts of the present case, the Revenue submit that none of the matters referred to in the draft judgment are matters in respect of which Dr Banerjee can have had a reasonable expectation of privacy; and even if that is wrong, none of the matters on which she relies would have been sufficient to outweigh the general need for justice to be done in public. While not doubting that her concerns are entirely sincere and genuine, on an objective basis they are unfounded. The personal information about Dr Banerjee in the case stated and the draft judgment relates only to the following matters. (1) It identifies her by name, and thus makes it clear that she had been involved in litigation with the Revenue. However, that cannot by itself be a sufficient reason to grant anonymity. If it were, then everyone involved in such litigation would be entitled to anonymity. Furthermore, there is no evidence to support her surprising assertion that her involvement in the present proceedings would be 'frowned upon' by those in positions of power over her career. (2) Details are given of the total amount of expenses that she incurred in attending educational courses, conferences and meetings between 1997 and 2000. Such information is not inherently private, and in any event it reveals nothing about her wider or general financial position, either at the time in question or today. In particular, no information is given about her annual income. (3) Some details are also given of her employment history up to 2001, and reference is also made to some of the standard terms and conditions of her employment. Again, none of these matters are inherently confidential, or (if they are) they are not so confidential as to justify departure from the general rule. Nor can the fact that Dr Banerjee currently works at a particular hospital be confidential. Indeed, her own evidence emphasises that she works at a public place and that members of the public have direct access to her. More generally, submit the Revenue, it is very difficult to see how, on any reasonable and objective basis, any detriment could be caused to Dr Banerjee as a result of patients knowing that she has successfully contested the Revenue's treatment

of her expenses. As Lord Hope of Craighead said in *Campbell v Mirror Group Newspapers Ltd* [2004] 2 All ER 995 at [94], [2004] 2 AC 457, albeit in a somewhat different context, 'The law of privacy is not intended for the protection of the unduly sensitive.'

[**28**] The present case is quite unlike any other case in which the courts have ordered a hearing to be held in private or granted anonymity for a party or witnesses. Such orders are typically made in cases which involve a person's family or children, or in libel cases of a sensitive nature. Thus in the case of *Ivereigh v Associated Newspapers Ltd*, relied upon by Dr Banerjee, the witness who had sought anonymity did so because her evidence would have required 'disclosure by her to the court of intimate and detailed information as to her personal life, her sexual life, her health and her family which strongly engage her art 8 rights' (para [3] of the judgment, quoting from the skeleton argument for the applicant). In addition, as the judgment notes at para [4], there were several witness statements and supporting documents evidencing the potential harm to the applicant's family and her children which would result from publicity, including statements from a consultant paediatrician and a teacher. Similarly, in the case of *W v H* [2009] EMLR 200, the claimant had brought an action for slander concerning an allegation of sexual harassment, and it is clear (as Mr Warby's written submissions accept) that the judge's decision to anonymise must have been based on the sensitive nature of the alleged libel. Nothing remotely comparable can be said to arise in the present case. Accordingly, even if an application for a private hearing and/or anonymity had been made prior to the High Court hearing in the present case, it should not have been granted.

[**29**] The present application is even less sustainable in view of the fact that a hearing in public has now taken place. The submissions for Dr Banerjee refer to the principles and case law concerning the question whether a duty of confidence can continue to apply once the information has entered the public domain. Those cases, however, do not directly address the question whether it is appropriate to anonymise a court's judgment following a hearing in public, but rather the question of when a civil action based on the private law duty of confidence can survive pre-existing publicity of the information in question. The position is quite different in relation to information revealed in open court, as *Tugendhat & Christie* make clear at pp 223–224 (para 6.63):

> 'Information of an otherwise confidential character will lose that quality when it enters the public domain in the course of criminal proceedings in public. The position is similar in civil proceedings: where a document has been read to or by the court or referred to at a hearing in public, the restrictions which the CPR impose on collateral use of the document cease and any private law claim to confidentiality in information contained in the document evaporates to the same extent, unless the court specifically makes an order restricting or prohibiting the use of the document. In both the criminal and civil contexts the public domain exception applies to documents which are read by the court to itself as well as to documents read aloud in court.'

[**30**] The footnotes to the above passage cite the judgment of Sir Nicolas Browne-Wilkinson VC in *Derby & Co Ltd v Weldon* (1988) Times, 20 October, where he said 'Once a document has been read or referred to in open court, it becomes a public document'. See too *Tugendhat & Christie* at pp 246–247

(paras 6.101 and 6.102), where the authors suggest that there may be a rule of policy to the effect that information referred to in a public court automatically lacks the necessary quality of confidence, whatever the extent of actual public knowledge about it may be. So, for example, in *Bunn v BBC* [1998] 3 All ER 552, Lightman J held at 557 that confidence could no longer attach to a witness statement which the judge at an earlier hearing had read to himself in open court.

[**31**] The Revenue submit the correct position to be that once information has been referred to in open court, it automatically loses its quality of confidence, regardless of the extent to which the wider public has in fact been made aware of it. Such an approach is consistent with the general principle of open justice: it should not be open to a party retrospectively to seek to conceal matters which were openly disclosed as part of his or her case. If the position were otherwise, it might be necessary to make detailed enquiries about who was in court during the hearing, and whether they had already disclosed the matters more widely or intended to do so. The requirements of open justice should not depend on who happened to be present in court on the day in question, and for what purpose.

[**32**] In the present case, some people were observed to be present in the public gallery taking notes during the hearing on 5 December. Whether they were law reporters, members of the press or simply interested members of the public, the information disclosed or referred to in open court has now irretrievably entered the public domain. Consistently with this, no order is sought by Dr Banerjee imposing reporting restrictions on third parties. Accordingly, without breaching the orders which she now seeks, a law reporter could quite properly obtain a transcript of the hearing and then publicise the very details, including Dr Banerjee's name, which she seeks to have redacted from the draft judgment.

DISCUSSION AND CONCLUSIONS

[**33**] As will already be apparent from the fact that this judgment is not anonymised, I have come to the clear conclusion that Dr Banerjee's application must be refused.

[**34**] In agreement with the Revenue's general approach to the question, I think it is helpful to begin by considering whether an application for anonymity and/or a hearing in private would have succeeded, had such an application been made before the hearing on 5 December. The court would clearly have had jurisdiction to entertain such an application: see CPR 39.2(3), which provides that a hearing, or any part of it, may be in private if '(c) it involves confidential information (including information relating to personal financial matters) and publicity will damage that confidentiality'. Nevertheless, in my judgment any such application would have been firmly rejected, on the basis that the fundamental principle of public justice enshrined in art 6(1) of the convention, and long established in the English common law, would have decisively outweighed the very limited interference with Dr Banerjee's right to respect for her private life, and the very limited disclosure of information relating to her personal financial affairs, that a public hearing would entail. I will assume in Dr Banerjee's favour at this point that her relevant rights of privacy and confidentiality had not already been irretrievably lost by reason of the public hearing of her previous appeal to the Commissioners. Making that assumption, I would accept that her art 8(1) rights were engaged. In my

opinion any taxpayer has a reasonable expectation of privacy in relation to his or her financial and fiscal affairs, and it is important that this basic principle should not be whittled away. However, the principle of public justice is a very potent one, for reasons which are too obvious to need recitation, and in my judgment it will only be in truly exceptional circumstances that a taxpayer's rights to privacy and confidentiality could properly prevail in the balancing exercise that the court has to perform.

[**35**] It is relevant to bear in mind, I think, that taxation always has been, and probably always will be, a subject of particular sensitivity both for the citizen and for the executive arm of government. It is an area where public and private interests intersect, if not collide; and for that reason there is nearly always a wider public interest potentially involved in even the most mundane seeming tax dispute. Nowhere is that more true, in my judgment, than in relation to the rules governing the deductibility of expenses for income tax. Those rules directly affect the vast majority of taxpayers, and any High Court judgment on the subject is likely to be of wide significance, quite possibly in ways which may not be immediately apparent when it is delivered. These considerations serve to reinforce the point that in tax cases the public interest generally requires the precise facts relevant to the decision to be a matter of public record, and not to be more or less heavily veiled by a process of redaction or anonymisation. The inevitable degree of intrusion into the taxpayer's privacy which this involves is, in all normal circumstances, the price which has to be paid for the resolution of tax disputes through a system of open justice rather than by administrative fiat.

[**36**] Can it then be said that there is anything truly exceptional about the circumstances of the present case, such that Dr Banerjee's rights to privacy and confidentiality might arguably have outweighed the principle of open justice? In my judgment, clearly not. She is not involved merely as a witness, or as a third party caught up in a dispute that has nothing to do with her. On the contrary, the very issue in the case is the correct tax treatment of her own expenses. The relevant information that is needed to resolve the dispute is set out in the case stated and the appended correspondence. It relates to only one aspect of her financial affairs, and to a period of only three tax years ending in April 2000, the best part of a decade ago. Viewed objectively, as it must be, the infringement of her privacy is very limited both in time and in extent. Nor is there anything inherently sensitive or embarrassing about the information disclosed. The case is about routine expenditure of relatively small amounts of money in fulfilling the training obligations of her past employment as a specialist registrar. It is hard to see how anybody could reasonably criticise her for her involvement in the present litigation, or how it could possibly lessen the professional esteem in which she is held by her patients, colleagues and superiors, if they know that she successfully challenged the Revenue's refusal to allow the deductions. On the contrary, I feel sure that the reaction of any reasonable person would be one of respectful admiration for her tenacity.

[**37**] Dr Banerjee's concerns about her personal vulnerability, and her wish to avoid publicity of any kind, naturally attract sympathy, but it seems to me that little weight can be attached to these factors. Her perceived vulnerability to physical attack stems from the nature of her job and the environment in which she works. She is known by name to her patients, and she works in a public place. I can see no rational grounds for supposing that publication of the judgment would place her at any increased risk of physical harm. Similarly, I cannot believe that the brief details disclosed of her employment history and

expenses ten years ago will in some way place her at increased risk of identity theft or financial harm. There is, however, one small alteration to the draft judgment which I feel I can properly make, and that is to remove the specific reference to the hospital where she now works and where she took up employment as a consultant in August 2001. I have replaced it with a reference to 'another London hospital': see para [14] of the judgment. This particular detail has no relevance to the tax dispute, and I am happy to accede to Dr Banerjee's wishes in this respect.

[**38**] If, as I think, an application for the appeal to be heard in private would have been rejected, I agree with the Revenue that the application which Dr Banerjee now makes, following a public hearing, has even less chance of success. The preponderance of English authority supports the view that once material has been read or referred to in open court, it enters the public domain. It seems to me that there is a need for a clear and simple rule on this point, which reflects the principle of open justice, and which can be overridden, if at all, only in exceptional circumstances where the interests of justice so require. The general rule is also reflected in the right of any interested member of the public to obtain a transcript of any judgment given or order made at a public hearing, subject to payment of the appropriate fee: see para 1.11 of the Practice Direction to CPR Pt 39. It is true that the paragraph refers only to judgments or orders, but I see no reason why an interested person should not also be able to obtain a transcript of the entire proceedings which took place in open court. After all, such a person would have had the right to sit in court and take notes, and if he was a shorthand writer, he could have taken a verbatim note. The right to obtain a full transcript would therefore add nothing to what he could, in principle, have done for himself by attending the hearing. The touchstone, in my view, is whether the hearing in question is held in public, not whether it is in fact attended by any member of the public.

[**39**] The court should never make orders which it cannot police, or which are liable to cause confusion, or which may bring the administration of justice into disrepute. In my judgment there is a very real danger of one or more of these undesirable consequences ensuing if I were to make the orders now sought by Dr Banerjee. The judgment would be handed down in anonymised form, and the Revenue (but nobody else) would be forbidden by court order from revealing any information likely to lead to identification of Dr Banerjee as the respondent to the appeal. What is then to happen when the case comes to be reported? I have not been asked to make any reporting restrictions, or indeed any orders binding on third parties. The normal practice, in the taxation field, is for the case stated to be reported together with the judgment of the appeal court. I have not been asked to make an order redacting the case stated, and as I said in my original letter to Dr Banerjee's solicitors, I am not clear what jurisdiction, if any, I would have to do so. Is the case then to be reported with an unredacted case stated standing next to a redacted judgment? That would clearly be absurd. Furthermore, would the reporters of Tax Cases, which are reported under the direction of HMRC, be at risk of proceedings for contempt of court if they were to follow the usual practice and include the case stated in the report? Even the reporters from an independent series of reports, such as Simon's Tax Cases, might be worried and feel it necessary to apply to the court for guidance. That apart, any interested member of the public would still be at liberty to apply for a transcript of the hearing on 5 December, and to ask for a copy of the case stated as a document which was referred to and discussed in open court on that occasion. It is unnecessary to pursue these speculations any

further. They are sufficient to show, in my judgment, that there are sound practical reasons, as well as good legal reasons, for dismissing Dr Banerjee's application. *a*

Application dismissed.

b

Gareth Williams Barrister.

A

[HOUSE OF LORDS]

ATTORNEY-GENERAL . . . . . RESPONDENT

AND

LEVELLER MAGAZINE LTD. AND OTHERS . . APPELLANTS

B

ATTORNEY-GENERAL . . . . . RESPONDENT

AND

NATIONAL UNION OF JOURNALISTS . . . APPELLANTS

ATTORNEY-GENERAL . . . . . RESPONDENT

AND

C

PEACE NEWS LTD. AND OTHERS . . . . . APPELLANTS

1978 Nov. 28, 29, 30;
1979 Feb. 1

Lord Diplock, Viscount Dilhorne, Lord Edmund-Davies, Lord Russell of Killowen and Lord Scarman

D

Contempt of Court — Proceedings completed — Court's ruling — Witness's name not to be disclosed during committal proceedings—National security—Publication of name after proceedings completed—Whether contempt of court—Evidence given by witness from which name readily discoverable—No specific ruling by magistrates that name not to be published outside courtroom—Whether publication interference with due administration of justice

E

In November 1977 committal proceedings were taking place before magistrates in respect of three defendants charged with offences under the Official Secrets Acts. In relation to a prosecution witness, counsel for the prosecution, following a previous ruling by the magistrates in respect of another witness, applied for him to be referred to as "Colonel B" and for his name to be written down and shown only to the court, the defendants and their counsel. That was said to be for reasons of national safety. The magistrates acceded to that application. During cross-examination, "Colonel B" gave the official name and number of the army unit to which he belonged and stated that his posting to it was recorded in a particular issue of a service magazine available to the public. No objection to that evidence was made by the prosecution or the magistrates. Subsequently, "Colonel B's" name was published in three magazines. The Attorney-General brought proceedings to commit the publishers of the magazines and other persons responsible for their publication for contempt of court. In the statements filed by the Attorney-General pursuant to R.S.C., Ord. 52, r. 2, it was alleged that the magistrates had expressly directed that no attempt should be made to disclose the identity of "Colonel B." Before the motions came on for hearing, however, an affidavit by the clerk to the magistrates was filed in which the clerk denied that any such explicit direction had been given, for the reason that he had advised the magistrates that they had no power to do so. The hearing of the motions proceeded on the basis

F

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H

that no explicit direction had been given. The Divisional Court held the appellants guilty of contempt of court.

On appeal:—

Held, allowing the appeals, that, where a court made a ruling the intended result of which would be frustrated by an act done outside the courtroom, a person who, knowing the purpose of the ruling, committed such an act might be guilty of contempt of court in interfering with the due administration of justice; but that, in the present case (*per* Lord Diplock, Viscount Dilhorne and Lord Russell of Killowen), in so far as it had been the intended effect of the magistrates' ruling that the colonel's name should not be published outside the courtroom, such intended effect had been abandoned by the statements made by the colonel in evidence, without protest by the court or the prosecution, from which his name could readily be deduced; and that, accordingly, there had been no interference with the due administration of justice in the publication of his name (post, pp. 452A–B, E–453D, 455F–G, 456D–E, 458A–E, 465B–D, 467G, 469B, 471G—472B).

Scott v. *Scott* [1913] A.C. 417, H.L.(E.); *Reg.* v. *Socialist Worker Printers and Publishers Ltd., Ex parte Attorney-General* [1975] Q.B. 637, D.C. and *Taylor* v. *Attorney-General* [1975] 2 N.Z.L.R. 675 considered.

Per Lord Diplock, Lord Russell of Killowen and Lord Scarman. The course that the magistrates took of allowing "Colonel B" to conceal his identity was an acceptable extension of the power of a court to control its own proceedings in the interests of the due administration of justice by sitting in private (post, pp. 451C–E, 467A–G, 468G–H, 472B–C).

Per Lord Diplock, Viscount Dilhorne, Lord Edmund-Davies and Lord Russell of Killowen. In future cases, where such a course is taken, it may be desirable that the court should give a warning as to the intended effect of its ruling and of the risk of proceedings for contempt of court if it is ignored (post, pp. 453G–H, 456G–H, 465E–G, 469A).

Quaere. Whether a court has power to make such a ruling ipso jure binding on persons outside the courtroom (post, pp. 451H, 456B–D, 467H, 471G–H).

Per Lord Edmund-Davies. A court has no power to pronounce to the public at large such a prohibition against publication that all disobedience to it would automatically constitute a contempt (post, p. 464A).

Decision of the Divisional Court of the Queen's Bench Division [1979] Q.B. 31; [1978] 3 W.L.R. 395; [1978] 3 All E.R. 731 reversed.

The following cases are referred to in their Lordships' opinions:

Attorney-General v. *Butterworth* [1963] 1 Q.B. 696; L.R. 3 R.P. 327; [1962] 3 W.L.R. 819; [1962] 3 All E.R. 326, C.A.

Attorney-General v. *Times Newspapers Ltd.* [1974] A.C. 273; [1973] 3 W.L.R. 298; [1973] 3 All E.R. 54, H.L.(E.).

F. (orse. A.) (A Minor) (Publication of Information), In re [1977] Fam. 58; [1976] 3 W.L.R. 307; [1976] 3 All E.R. 274; [1977] Fam. 58; [1976] 3 W.L.R. 813; [1977] 1 All E.R. 114, C.A.

Johnson v. *Grant*, 1923 S.C. 789.

Reg. v. *Border Television Ltd., Ex parte Attorney-General*, The Times, January 18, 1978, D.C.

Reg. v. *Newcastle Chronicle and Journal Ltd., Ex parte Attorney-General*, The Times, January 18, 1978, D.C.

Reg. v. *Socialist Worker Printers and Publishers Ltd., Ex parte Attorney-General* [1975] Q.B. 637; [1974] 3 W.L.R. 801; [1975] 1 All E.R. 142, D.C.

Rex v. *Blumenfeld, Ex parte Tupper* (1912) 28 T.L.R. 308.

Rex v. *Davies, Ex parte Delbert-Evans* [1945] K.B. 435; sub nom. *Delbert Evans* v. *Davies and Watson* [1945] 2 All E.R. 167, D.C.

Rex v. *Governor of Lewes Prison, Ex parte Doyle* [1917] 2 K.B. 254, D.C.

Scott v. *Scott* [1913] A.C. 417, H.L.(E.).

Taylor v. *Attorney-General* [1975] 2 N.Z.L.R. 675.

Thomas (P. A.) & Co. v. *Mould* [1968] 2 Q.B. 913; [1968] 2 W.L.R. 737; [1968] 1 All E.R. 963.

The following additional cases were cited in argument:

Chapman v. *Honig* [1963] 2 Q.B. 502; [1963] 3 W.L.R. 19; [1963] 2 All E.R. 513, C.A.

Reg. v. *Lewes Justices, Ex parte Secretary of State for the Home Department* [1973] A.C. 388; [1972] 3 W.L.R. 279; [1972] 2 All E.R. 1057, H.L.(E.).

APPEALS from the Divisional Court of the Queen's Bench Division.

Timothy Reginald Gopsill, Philip John Kelly and David Anthony Clark, the National Union of Journalists and Peace News Ltd., Helen Linton, Michael Holderness and Albert Beale appealed by leave of the House of Lords given on July 6, 1978, from the decision of the Divisional Court of the Queen's Bench Division (Lord Widgery C.J., Croom-Johnson and Stocker JJ.) dated May 19, 1978, by which the Divisional Court, on three motions by the Attorney-General, which were heard together, for orders committing the appellants and others for contempt of court, held that the appellants and others had been guilty of contempt and imposed fines on Leveller Magazine Ltd. (who did not appeal), the National Union of Journalists and Peace News Ltd.

The appeals were heard together.

The facts are stated in their Lordships' opinions.

John Melville Williams Q.C. and *John Hendy* for the National Union of Journalists. It was the intention of the Crown that "Colonel B" should remain anonymous, and the court acceded to that, rather than that it was the intention of the court that he should remain anonymous, as the judgment of the Divisional Court says [1979] Q.B. 31, 42.

(1) The essence of contempt of court is always—regardless of the form that it takes in the particular case—that it involves a risk of interference with the administration of justice, either in the particular case or generally. It may arise within the courtroom itself—disorder, or witnesses refusing to leave the court—or in the publication of or in connection with the case pending, and, although in fact at the time of these publications the case was pending, it was not suggested that the publication of Colonel B's name would in any way interfere with the three defendants in the trial in the official secrets case. Or it may arise in connection with the administration

of justice generally—in the kind of cases where, for example, there is victimisation of witnesses after giving evidence for giving evidence, and the old cases where it is referred to as scandalising the court—where matters are published that lower the authority of the court; this seems to be a category that has been greatly restricted over recent years [*Reg.* v. *Gray* [1900] 2 Q.B. 36]. Interference with the course of justice is an essential feature of contempt, and the Divisional Court failed to consider it.

(2) One should not confuse the protection that is necessary for the interests of national safety and that which is necessary for the administration of justice. This is fundamental, because in every case those responsible for the security service in such prosecutions will desire to seek maximum secrecy. The interests of security will always be in secrecy, whereas the interests of the administration of justice are in favour of the maximum amount of disclosure consistent with the administration of justice.

(3) The courts in considering contempt of court are seeking certainty, as nearly as possible, and the concept of "flouting the intention of the court" is one that will lead to great uncertainty. The fact that a direction is given in clear terms—a direction that is within the power of the court—would not without more constitute a contempt. There has to be power to make the order within the court. Reference was made to the Phillimore Report on Contempt of Court (1974) (Cmnd. 5794) and *Attorney-General* v. *Times Newspapers Ltd.* [1974] A.C. 273, 294 (Lord Reid), 315–318 (Lord Simon of Glaisdale), 322 (Lord Cross of Chelsea).]

The court has power to prevent the *victimisation* of witnesses. It has to be shown that it was an order that this particular court in this particular case had power to make. It may say: we have no power to make an order in this particular case, because there is no question of victimisation. [Reference was made to *Attorney-General* v. *Butterworth* [1963] 1 Q.B. 696, 709 (Sir Reginald Manningham-Buller Q.C., A.-G., arguendo), 719 et seq. In *Reg.* v. *Socialist Worker Printers and Publishers Ltd., Ex parte Attorney-General* [1975] Q.B. 637, the second ground given at p. 652, "destroying the confidence of witnesses," was a proper consideration and would have been justification of itself for the decision in the case. It is conceded that it can be done in blackmail cases; there is a distinction between blackmail cases and others. The first ground, "an affront to the authority of the court," was not sound; *Attorney-General* v. *Butterworth* [1963] 1 Q.B. 696 does not say that; also, it is too widely stated. There is no category of contempt consisting in affront to the court.

In the present case, there was no direction; further, if what the magistrates said amounted to a direction, they had no power to make it such. The power is in the Official Secrets Act; there is no power otherwise. In so far as *Reg.* v. *Socialist Worker Printers and Publishers Ltd., Ex parte Attorney-General* [1975] Q.B. 637 leads to a different power, or to a general power, it is wrong. [Reference was made to *Scott* v. *Scott* [1913] A.C. 417, 477 et seq.] The warning of Lord Shaw of Dunfermline is against saying that allowing certain parts of the evidence to be received in writing and not disclosed is a reasonable thing to do; therefore it is within the power of the court. It should be done by specific power, not by the back door. The union does not go so far as to say there has to be sworn evidence of the need for anonymity. [Reference was made to *Taylor* v. *Attorney-General*

[1975] 2 N.Z.L.R. 675 and *Reg.* v. *Lewes Justices, Ex parte Secretary of State for the Home Department* [1973] A.C. 388, 405, *per* Lord Pearson.]

For there to be a direction, the court must actually purport to make an order; it must say something; it must in terms direct. It may be that a court can regulate its own procedure in some informal way, so far as affects those within the court, but, for it to have any effect so as to give rise to a risk of sanction on those outside the court, it must do so in terms, for example, by giving some direction such as that given in *Taylor* v. *Attorney-General* [1975] 2 N.Z.L.R. 675. In the present case, no such direction or order was made in the case of "Colonel B," and it will not do, so far as affecting those outside the court is concerned, to say that it was a carry-over from "Colonel A." There was not a sufficient direction given in the case of "Colonel A," Certainty is needed. In their judgment, the Divisional Court describe what the magistrates did as "a ruling," "a permission," "an arrangement," "an intention" and "a decision."

Stephen Sedley for the other appellants. The appellants adopt and support the union's submissions.

As to what constitutes a sufficient direction, the premise has to be that every court has certain powers to ensure the proper administration of justice, and beyond that it is probably unnecessary to frame contempt in other ways, such as "an affront to the court." If the administration of justice is lawfully conducted, to frustrate it is ex hypothesi to interfere with the administration of justice.

So far, apart from sitting in open court, the only power that has been mentioned is the power to sit in camera. As to whether there is some third course, a middle course was found to exist in *Reg.* v. *Socialist Worker Printers and Publishers Ltd., Ex parte Attorney-General* [1975] Q.B. 637, but with an indication also of "middle standards." In law there can only be one standard. The decision in *Reg.* v. *Socialist Worker Printers and Publishers Ltd., Ex parte Attorney-General* proceeded explicitly from the assumption that anything done that interfered with the administration of justice was in the ordinary way contempt. It does not follow that anything calculated to deter witnesses from giving evidence is contempt. By finding such a prima facie case (founded on *Attorney-General* v. *Butterworth* [1963] 1 Q.B. 696), the Divisional Court fell into error. [Reference was made to *Scott* v. *Scott* [1913] A.C. 417.] It is not (universally) right to ask, as the test of contempt: "is this calculated to deter witnesses (or litigants)?" That is a test that long ago would have forbidden reports of rape cases. The question properly asked is: is this a prohibited act calculated to deter witnesses or litigants? One then asks: what is sufficient to constitute a prohibition? It is an error of logic to go from a ruling to a direction and from a direction to an arrangement and then say that anything that interferes with an arrangement is an interference with the administration of justice The mere permission of the parties for the suppression of publicity is not enough. Knowing that a witness has written his name down will not tell the journalist whether that was by order of the court or permission of the parties. *Reg.* v. *Socialist Worker Printers and Publishers Ltd., Ex parte Attorney-General* [1975] Q.B. 637 was wrongly decided. The Divisional Court there deduced the power to suppress names from the practice in the blackmail cases (see the Phillimore

Report on Contempt of Court, p. 60). The Divisional Court confined its decision in terms to blackmail, but in principle it was open-ended in its reasoning: it left open the possibility that any other class of direction or procedure habitually adopted by the courts might have the force of law and that the sanctions of contempt would apply. In blackmail cases, there is no power to prohibit publication of the name *outside* the court: *Scott* v. *Scott* [1913] A.C. 417, and see *per* Lord Reid in *Reg.* v. *Knuller (Publishing, Printing and Promotions) Ltd.* [1973] A.C. 435, 457–458; *Reg.* v. *Bhagwan* [1972] A.C. 60, *per* Lord Diplock, at p. 82. Where there is a saving of other powers, as in section 12 (4) of the Administration of Justice Act 1960, that is likely to mean that the powers are well known at common law.

These appellants adopt the distinction between the security services and the administration of justice, although the one may have a bearing on the other. Blackmail and trade secrets cases are classes of case in which in the nature of the case there is a secret. The subject matter will evaporate unless witnesses can appear without fear of the consequences. National security could be analogous, but it is not a fortiori that the disclosure of a witness's name will prejudice the administration of justice. An application to sit in camera could be heard in camera. [Reference was made to *Scott* v. *Scott* [1913] A.C. 417, 432, 434, 436, 442-443.] So consent in itself is not a sufficient basis. If the mere say-so of the prosecution suffices, the Crown becomes the arbiter of secrecy in the courts. The appellants do not say that the prosecution must call evidence, but the court must have material before it, for example, the witness's proof.

An order, even if made, is not indefinite and of fixed duration. Once evidence was given in open court from which the identity of Colonel B could be deduced, the magistrates' order was spent.

Lord Rawlinson Q.C., Harry Woolf and *Rodger Bell* for the Attorney-General. The questions that arise are: (i) had the magistrates power to allow the witness to give evidence anonymously? (ii) Did they exercise that power bona fide? (iii) Did they exercise it with sufficient particularity to make an effective ruling? (iv) Is the publication of a witness's identity in defiance of a court's ruling a contempt?

[LORD DIPLOCK. The House need not trouble you on (i) and (ii). The House wishes to be addressed on two points: whether the magistrates did give a sufficiently effective ruling—whether they sufficiently conveyed their ruling to those in court—and the point raised by Viscount Dilhorne in the course of argument: assuming that there was a non-disclosure for national security reasons, how do you link national security in this case with the administration of justice?]

On question (iii), a ruling—that a witness's identity should not be disclosed—is necessary. The magistrates must make that clear to the court, because the order goes only to the process before them. If thereafter there is disobedience to the order by revealing what has happened, that will be a contempt. That was what the magistrates did here in making their ruling. It was a sufficient ruling made perfectly plain to the court over which they were presiding. That was accepted at the time. It was thus clear to the appellants that a ruling had been given, and it was subsequently breached, and deliberately breached.

No one has suggested that there was any doubt or uncertainty over

what the magistrates here did. If there is any uncertainty, it must be over who were the persons who were in court. It has been held (*Reg.* v. *Border Television Ltd., Ex parte Attorney-General,* The Times, January 18, 1978) that when the jury retire while there is legal argument, publication of the legal argument is a contempt, but in such a case no direction is given that the argument should not be published. Allowing a witness to write his name down is a sufficient ruling that his name is not to be published in the proceedings. If, later, someone discloses his name, that is a contempt. The test is whether anyone reading a full and fair report of the proceedings would realise that a ruling had been given. The court here had power to make the ruling that it did make, and anybody who thereafter thwarted that purpose—that the witness should be kept anonymous—is guilty of contempt. It is going too far to say that the court could prohibit publication of *anything* that *might* lead to identification of the witness. Technically, one may commit a contempt although one did not know of the ruling: *In re F.* (*orse. A.*) (*A Minor*) (*Publication of Information*) [1977] Fam. 58 and *Taylor* v. *Attorney-General* [1975] 2 N.Z.L.R. 675. Lord Widgery C.J. here found that these defendants knew of the ruling. The Attorney-General cannot accept as correct the sentence in the judgment of Richmond J., at p. 685, where he said that the essential purpose of the judge's direction might not have been apparent to the public. The magistrates have power to control what is said in their own court, and, although they have no power to prohibit publication outside, the effect of their power is to make publication outside by someone with a guilty mind contempt: see *In re F.* (*orse. A.*) (*A Minor*) (*Publication of Information*). The campaign here was to thwart the magistrates' ruling; see also *Reg.* v. *Border Television Ltd., Ex parte Attorney-General,* The Times, January 18, 1978. The fact that the judge there did not actually make the ruling did not prevent it from being a contempt, because those in court knew the rules. [Reference was made to *Chapman* v. *Honig* [1963] 2 Q.B. 502.]

Williams Q.C. in reply on the adequacy of the direction given. There was no attempt in the statements and affidavit filed by and on behalf of the Attorney-General to link the national security with the administration of justice. Greater clarity is needed. If something implicit can form the basis of a sanction for contempt, then, having regard to section 12 (1) (*e*) of the Administration of Justice Act 1960, that would mean that where there is a lesser restriction there is a greater ambit of contempt (where the court is not in camera). [Reference was made to *Rex* v. *Governor of Lewes Prison, Ex parte Doyle* [1917] 2 K.B. 254.] These appellants do not link national security with the administration of justice. If the Crown could apply for proceedings to be held in camera, witnesses would not be deterred by the possibility of disclosure. If one says that the administration of justice requires proceedings to be in open court if possible, the court must at least purport to give a ruling designed to avoid going into camera on the grounds of the administration of justice. It would have been the easiest thing in the world here for the magistrates to spell out what they were seeking to achieve.

Sedley in reply. If there is mens rea with regard to breach of a ruling, there must be actual or constructive knowledge of the ruling as such. If that is so, knowledge that there has been permission given to

conceal a witness's identity is at the highest ambiguous. It is consistent with a direction having been given, and consistent with a request by the court. At the highest, one can only know that there could have been a ruling. One has to look at mens rea in relation to the actus reus. The appellants knew what they were doing, and they were correct in law and fact: they were not in breach of a ruling of the court prohibiting what they did. Even if they had intended to breach a ruling, thinking cannot have made it so.

Richmond J. in *Taylor* v. *Attorney-General* [1975] 2 N.Z.L.R. 675, 685, "The order had the advantage . . ." was talking about two different things: the order of Beattie J. in that case and the direction of Judge King-Hamilton in *Reg.* v. *Socialist Worker Printers and Publishers Ltd., Ex parte Attorney-General* [1975] Q.B. 637; compare at p. 683: "It is noteworthy . . ." and p. 685: "The order now in question . . ."

Their Lordships took time for consideration.

February 1, 1979. LORD DIPLOCK. My Lords, in November 1977 three defendants, two of whom were journalists, had been charged with offences under the Official Secrets Act. Committal proceedings against them were being heard before the Tottenham Magistrates' Court acting as examining justices. The proceedings extended over a considerable number of days. On the first day, on the application of counsel for the prosecution, some of the evidence was heard in camera pursuant to section 8 (4) of the Official Secrets Act 1920. On the third day, November 10, counsel for the prosecution made an application that the next witness whom he proposed to call should, for his own security and for reasons of national safety, be referred to as "Colonel A" and that his name should not be disclosed to anyone. The magistrates, upon the advice of their clerk, ruled, correctly but with expressed reluctance, that this would not be possible and that although the witness should be referred to as "Colonel A," his name would have to be written down and disclosed to the court and to the defendants and their counsel. The prosecution decided not to call that witness and the proceedings were adjourned.

The hearing was resumed four days later on November 14. The prosecution called, instead of "Colonel A," another witness. Counsel for the prosecution applied for him to be referred to as "Colonel B," and that his name be written down and shown only to the court, the defendants and their counsel. This was said to be necessary for reasons of national safety; risk to "Colonel B's" own security was not relied on. Counsel for the defendants raised no objection to the course proposed; the magistrates assented to it and the witness then gave evidence in open court. He was throughout referred to as "Colonel B"; his real name was never mentioned. For the purposes of the proceedings for contempt of court with which the Divisional Court and now your Lordships have been concerned, it must be taken, although initially there was conflicting evidence as to this, that the magistrates gave no express ruling or direction other than that the witness was to be referred to in court as "Colonel B" and not by his real name and that his real name was to be written down and disclosed only to the court, the defendants and their counsel.

In the course of the cross-examination of "Colonel B" questions were put the effect of which was to elicit from him (1) the official name and number of the army unit to which he belonged and (2) the fact that his posting to it was recorded in a particular issue of "Wire," the magazine of the Royal Corps of Signals which is obtainable by the public. These answers enabled his identity to be discovered by anyone who cared to follow up this simple clue. The line of questioning which elicited this information was pursued without objection from counsel for the prosecution, the witness or the magistrates; and the answers which made his identity so easy to discover were included in the colonel's deposition read out to him in open court before he signed it.

In the issue of "Peace News" for November 18 these two pieces of information about "Colonel B" elicited in open court were published; and in the issue for December 16, the name of "Colonel B" was disclosed and an account was given of his military career. In the January and March 1978 issues of another magazine, "The Leveller," the name of "Colonel B" was published. Finally, in the issues of the "Journalist" for March and April 1978 published by the National Union of Journalists, "Colonel B" was again identified by name.

All this occurred before the trial of the defendants at the Central Criminal Court began.

On March 22, 1978, the Attorney-General brought in the Divisional Court proceedings for contempt of court against Peace News Ltd. and Leveller Magazine Ltd. and persons responsible for the publication in those periodicals of the articles which published the real name of "Colonel B"; and on April 18, 1978, he brought similar proceedings against the National Union of Journalists in respect of the articles appearing in the "Journalist." In each of these proceedings the statement filed pursuant to R.S.C., Ord. 52, r. 2 contained an allegation that at the committal proceedings in the Tottenham Magistrates' Court on November 14, 1978, not only had the magistrates permitted "Colonel B" not to disclose his identity but their chairman had also given an express direction in open court that no attempt should be made to disclose the identity of "Colonel B." Before the three motions, which were heard together, came on for hearing, an affidavit by the clerk to the Tottenham Magistrates' Court was filed, denying that any such explicit direction had been given by the chairman of the magistrates and stating that the reason why such a direction was not given was because he had advised the magistrates that they had no power to do so. In view of this evidence the hearing of the motions proceeded on the basis that no explicit direction had been given to those present at the hearing that no attempt should be made to disclose the identity of "Colonel B"; and that what had happened at the committal proceedings in relation to the witness being referred to only as "Colonel B" was as I have already stated it.

My Lords, it is not disputed that the disclosure of "Colonel B's" identity by the appellants was part of a campaign of protest against the Official Secrets Act. It was designed, no doubt, to ridicule the notion that national safety needed to be protected by suppression of the colonel's name. The only question for your Lordships is whether in doing what they did the appellants were guilty of contempt of court.

The Divisional Court found contempt of court established against all appellants but made orders only against the National Union of Journalists and the two companies. The National Union of Journalists was fined £200, Peace News Ltd. and Leveller Magazine Ltd. were each fined £500. Against these orders these appeals are now brought to this House.

In the judgment of the Divisional Court delivered by Lord Widgery C.J. it is pointed out that contempt of court can take many forms. The publication by the appellants of the witness's identity after the magistrates had ruled that he should be referred to in their court only as "Colonel B" was held by the Divisional Court to fall into a class said to be exemplified in *Attorney-General* v. *Butterworth* [1963] 1 Q.B. 696 and *Reg.* v. *Socialist Worker Printers and Publishers Ltd., Ex parte Attorney-General* [1975] Q.B. 637 and variously described in the course of the judgment as "a deliberate flouting of the court's authority," "a flouting or deliberate disregard outside the court [of the court's ruling]," a "deliberate intention of frustrating the arrangement which the court had made to preserve Colonel B's anonymity" and finally a "deliberate flouting of the court's intention." I do not think that any of these ways of describing what the appellants did is sufficiently precise to lead inexorably to the conclusion that what they did amounted to contempt of court. Closer analysis is needed.

The only "ruling" that the magistrates had in fact given was that the witness should be referred to *at the hearing in their court* as "Colonel B" and that his name must be written down and shown to the court, the defendants and their counsel but to no one else. That it was also the only ruling that they intended to give is apparent from the fact that they had been advised by their clerk that it was the only ruling that they had power to give, however much they might have preferred to give a wider one. None of the appellants committed any breach of this ruling. What they did, and did deliberately, outside the court and after the conclusion of "Colonel B's" evidence in the committal proceedings, was to take steps to ensure that this anonymity was not preserved.

My Lords, although criminal contempts of court make take a variety of forms they all share a common characteristic: they involve an interference with the due administration of justice either in a particular case or more generally as a continuing process. It is justice itself that is flouted by contempt of court, not the individual court or judge who is attempting to administer it.

Of those contempts that can be committed outside the courtroom the most familiar consist of publishing, in connection with legal proceedings that are pending or imminent, comment or information that has a tendency to pervert the course of justice, either in those proceedings or by deterring other people from having recourse to courts of justice in the future for the vindication of their lawful rights or for the enforcement of the criminal law. In determining whether what is published has such a tendency a distinction must be drawn between reporting what actually occurred at the hearing of the proceedings and publishing other kinds of comment or information; for prima facie the interests of justice are served by its being administered in the full light of publicity.

As a general rule the English system of administering justice does

require that it be done in public: *Scott* v. *Scott* [1913] A.C. 417. If the way that courts behave cannot be hidden from the public ear and eye this provides a safeguard against judicial arbitrariness or idiosyncrasy and maintains the public confidence in the administration of justice. The application of this principle of open justice has two aspects: as respects proceedings in the court itself it requires that they should be held in open court to which the press and public are admitted and that, in criminal cases at any rate, all evidence communicated to the court is communicated publicly. As respects the publication to a wider public of fair and accurate reports of proceedings that have taken place in court the principle requires that nothing should be done to discourage this.

However, since the purpose of the general rule is to serve the ends of justice it may be necessary to depart from it where the nature or circumstances of the particular proceeding are such that the application of the general rule in its entirety would frustrate or render impracticable the administration of justice or would damage some other public interest for whose protection Parliament has made some statutory derogation from the rule. Apart from statutory exceptions, however, where a court in the exercise of its inherent power to control the conduct of proceedings before it departs in any way from the general rule, the departure is justified to the extent and to no more than the extent that the court reasonably believes it to be necessary in order to serve the ends of justice. A familiar instance of this is provided by the " trial within a trial " as to the admissibility of a confession in a criminal prosecution. The due administration of justice requires that the jury should be unaware of what was the evidence adduced at the " trial within a trial " until after they have reached their verdict; but no greater derogation from the general rule as to the public nature of all proceedings at a criminal trial is justified than is necessary to ensure this. So far as proceedings in the courtroom are concerned the trial within a trial is held in open court in the presence of the press and public but in the absence of the jury. So far as publishing those proceedings outside the court is concerned any report of them which might come to the knowledge of the jury must be withheld until after they have reached their verdict; but it may be published after that. Only premature publication would constitute contempt of court.

In the instant case the only statutory provisions that have any relevance are section 8 (4) of the Official Secrets Act 1920 and section 12 (1) (*c*) of the Administration of Justice Act 1960. Both deal with the giving of evidence before a court sitting in camera. They do not apply to the evidence given by " Colonel B " in the instant case. Their relevance is thus peripheral and I can dispose of them shortly.

Section 8 (4) of the Act of 1920 applies to prosecutions under that Act and the Official Secrets Act 1911. It empowers but it does not compel a court to sit to hear evidence in private if the Crown applies for this on the ground that national safety would be prejudiced by its publication. Section 12 (1) of the Act of 1960 defines and limits the circumstances in which the publication of information relating to proceedings before any court sitting in private is of itself contempt of court. The circumstance defined in section 12 (1) (*c*) is

A "where the court sits in private for reasons of national security during that part of the proceedings about which the information in question is published; . . ."

So to report evidence in camera in a prosecution under the Official Secrets Act would be contempt of court.

In the instant case the magistrates would have had power to sit in B camera to hear the whole or part of the evidence of "Colonel B" if this had been requested by the prosecution; and although they would not have been bound to accede to such a request it would naturally and properly have carried great weight with them. So would the absence of any such request. Without it the magistrates, in my opinion, would have had no reasonable ground for believing that so drastic a derogation from the general principle of open justice as is involved in hearing evidence in a C criminal case in camera was necessary in the interests of the due administration of justice.

In substitution for hearing "Colonel B's" evidence in camera which it could have asked for the prosecution was content to treat a much less drastic derogation from the principle of open justice as adequate to protect the interests of national security. The witness's evidence was to be given D in open court in the normal way except that he was to be referred to by the pseudonym of "Colonel B" and evidence as to his real name and address was to be written down and disclosed only to the court, the defendants and their legal representatives.

I do not doubt that, applying their minds to the matter that it was their duty to consider—the interests of the due administration of justice—the magistrates had power to accede to this proposal for the very reason that E it would involve less derogation from the general principle of open justice than would result from the Crown being driven to have recourse to the statutory procedure for hearing evidence in camera under section 8 (4) of the Official Secrets Act 1920; but in adopting this particular device which on the face of it related only to how proceedings within the court-room were to be conducted it behoved the magistrates to make it clear F what restrictions, if any, were intended by them to be imposed upon publishing outside the courtroom information relating to those proceedings and whether such restrictions were to be precatory only or enforceable by the sanction of proceedings for contempt of court.

My Lords, in the argument before this House little attempt was made to analyse the juristic basis on which a court can make a "ruling," "order" or "direction"—call it what you will—relating to proceedings G taking place before it which has the effect in law of restricting what may be done outside the courtroom by members of the public who are not engaged in those proceedings as parties or their legal representatives or as witnesses. The Court of Appeal of New Zealand in *Taylor* v. *Attorney-General* [1975] 2 N.Z.L.R. 675 was clearly of opinion that a court had power to make an explicit order directed to and binding on H the public ipso jure as to what might lawfully be published outside the courtroom in relation to proceedings held before it. For my part I am prepared to leave this as an open question in the instant case. It may be that a "ruling" by the court as to the conduct of proceedings can have

binding effect as such within the courtroom only, so that breach of it is not ipso facto a contempt of court unless it is committed there. Nevertheless where (1) the reason for a ruling which involves departing in some measure from the general principle of open justice within the courtroom is that the departure is necessary in the interests of the due administration of justice and (2) it would be apparent to anyone who was aware of the ruling that the result which the ruling is designed to achieve would be frustrated by a particular kind of act done outside the courtroom, the doing of such an act with knowledge of the ruling and of its purpose may constitute a contempt of court, not because it is a breach of the ruling but because it interferes with the due administration of justice.

So it does not seem to me to matter greatly in the instant case whether or not the magistrates were rightly advised that they had in law no power to give directions which would be binding as such upon members of the public as to what information relating to the proceedings taking place before them might be published outside the courtroom. What was incumbent upon them was to make it clear to anyone present at, or reading an accurate report of, the proceedings what in the interests of the due administration of justice was the result that was intended by them to be achieved by the limited derogation from the principle of open justice within the courtroom which they had authorised, and what kind of information derived from what happened in the courtroom would if it were published frustrate that result.

There may be many cases in which the result intended to be achieved by a ruling by the court as to what is to be done in court is so obvious as to speak for itself; it calls for no explicit statement. Sending the jury out of court during a trial within a trial is an example of this; so may be the common ruling in prosecutions for blackmail that a victim called as a witness be referred to in court by a pseudonym (see *Reg.* v. *Socialist Worker Printers and Publishers Ltd., Ex parte Attorney-General* [1975] Q.B. 637); but, in the absence of any explicit statement by the Tottenham magistrates at the conclusion of the colonel's evidence that the purpose of their ruling would be frustrated if anything were published outside the courtroom that would be likely to lead to the identification of "Colonel B" as the person who had given evidence in the case, I do not think that the instant case falls into this class.

The ruling that the witness was to be referred to in court only as "Colonel B" was given before any of his evidence had been heard and at that stage of the proceedings it might be an obvious inference that the effect intended by the magistrates to be achieved by their ruling was to prevent his identity being publicly disclosed. As I have already pointed out however the evidence that he gave in open court in cross-examination did in effect disclose his identity to anyone prepared to take the trouble to consult a particular issue (specified in the evidence) of a magazine that was on sale to the public. This evidence was elicited without any protest from counsel for the prosecution; no application was made that this part of the evidence should be heard in camera; no suggestion, let alone request, was made to members of the press present in court that it should not be reported; and once it was reported the witness's anonymity was blown.

In these circumstances whatever may have been the effect intended to be achieved by the magistrates at the time of their initial ruling, this, as it seems to me, had been abandoned with the acquiescence of counsel for the Crown, by the time that "Colonel B's" evidence was over. I see no grounds on which a person present at or reading a report of the proceedings was bound to infer that to publish that part of the colonel's evidence in open court that disclosed his identity would interfere with the due administration of justice so as to constitute a contempt of court. Indeed the natural inference is to the contrary and it may not be without significance that no proceedings were brought against "Peace News" in respect of the issue of November 18 in which this evidence was published, without actually stating what would be found to be the colonel's name if the particular issue of "Wire" were consulted. But if there was no reason to suppose that publication of this evidence would interfere with the due administration of justice, how could it reasonably be supposed that to take the final step of publishing the name itself made all the difference?

My Lords, I would allow these appeals upon the ground that in the particular and peculiar circumstances of this case the disclosure of "Colonel B's" identity as a witness involved no interference with the due administration of justice and was not a contempt of court.

The difficulty that has arisen, as my noble and learned friends Viscount Dilhorne and Lord Edmund-Davies point out, is because the proceedings were launched upon the basis that at the conclusion of "Colonel B's" evidence the chairman of the examining magistrates had "stressed that no attempt should be made to disclose the identity of Colonel B." At the hearing, however, the proceedings, if persisted in, had to be conducted on the basis that no such explicit statement had been made. So everything was left to implication except the actual ruling as to how the witness was to be referred to in court and as to the persons to whom alone his real name and identity were to be disclosed.

My Lords, in cases where courts, in the interests of the due administration of justice, have departed in some measure from the general principle of open justice no one ought to be exposed to penal sanctions for criminal contempt of court for failing to draw an inference or recognise an implication as to what it is permissible to publish about those proceedings, unless the inference or implication is so obvious or so familiar that it may be said to speak for itself.

Difficulties such as those that have arisen in the instant case could be avoided in future if the court, whenever in the interests of due administration of justice it made a ruling which involved some departure from the ordinary mode of conduct of proceedings in open court, were to explain the result that the ruling was designed to achieve and what kind of information about the proceedings would, if published, tend to frustrate that result and would, accordingly, expose the publisher to risk of proceedings for contempt of court.

VISCOUNT DILHORNE. My Lords, the question to be determined in this appeal is whether the appellants were, as the Divisional Court held,

guilty of contempt of court in publishing in " Peace News," " The Leveller " and the " Journalist " respectively the identity of " Colonel B."

In the statements dated March 17 and April 17, 1978, filed pursuant to the rules of court in support of the Attorney-General's motions and which stated the grounds for the motions, it was alleged that they had revealed his identity after he had been referred to as " Colonel B " in the committal proceedings and

> " (b) The said ' Colonel B ' had properly been permitted not to disclose his identity when giving evidence to the said magistrates, [the chairman directing in open court that no attempt should be made to disclose the identity of ' Colonel B ']. (c) [The appellants were at all material times well aware that the aforesaid direction had been given.] (d) The said disclosure of the identity of ' Colonel B ' tended and was calculated to prejudice the due administration of justice: it was intended to [flout the aforesaid direction and] make it difficult for witnesses in the position of ' Colonel B ' to give evidence in open court."

The motions were supported by an affidavit sworn by Miss Anne Butler, a member of the Director of Public Prosecutions' office. In it she said that at the conclusion of the hearing on November 14, 1977, the chairman of the magistrates had " stressed that no attempt should be made to disclose the identity of ' Colonel B.' " In this, according to Mr. Pratt, the clerk to the magistrates, she was mistaken. In an affidavit sworn by him on April 27, 1978, he said that he had no recollection of that being said and in fact did not agree that it had happened. Paragraphs 3 and 4 of his affidavit read as follows:

> " 3. The Official Secrets Act provides for exclusion of all or part of the public and, in fact, the public was excluded during the playing of the tape but I am not aware of any other provision relevant to these proceedings enabling an order to be made such as is referred to or implied in Anne Butler's affidavit and that was the reason why the magistrates did not make any order such as she refers to—because I advised them that they had no power to do so. 4. I am not aware of any provision enabling my court to purport to impose any restriction on anything said in court in the presence of the public in the proceedings. . . ."

At the hearing of the motions, the contention that the appellants had published " Colonel B's " name in breach of a direction given by the chairman was abandoned and the Crown sought leave to amend the statements filed by the deletion of the words which I have enclosed in square brackets. Leave to do so was refused.

Breach of the chairman's direction was clearly the main plank in the Crown's case when the proceedings were initiated. Abandonment of that contention meant that the Crown was consequently limited to establishing that the appellants had been guilty of contempt in publishing " Colonel B's " name after he " had properly been permitted not to disclose his identity when giving evidence."

That they had done so after he had been given that permission was

not in dispute. The question is whether, in all the circumstances of the case, that amounted to a contempt.

From his deposition it appears that at the commencement of his cross-examination "Colonel B" gave the following evidence:

> "I have been with the Ministry of Defence for some three years. I left earlier this month. My posting was Colonel, General Staff, in the Defence Intelligence Staff. The Defence Intelligence number is D.I.24 Army. I realise that it may have been published in various publications but I am now aware it was published in 'Wire,' December 1974–January 1975."

"Wire" is the Royal Corps of Signals magazine. Among the appointments listed in this issue was that of Colonel H. A. Johnstone M.B.E. as "Col GS DI 24 (Army) 11.74."

I do not know to what issue in the case the questions which elicited this information about "Colonel B's" career were directed. I assume that they were relevant to some issue. We were not told that any objection was made to them and it does not appear that any application was made for the hearing of his evidence in camera once the line the cross-examination was taking became apparent. However relevant the questions may have been, the answers given in open court made it possible for anyone who wished to do so to find out who "Colonel B" was. He had only to look at that issue of "Wire." In the issue of "The Leveller" of March 13, 1978, it was said that these answers given in open court enabled that paper and "Peace News" to "deduce his identity."

Unless the magistrates had power to prohibit and had prohibited it, the publication of this evidence could not be a contempt of court. It was not suggested that there had been any such prohibition or that the magistrates had power to impose one. If publication of the evidence could not be a contempt of court, was it a contempt to publish what could be deduced from that evidence, namely, the identity of "Colonel B"? In my opinion the answer is in the negative unless the magistrates had power to prohibit and had prohibited any attempt being made to ascertain his identity and the publication of his identity. The abandonment of the Crown's allegation that the chairman had given the direction alleged meant that it could not be contended that the publication of his identity by the appellants was in breach of a prohibition.

It follows that in my opinion the appellants were not guilty of contempt in disclosing his identity and on this ground I would allow these appeals.

If the magistrates had power to direct and had directed that "Colonel B's" name should not be published and such a direction was operative not only within but outside the court, then the case might be different. In *Reg.* v. *Socialist Worker Printers and Publishers Ltd., Ex parte Attorney-General* [1975] Q.B. 637 the Crown did not contend that the court had any power to make orders affecting the press or other media in their conduct outside the court and in the present case the Crown, rightly in my opinion, did not contend that examining magistrates had any such power. In *Taylor* v. *Attorney-General* [1975] 2 N.Z.L.R. 675, where the judge in a trial for offences under the Official Secrets Act 1951 of New Zealand made an order "prohibiting the publication of anything that

may lead to the identification of officers of the New Zealand Security Service," the Court of Appeal of New Zealand held that he had power to make that order and that it operated outside the court. It is not necessary to express an opinion on whether that case was rightly decided. It suffices for me to say that in my opinion the courts of this country have no such power, except when expressly given by statute. Although in *Scott* v. *Scott* [1913] A.C. 417, 438 Lord Haldane expressed the view that in exceptional cases publication of what had occurred in camera might be prohibited for a time or altogether, that view was not endorsed by those sitting with him, Lord Loreburn saying, at p. 448, that the court did not possess any such power and Lord Shaw of Dunfermline, at p. 476, regarding its exercise as not only "an encroachment upon and suppression of private right, but the gradual invasion and undermining of constitutional security."

As there is no statutory provision which gives to a court power to make an order applying to all members of the public prohibiting the publication of information which might lead to the identification of a witness such as "Colonel B," it follows that in my opinion the advice given by Mr. Pratt to his bench was right and that if the chairman had given any such direction, it would not have operated to convert conduct which otherwise did not constitute a contempt into one.

Were it not for the evidence given by "Colonel B" in open court from which his identity could be ascertained without difficulty, I would have been in favour of dismissing these appeals. It must have been clear to all in court and to all who learnt what had happened in court that the object sought to be achieved by the justices allowing "Colonel B" to write down his name was the preservation of his anonymity. Knowing that but believing that concealment of his name was not necessary in the national interest, the appellants disclosed his identity. But the effect of what the magistrates had permitted to be done was destroyed by "Colonel B's" evidence in open court, which, as I have said, made it possible for anyone who wished to do so to find out who he was.

If he had not given that evidence, then the appellants would have frustrated the object which the magistrates by their ruling sought to achieve. True it is that no warning was given that anyone who published his name might be proceeded against for contempt of court. In *Reg.* v. *Border Television Ltd., Ex parte Attorney-General*, The Times, January 18, 1978, and *Reg.* v. *Newcastle Chronicle and Journal Ltd., Ex parte Attorney-General* (unreported), heard together by the Divisional Court on January 17, 1978, it was held that in those cases no warning was necessary. While I do not think that it was strictly necessary for the magistrates to give such a warning in this case, I think it very desirable that in future cases where a court takes the course that the magistrates took in this case, a warning that publication of the witness's identity might lead to proceedings for contempt should be given. Such a warning will make it clear that it is not just a request not to publish that is being made, a request usually made when the identity of a person is inadvertently disclosed and one that is usually complied with.

In the *Newcastle Journal* case the fact that the defendant at a trial had pleaded guilty to four counts in an indictment was published during

the course of her trial on the remaining 16 counts in that indictment. In the *Border Television* case there had been publication of what had happened in the course of a trial within a trial when the jury had been sent out so that they should not hear what was discussed. Each publication was held to be a contempt of court.

For conduct which frustrates what a court has done to be a contempt of court, the action taken by the court must be within its powers and the question which has troubled me is whether in this case the magistrates had jurisdiction to allow "Colonel B" to conceal his identity when the application was made on the ground that to reveal it would prejudice national safety. Section 8 (4) of the Official Secrets Act 1920 gives a court power to sit in camera if it appears that the publication of any evidence or statement would be prejudicial to national safety. This subsection does not require the application for a sitting in camera to be supported by evidence and in my opinion a court is entitled in the exercise of its discretion to make an order under it excluding the public in the light of the information given to it and the reasons advanced for taking that course. But the terms of that subsection cannot in my opinion be construed as giving power during a sitting in open court to permit or to direct that a witness's identity should not be disclosed.

Proceedings in the courts of this country are normally conducted in public. The courts have, however, inherent jurisdiction to sit in camera if that is necessary for the due administration of justice: see *Scott* v. *Scott* [1913] A.C. 417; *Rex* v. *Governor of Lewes Prison, Ex parte Doyle* [1917] 2 K.B. 254, *per* Lord Reading C.J., at p. 271; *Attorney-General* v. *Times Newspapers Ltd.* [1974] A.C. 273, *per* Lord Reid, at p. 294. In *Scott* v. *Scott* Lord Loreburn said, at p. 446:

> ". . . in all cases where the public has been excluded with admitted propriety the underlying principle, as it seems to me, is that the administration of justice would be rendered impracticable by their presence, whether because the case could not be effectively tried, or the parties entitled to justice would be reasonably deterred from seeking it at the hands of the court."

It cannot be said that disclosure of "Colonel B's" name would have rendered the trial of the three accused impracticable, nor is it in my opinion the case that its disclosure would have reasonably deterred the Crown from instituting prosecutions for offences under the Official Secrets Act which ought in the national interest to be brought. The likely result if the magistrates had refused the application made by the Crown would have been an application that the court should sit in camera for his name to be given, the rest of his evidence being given in open court, and the likely consequence in future cases that there would be more applications for sittings in camera. So in the present case the administration of justice was not rendered impracticable on either of the two grounds mentioned by Lord Loreburn. Nor do I think that it can be said that the writing down of "Colonel B's" name involved less derogation from the open administration of justice than the giving of his name in camera with the rest of his evidence being given in open court.

If the criteria which apply in relation to the exercise of the court's inherent jurisdiction to sit in camera apply in relation to allowing or directing a witness to write down his name, then I do not think that those criteria are satisfied in this case; but I have come to the conclusion that they do not apply.

Judges and justices have a wide measure of control over the conduct of proceedings in their courts. On occasions for a variety of reasons witnesses are allowed to write down a piece of evidence instead of giving it orally and I know of a number of occasions when in Official Secrets Act cases witnesses have been allowed to conceal their identity. In my opinion it is within the jurisdiction of the court to allow this in the exercise of control over the conduct of the proceedings just as a judge is entitled to send a jury out in the course of a trial and to have a trial within a trial.

In cases where a court permits this and takes every step within its power, short of sitting in camera, to preserve the anonymity of a witness, a person who seeks to frustrate what the court has done may well be guilty of contempt. The giving of evidence in open court by the unnamed witness from which his identity can be deduced is not likely to occur often and it was the giving of that evidence which frustrated the magistrates' efforts to conceal " Colonel B's " identity. As I have said it is only because that happened in this case that I think that the appeals should be allowed.

In my opinion *Reg.* v. *Socialist Worker Printers and Publishers Ltd., Ex parte Attorney-General* [1975] Q.B. 637 was rightly decided. There was a deliberate attempt to frustrate the effect of the court's direction that the names of the persons who alleged that they had been blackmailed should not be disclosed. The giving of that direction was a proper exercise by the court of its jurisdiction to control the conduct of the proceedings. It is generally, if not invariably, recognised that the disclosure of the identity of witnesses alleged to have been blackmailed is likely to deter others blackmailed from seeking the protection of the courts.

In the course of the argument section 12 (1) of the Administration of Justice Act 1960 was referred to. As that subsection deals only with the publication of information relating to proceedings in private, it has not, in my opinion, any relevance to this case.

For the reasons I have stated I would allow these appeals with costs here and in the Divisional Court.

LORD EDMUND-DAVIES. My Lords, it is manifest that this appeal is of considerable public importance. The salient facts have been related in the speech of my noble and learned friend Lord Diplock and I shall not repeat them. Although I regard the proper outcome of these benighted proceedings as clear, the hearing in your Lordships' House has ranged over such a wide area that I do not propose to restrict myself simply to indicating how they should be disposed of. There has been much discussion of many aspects of the confused and confusing law relating to what, as Lord Cross of Chelsea complained in *Attorney-General* v. *Times Newspapers Ltd.* [1974] A.C. 273, 322, is still unfortunately called " contempt of court " which were not touched upon when that appeal was

heard in your Lordships' House. Though not strictly necessary for present purposes, in these circumstances it would, as I believe, be unfortunate if we withheld such views as we have formed regarding them, and (like others of your Lordships) I do not propose to do so. This seems all the more desirable in view of the fact that it was only 18 years ago that, for the first time, a general right of appeal in cases of civil or criminal contempt of court was created (see Administration of Justice Act 1960, section 13) and there has been comparatively little judicial comment on the topic meanwhile.

> "The phrase 'contempt of court' does not in the least describe the true nature of the class of offence with which we are here concerned. . . . The offence consists in interfering with the administration of the law; in impeding and perverting the course of justice. . . . It is not the dignity of the court which is offended—a petty and misleading view of the issues involved—it is the fundamental supremacy of the law which is challenged." (*Johnson* v. *Grant*, 1923 S.C. 789, 790, *per* Lord President Clyde.)

When contempt is alleged the courts have for generations found themselves called upon to tread a judicial tightrope, for, as Phillimore J. put it in *Rex* v. *Blumenfeld, Ex parte Tupper* (1912) 28 T.L.R. 308, 311:

> "The court had to reconcile two things—namely, the right of free speech and the public advantage that a knave should be exposed, and the right of an individual suitor to have his case fairly tried. The only way in which the court could save both was to refuse an unlimited extension of either right. It became, then, a question of degree."

This dilemma most frequently arises in relation to press and other reports of court proceedings, for the public interest inherent in their being fairly and accurately reported is of great constitutional importance and should never lead to punitive action unless, despite their factual accuracy, they nevertheless threaten or prejudice the due administration of justice.

It is of paramount importance to examine at the outset the statement filed pursuant to R.S.C., Ord. 52, r. 2 in support of the present proceedings for contempt brought against Leveller Magazine Ltd., Peace News Ltd., the National Union of Journalists and various individuals. Taking as a typical example that filed on April 17, 1978, in relation to the "Journalist," we find the following assertions:

> "(b) The said 'Colonel B' had properly been permitted not to disclose his identity when giving evidence by the said magistrates, the chairman directing in open court that no attempt should be made to disclose the identity of 'Colonel B.' (c) The said National Union of Journalists was at all material times well aware that the aforesaid direction had been given. (d) The said disclosure of the identity of 'Colonel B' tended and was calculated to prejudice the due administration of justice: it was intended to flout the aforesaid direction and make it difficult for witnesses in the position of 'Colonel B' to give evidence in open court."

The basis of these assertions unquestionably was the earlier affidavit of a Miss Butler, a member of the Director of Public Prosecutions' staff, that,

the examining magistrates having ruled that "Colonel B's" name should be written down and shown only to the court, defence counsel and the defendants, on the Crown's contention that disclosure would not be in the interests of national security:

> "At the conclusion of the proceedings on that day the chairman of the justices reminded the court of his earlier ruling *and stressed that no attempt should be made to disclose the identity of 'Colonel B.'*"

The words which I have emphasised undoubtedly constituted the "direction" relied upon by the Attorney-General in his motion to commit. But before it was heard, Mr. Pratt, the clerk to the justices, swore an affidavit in which he said:

> "The Official Secrets Act provides for exclusion of all or part of the public . . . but I am not aware of any other provision relevant to these proceedings enabling an order to be made such as is referred to or implied in Anne Butler's affidavit and that was the reason why the magistrates did not make any order such as she refers to—because I advised them that they had no power to do so."

Confronted by this latter affidavit, during the hearing of the motion counsel for the Attorney-General sought leave to amend his grounds by substituting the word "procedure" for the word "direction" in paragraphs (c) and (d) of the Attorney-General's statement. But the Divisional Court refused leave to amend. As I see it, it follows that the whole proceedings thereafter must be regarded as having taken place upon the basis that a committal was sought upon the single ground (a) that the magistrates had given a direction that no attempt must be made to disclose the identity of "Colonel B," and (b) that deliberate publication of his identity by the appellants sprang from their determination to disregard that direction. That, and that alone, was the case which the appellants were called upon to meet. And, whatever view one may hold of their behaviour generally, in my judgment it is irrefutable that the appellants destroyed that case. Or perhaps it would be more accurate to say that it had already been destroyed by affidavit, for at no time during the hearing did the Attorney-General contend that the magistrates had in fact given the direction deposed to by Miss Butler. Yet the Divisional Court seemingly attached no importance to this decisive fact. Lord Widgery C.J. said [1979] Q.B. 31, 43:

> "Central to all the [appellants'] arguments was the contention that this type of contempt requires a direction or mandatory order of a court and breach of that order, whereas here it is said that there was no order against disclosure, but merely a request."

After considering the challenge to Miss Butler's evidence, he continued:

> "In view of that conflict of evidence, counsel for the Attorney-General has not sought to rely on any disregard of such a statement, but relies on the earlier ruling in conformity with which it is said Colonel B gave his evidence. Indeed, if the chairman of the justices did say what Miss Butler says he said, its direct authority would only have gone to those within the court. The relevant ruling

A for present purposes was when the court gave permission for Colonel B to write down his name, in accordance with the same decision it had made for Colonel A. It is the authority of that ruling which is for consideration. If it was an effective ruling, a later so-called 'direction' would have added nothing to it, and consequently can be ignored."

B A little later, dealing with the power of a court to allow a witness to write down his name, to order a witness to leave the court and so on, Lord Widgery C.J. added, at p. 44:

> "They are matters on which the court gives a ruling or a decision. The court may add something which can be called a formal direction, but no such formality is required. All such rulings are given, and only purported to be given, to those in court and not outside it. A C flouting in court of the court's ruling will be a contempt. Equally, a flouting or deliberate disregard outside the court will be a contempt if it frustrates the court's ruling. . . . The fact that the justices' ruling had no direct effect outside the court does not prevent the publications here in question from being a contempt if they were made with the deliberate intention of frustrating the arrangement which the court had made to preserve Colonel B's anonymity. It D is this element of flouting the court which is the real basis of the contempt here alleged. It can be sustained without proof that something like a direction or a specific order of the court has been breached."

Yet a little later, Lord Widgery C.J. added, at p. 45:

E "The contempt here relied upon is the deliberate flouting of the court's intention. The public has an interest in having the courts protected from such treatment and that is the public interest on which the Attorney-General relies."

My Lords, I have to repeat with the greatest respect that the Attorney-General had moved to commit the appellants upon an entirely different F basis and upon that basis alone. The basis having in effect been abandoned by the Attorney-General, in my judgment it was not open to the Divisional Court (and particularly after refusing to allow him to amend his grounds of application) to entertain an entirely different case upon which to commit the appellants for criminal contempt.

This is no mere judicial quibble. Persons charged with criminal misconduct are entitled to know with reasonable precision the basis of the G charge. If proceedings such as the present were tried on indictment and the statement of the charge "Criminal Contempt," it would be impermissible to present a case wholly different from that outlined in the particulars of the charge and then to urge that the departure was immaterial, since the new misconduct relied upon was, like the old, simply another variety of criminal contempt.

H Nor, my Lords, would it be acceptable were the Attorney-General to urge, in effect, that no injustice has here been done, since the *wishes* of the court were clear and the determination of the appellants to flout or disregard those wishes equally clear. Mr. Sedley rightly observed that, if

no direction was in fact given, thinking cannot have made it so, and the appellants were correct in thinking that by publishing they were breaching no ruling of the court. I have to say respectfully that I am uneasy about the view expressed by Lord Widgery C.J. that " the deliberate flouting of the court's *intention* " is sufficient to constitute criminal contempt, for as O'Connor J. said in *P. A. Thomas & Co.* v. *Mould* [1968] 2 Q.B. 913, 923:

> ". . . where parties seek to invoke the power of the court to commit people to prison and deprive them of their liberty, there has got to be quite clear certainty about it."

In the absence of any such ruling as that deposed to by Miss Butler, but denied by the clerk of the court, was it the unmistakable intention of the magistrates in the present case that no one should behave as these appellants later did, particularly when those magistrates were specifically advised by their clerk that they had no power to make any order restricting the publication outside their court of " Colonel B's " identity? In such circumstances " intention " and " preference " seem indistinguishable. The latter would have been manifested by the expression of a mere request that no such publication should take place, and when the magistrates elected to discontinue sitting in camera and thereafter did no more than rule that in their court the name of the witness should be written down, their " intention " regarding what must or must not be done outside court was, in my judgment, indeterminable. Indeed, it was ex hypothesi non-existent, since they had been advised that they could in no way control such conduct. They might well have *preferred* that no publication of " Colonel B's " name should take place anywhere or at any time, but it is going too far to say that they had manifested an intention to do all they could to guard against it by ruling as they did. " No man should be condemned by an implication," observed my noble and learned friend, Lord Diplock, in the course of counsel's submissions. Condemnation is even more objectionable when the implication underlying the court's conduct is simply a matter of conjecture, and I have already indicated why I consider that such omission was fatal in the circumstances and should lead to these appeals being allowed.

I should add that I am for a like reason not wholly satisfied about the ratio decidendi of the Divisional Court in *Reg.* v. *Socialist Worker Printers and Publishers Ltd., Ex parte Attorney-General* [1975] Q.B. 637 in contempt proceedings following upon a blackmail prosecution in which the trial judge had directed that the victims who gave evidence should be referred to in court by letters, notwithstanding which the defendants proceeded to publish their names. I have ascertained that the ipsissima verba of the statement filed by the Attorney-General pursuant to R.S.C., Ord. 52, r. 2 were that:

> ". . . the said publication tended and was calculated to prejudice the due administration of justice by causing victims of blackmail to fear publicity and thus deter them from coming forward in aid of legal proceedings or from seeking the protection of the law and/or by holding up to public obloquy witnesses who had given evidence in criminal proceedings."

One of the two grounds upon which the Divisional Court granted the application to commit was (in the words of Lord Widgery C.J., at pp. 649–650):

> ". . . that by publishing the names of these two witnesses in defiance of the judge's directions the respondents were committing [a] blatant affront to the authority of the court. . . ."

If there was any "direction" it was at best implicit. And it should be observed that no publication of the victims' names took place until the judge was about to sum up, and there was accordingly no question of the administration of justice in *that* case being prejudiced by their being deterred from giving evidence for the prosecution. So the basis of the decision seems to be that publication was objectionable on the *general* ground that in any and every blackmail case the administration of justice in future prosecutions will be interfered with if victims' names are published. But, while many (and perhaps most) would accept this, is it necessarily so? I certainly recall one eminent judge (now retired) who in such cases scrutinised with very great care counsel's request that the victims should remain anonymous and emphatically rejected the idea that in every such case the administration of justice would automatically be prejudiced by publication. Counsel for two of the appellants in the present case submitted that it does not follow that everything done which had the effect of deterring possible witnesses necessarily constitutes a contempt, the proper test being whether it is a *prohibited* act calculated to deter. The time may yet come when this House will be called upon to adjudicate upon the point.

Neither in *Reg.* v. *Socialist Worker Printers and Publishers Ltd., Ex parte Attorney-General* [1975] Q.B. 637 nor in the instant case did the court give any direction against publication purporting to operate outside the courtroom. It has to be said that hitherto the view seems to have been widely accepted that no such power exists. Thus, in the *Socialist Worker* case the present Attorney-General submitted, at p. 639:

> "The trial judge did not give any express direction about revealing the names of the witnesses in the press. Indeed, he had no power to make orders affecting the press or other media in their conduct outside the court."

He nevertheless added:

> "The direction could only protect the witnesses effectively if their names were not revealed subsequently. Hence the direction was concerned with publication outside as well as inside the court."

Defence counsel likewise submitted, at p. 640: "A trial judge has no power to order the press not to publish matters elicited at an open trial."

In the present appeals, again, appellants and respondents alike concurred in submitting that (as, indeed, Lord Widgery C.J. had himself observed: see [1979] Q.B. 31, 43) the magistrates' court had no power to direct that there should be no publication in the press or by any other means of the identity of the "Colonel B" who had given evidence before them. Lord Rawlinson Q.C., for the Attorney-General, told your Lordships

in terms that the court could not direct the outside world, but added that its ruling nevertheless extended outside its walls. For myself I found this difficult to follow, particularly as no illustrations were forthcoming of what learned counsel had in mind. After considerable reflection I have come to the conclusion that a court has no power to pronounce to the public at large such a prohibition against publication that all disobedience to it would automatically constitute a contempt. It is beyond doubt that a court has a wide inherent jurisdiction to control its own procedure. In certain circumstances it may decide to sit wholly or in part in camera. Or witnesses may be ordered to withdraw, "lest they trim their evidence by hearing the evidence of others" (as Earl Loreburn put it in *Scott* v. *Scott* [1913] A.C. 417, 446). Or part of a criminal trial may be ordered to take place in the absence of the jury, such as during the hearing of legal submissions or during a "trial within a trial" regarding the admissibility of an alleged confession. Or the court may direct that throughout the hearing in open court certain witnesses are to be referred to by letter or number only. But it does not follow that, were a person (and even one with knowledge of the procedure which had been adopted) thereafter to make public that which had been wholly or partially concealed, he would be ipso facto guilty of contempt. Nothing illustrates this more clearly than the hearing of evidence in camera,

> "... it [being] plain that inherent jurisdiction exists in any court which enables it to exclude the public where it becomes necessary in order to administer justice." (*Rex* v. *Governor of Lewes Prison, Ex parte Doyle* [1917] 2 K.B. 254, *per* Viscount Reading C.J., at p. 271).

It might be thought that disclosure of that which had been divulged only in secret would in all cases constitute the clearest example of contempt. Thus we find Oliver J. saying in *Rex* v. *Davies, Ex parte Delbert-Evans* [1945] K.B. 435, 446:

> ". . . everything the public has a right to know about a trial . . ., *that is to say, everything that has taken place in open court,* may be published, and beyond that there is no need or *right* to go." (The italics are mine.)

But *Scott* v. *Scott* [1913] A.C. 417 has long established that this is not so. And the Administration of Justice Act 1960 provides in terms by section 12 (1):

> "The publication of information relating to proceedings before any court sitting in private shall not of itself be contempt of court except in the following cases . . ."

Five types of proceedings are then set out, ending with

> "(*e*) where the court (having power to do so) expressly prohibits the publication of all information relating to the proceedings or of information of the description which is published."

Section 12 (4) provides:

> "Nothing in this section shall be construed as implying that any publication is punishable as contempt of court which would not be so punishable apart from this section."

I am in respectful agreement with Scarman L.J. who said in *In re F. (orse. A.) (A Minor) (Publication of Information)* [1977] Fam. 58, 99 that this last obscure subsection

> ". . . was enacted to ensure that no one would in future be found guilty of contempt who would not also under the pre-existing law have been found guilty."

And what appears certain is that at common law the fact that a court sat wholly or partly in camera (and even where in such circumstances the court gave a direction prohibiting publication of information relating to what had been said or done behind closed doors) did not of itself and in every case necessarily mean that publication thereafter constituted contempt of court.

For that to arise something more than disobedience of the court's direction needs to be established. That something more is that the publication must be of such a nature as to threaten the administration of justice either in the particular case in relation to which the prohibition was pronounced or in relation to cases which may be brought in the future. So the liability to be committed for contempt in relation to publication of the kind with which this House is presently concerned must depend upon all the circumstances in which the publication complained of took place.

It may be objected that, in an area where the boundaries of the law should be defined with precision, such a situation confronts those engaged in the public dissemination of information with perils which cannot always be foreseen or reasonably safeguarded against. To retort that this has always been so affords no comfort, but intelligent anticipation of what would be fair and what would be unfair can go a long way to ease the burden of the disseminators. They would themselves be in all probability the first to resist court "directions" as to what they may or may not publish, and I have already expressed my disbelief in their general validity. But the press and others could, as I believe, be helped were a court when sitting in public to draw express attention to any procedural decisions it had come to and implemented during the hearing, to explain that they were aimed at ensuring the due and fair administration of justice and to indicate that any who by publishing material or otherwise acting in a manner calculated to prejudice that aim would run the risk of contempt proceedings being instituted against them. Farther than that, in my judgment, the court cannot go. As far as that they could, as I believe, with advantage go. The public and the press would thereby be relieved of the burden of divining what was the court's "intention," for this would have been made clear and it would be up to them to decide whether they would respect it or frustrate it. Even so, ignoring the warning by disobedience or otherwise would not of itself necessarily establish a case of contempt. But the knowledge that the warning had been given should prove at least a guide to possible consequences and would render it impossible for the person responsible for publication to urge (as was done in *Reg.* v. *Socialist Worker Printers and Publishers Ltd., Ex parte Attorney-General* [1975] Q.B. 637, 646A–B) that he was under the impression that the court had merely *requested* that there be no disclosure

of certain specified matters, or that, as the editor of the "Journalist" said in the present case:

> ". . . my understanding was that [Colonel B] had been permitted to write his name down rather than give it in evidence but that there was no direct [intimation] . . . . that his name should not be published."

Were such intimation as I have in mind given by the court, the possible plea of a publisher that he had no knowledge of it would be of little moment. In such cases as the instant one, we are concerned not with improper publication by a private individual (as to whom nothing presently arises) but with people controlling or connected with powerful organs of publicity who, for reasons of their own (one of which may be no more than the desire to boost sales), decide to take the course of defiant dissemination of matter which ought to be kept confidential. It is incumbent upon such people to ascertain what had happened in court. They have the means of doing this, and they cannot be heard to complain that they were ignorant of what had taken place. Perhaps the time has come when heed should be paid to the view expressed in the Phillimore Report on Contempt of Court (1974) (Cmnd. 5794), at p. 60, in reference to *Reg.* v. *Socialist Worker Printers and Publishers Ltd., Ex parte Attorney-General* [1975] Q.B. 637:

> "We incline to the view that the important question of what the press may publish concerning proceedings in open court should no longer be left to judicial requests (which may be disregarded) nor to judicial directions (which, if given, may have doubtful legal authority) but that legislation . . . should provide for these specific circumstances in which a court shall be empowered to prohibit, in the public interest, the publication of names or of other matters arising at a trial."

Although it should be unnecessary, perhaps I ought to add that nothing I have said should be regarded as implying that there can be no committal for contempt unless there has been some sort of warning against publication. While, for the reasons I have indicated, it would be wise to warn, the court is under no obligation to do so. And there will remain cases where a court could not reasonably have considered a warning even desirable, such as where the later conduct complained of should not have been contemplated as likely to occur. *Reg.* v. *Newcastle Chronicle and Journal Ltd., Ex parte Attorney-General* (unreported), January 17, 1978, is an example of such a case. There the Divisional Court rightly held contempt proved where, during the course of a trial on an indictment containing 20 counts for dishonesty, a newspaper reported that on arraignment on the first day the defendant had pleaded guilty to four of the counts and that the trial was proceeding only on the remaining 16. Lord Widgery C.J. rightly commented:

> "It is to be observed that the learned trial judge gave no sort of warning to representatives of the press in his court that the evidence would contain matter which should not be reported. I do not think that there is any obligation on the judge to give a warning to the

A press, or indeed to anybody else, when the matter complained of and relied upon is so elementary and well understood as this one. . . . Certainly it does not seem to me to be an unfair burden on the newspaper reporter to say that he ought to know (and, knowing, ought to practise in his profession) that any reference to additional offences committed by the accused is something which ought to be kept out of the jury's ears *unless* there is some clear exception which B covers the matter."

My Lords, I said at the outset that I should digress, and I fear I have done so at some length, but I comfort myself by the reflection that I am not alone among your Lordships in this respect. Let me now return to the matter in hand and say that, for the reason earlier indicated, I hold that all these appeals should be allowed.

C

LORD RUSSELL OF KILLOWEN. My Lords, I propose to state briefly my conclusions on the questions relevant to this case. From what happened in connection with the deposition of " Colonel B," and from the opening sentence of that deposition itself, it was clear that the examining magistrates decided that his identity should have strictly limited publi- D cation. Contempt of court in its essentials consists in interference with the due administration of justice. It is true that in this case the application by the Crown to which the magistrates acceded was based upon the suggestion that revelation of the witness's identity would be inimical to national safety, and no specific mention appears to have been made of the requirements of the due administration of justice. But this was a prosecution under the Official Secrets Act. In my opinion it really goes E without saying that behind the application (and the decision) lay considerations of the due administration of justice. In the first place an alternative to the via media adopted would be an application that " Colonel B's " evidence be taken in camera, and in principle the less that evidence is taken in camera the better for the due administration of justice, a point with which journalists certainly no less than others would agree. In the F second place a decision on anonymity—the via media—would obviously, and for the same reasons, be highly desirable in the interest of the due administration of justice as a continuing process in future in such cases. In the third place it appears to me that the furtherance of the due administration of justice was the only ground to support the decision of the magistrates.

I arrive therefore at the conclusion that it should have been apparent G to the appellants, from the very form of the deposition of " Colonel B," that the magistrates had arrived at a decision on his anonymity designed to promote not merely national safety but the due administration of justice. (Incidentally I reject entirely the specious suggestion that there was here merely a polite request to the press not to publish the identity.)

I do not, my Lords, regard as of any relevance the question whether the H magistrates had any power or authority directly to forbid all publication of " Colonel B's " identity. The field in which contempt of court, or, as I prefer to describe it, improper interference with the due administration of justice, may be committed is not circumscribed by the terms of an order

enforceable against the accused. I find no problem in the concept that a decision or direction may have no immediate aim and no direct enforceability beyond the deciding and directing court, but yet may have such effect in connection with contempt of court. Merely to state, as is the law, that in general contempt of court is the improper interference with the due administration of justice is to state that it need not involve disobedience to an order binding upon the alleged contemnor.

Where then, in the light of these principles, stands the present case? I dismiss at once the fact, which I am prepared to assume, that the *motive* which induced the appellants to publish the identity of "Colonel B" was that they considered the Crown's view that its revelation would endanger national safety to be nonsense. Their motive is irrelevant to guilt if they intended to do that which amounted in law to interference with the due administration of justice and therefore contempt.

It is at this stage that I feel great concern with this case. There can be no doubt that the publication in toto of "Colonel B's" deposition was permissible without contempt of court. In it was to be found a reference to a particular edition of the Royal Corps of Signals publication "Wire" in which "Colonel B" admitted in his deposition that his name in association with his stated then current posting was to be found. (I believe that the reference to the particular edition was due to a question by the clerk to the magistrates and not to cross-examining counsel.) This edition of "Wire" was available to the public, including anyone who read a report of the deposition, which of course was freely reportable; no doubt it was also deposited in the British Museum. No objection was raised by the prosecution to this part of the deposition, nor by the magistrates.

The position therefore was that, notwithstanding the decision of the magistrates designed to preserve the anonymity of "Colonel B," his deposition itself revealed at one simple remove his identity. Publication in full of his deposition, given as it was in open court, could not have been a contempt. It would have told the world (if interested) where to look for "Colonel B's" identity. Would it have transgressed the limits of the permissible if the publication of the deposition had been accompanied by a re-publication of the stated edition of "Wire," or the relevant extracts from it? I do not think so. The substance of the magistrates' decision would not have been breached. The gaff was already blown by the deposition, to the publication of which no objection could be taken.

For these reasons, which depend entirely upon the totally revealing content of "Colonel B's" deposition, I would allow these appeals. I see no sufficient justification for holding that the direct short cut to breach of the decided anonymity of "Colonel B" is to be regarded in the particular circumstances of this case as a contempt of court.

If, my Lords, I may summarise:

(1) The decision of the examining magistrates should have been recognised by the appellants as one designed to preserve the anonymity of "Colonel B."

(2) That decision should be taken as made in the interests of the due administration of justice, both in that case, and in the due administration of justice as a continuing process.

(3) No specific warning of a risk of contempt of court by ignoring the decision should be necessary to found such a charge, though it might be useful.

(4) There was no justification for thinking that this decision involved merely a request.

(5) But for the substantially self-identifying content of "Colonel B's" legitimately reportable deposition I would have been for dismissal of these appeals.

(6) Because, and only because, the properly reportable deposition of "Colonel B" really in itself revealed his identity, without protest from either magistrates or prosecution, I would allow these appeals, with costs here and below.

LORD SCARMAN. My Lords, when an application is made to commit for contempt of court a journalist or editor for the publication of information relating to the proceedings of a court, freedom of speech and the public nature of justice are at once put at risk. The general rule of our law is clear. No one shall be punished for publishing such information unless it can be established to the satisfaction of the court to whom the application is made that the publication constitutes an interference with the administration of justice either in the particular case to which the publication relates or generally. Parliament clearly had the general rule in mind when in 1960 it enacted that even the publication of information relating to proceedings before any court sitting in private shall not of itself be contempt of court save in specified exceptional cases: section 12 (1) of the Administration of Justice Act 1960.

The law does not treat any, or every, interference with the course or administration of justice as a contempt. The common law rule which was affirmed by this House in *Scott* v. *Scott* [1913] A.C. 417 is that the interference must be such as to render impracticable the administration of justice or to frustrate the attainment of justice either in the particular case or generally.

Further, since such interference is a criminal offence, the court to whom the application to commit is made must be satisfied beyond reasonable doubt that the interference is of such a character. If the court is not sure, the application must be dismissed.

Three questions arise for consideration in this appeal. (1) Did the examining justices have power to sit in private to take the evidence of the witness described in court as "Colonel B"? (2) Did they have the power, without going into private session, to require evidence as to the identity of the witness to be written down and not to be mentioned in open court? (3) If either of the first two questions be answered in the affirmative, was it a contempt of court to publish information relating to the identity of the witness?

Since the history of the case is fully set out in the speech of my noble and learned friend Lord Diplock, I propose to refer only to those facts which I consider to be critical.

This is an appeal from an order of the Divisional Court of the Queen's Bench Division (Lord Widgery C.J. presiding). The court found, upon the application of the Attorney-General, that the criminal offence of a

contempt of court had been established against the appellants. The alleged offence consisted of publication in three newspapers—" Peace News," " The Leveller " and the " Journalist "—of the true name of a witness who, using the pseudonym " Colonel B," had given evidence for the prosecution in committal proceedings against three men accused of offences under the Official Secrets Acts. His identity was not disclosed in those proceedings, though he gave his evidence orally in open court. The examining justices had ruled that his name should be written down and shown to the defence but not mentioned in court. The justices gave no direction prohibiting publication of the name, since they were advised by their clerk that they had no power to do so. In finding the contempt established the Divisional Court held that it consisted of a flouting of the authority of the court in that the appellants, with notice of the proceedings and the ruling, had caused the witness's name to be published in the three newspapers. The court, accepting that a contempt could not be shown unless the publications frustrated a decision of the court, the object of which was to avert the risk of interference with the administration of justice either in the particular case or generally, found that this was the object of the ruling and that the appellants' publications had frustrated it. In adopting this criterion for determining a contempt of court, the Divisional Court followed the decision of the Court of Appeal in *Attorney-General* v. *Butterworth* [1963] 1 Q.B. 696, where, however, the facts were very different.

The powers of the court—the first question

The committal proceedings being in respect of offences alleged under the Official Secrets Acts, the examining justices had power to exclude the public from any part of the hearing, if, upon the application of the prosecution, they thought a public hearing prejudicial to national safety: Official Secrets Act 1920, section 8 (4). They had exercised this power in respect of certain tape-recordings, but they did not use it (though it was open to them to do so) in respect of Colonel B's evidence. The public were not excluded when he gave evidence. The subsection, therefore, does not apply. The only relevance of the subsection is that it indicates that Parliament considered it necessary to augment, in official secrets cases, whatever common law powers a court had to sit in private by one the exercise of which would not be dependent upon the court's assessment of the danger of publicity to the administration of justice. The exercise of this power would, of course, enable contempt proceedings to be brought, if there were publication of the matter kept private: see Act of 1960, section 12 (1) (*c*).

Examining justices also have the power to sit in private if the " ends of justice " appear to them to require it: Criminal Justice Act 1967, section 6 (1). As they chose to sit in public, this statutory power cannot be invoked to support their ruling.

Examining justices also have the common law power, which belongs to all courts, to sit in private in the exceptional cases specified in *Scott* v. *Scott* [1913] A.C. 417.

In *Scott* v. *Scott* your Lordships' House affirmed the general rule of the common law that justice must be administered in public. Certain exceptions were, however, recognised. The interest of national security was not one

of them; indeed, it was not mentioned in any of the speeches. The House was divided as to whether protection of the administration of justice from interference was an exception. A majority held that it was—though their respective formulations of the exception differed markedly in emphasis. Earl Loreburn held the underlying principle to be that the public were to be excluded if "the administration of justice would be rendered impracticable by their presence" (p. 446). Viscount Haldane L.C. thought that

> "to justify an order for hearing in camera it must be *shown*" (my emphasis) "that the paramount object of securing that justice is done would really be rendered doubtful of attainment if the order were not made" (p. 439).

Lord Halsbury—maxime dubitans (p. 442)—agreed with the Lord Chancellor, while also, in effect, agreeing with Lord Shaw of Dunfermline who thought the ground put forward by the Lord Chancellor was "very dangerous ground" (p. 485).

While paying heed to the dangers of extending this sensitive branch of the law by judicial decision, I think it plain that the basis of the modern law is as Viscount Haldane declared it was. It follows: (1) that, in the absence of express statutory provision (e.g., section 8 (4) of the Act of 1920), a court cannot sit in private merely because it believes that to sit in public would be prejudicial to national safety, (2) that, if the factor of national safety appears to endanger the due administration of justice, e.g., by deterring the Crown from prosecuting in cases where it should do so, a court may sit in private, (3) that there must be material (not necessarily formally adduced evidence) made known to the court upon which it can reasonably reach its conclusion.

"The device"—the second question

In the present case the justices, instead of sitting in private, adopted the device of allowing a piece of evidence to be written down and requiring it not to be mentioned in open court. If they took this course in the interest of justice, they adopted what Lord Widgery C.J. described as a convenient device, for it achieved a result, i.e., no mention of the name in open court, which otherwise would only be achieved by the court going into camera. In other words, it was a substitute for sitting in private. I agree with Lord Widgery C.J. in believing this device to be a valuable and proper extension of the common law power to sit in private, and to be available where the court would have power at common law to sit in private but chooses not to do so. I think *Reg.* v. *Socialist Worker Printers and Publishers Ltd., Ex parte Attorney-General* [1975] Q.B. 637 (a blackmail case) was correctly decided.

Contempt of court—the third question

The law of contempt of court has been, throughout its history, bedevilled by technicalities. One of them was raised in this appeal. Can a court make an order, or give a ruling, which is binding on persons who are neither witnesses nor parties in the proceedings before the court? It is a misconception of the nature of the criminal offence of contempt to regard it as being an offence because it is the breach of a binding order.

The offence is interference, with knowledge of the court's proceedings, with the course of administration of justice: see *In re F. (orse. A.) (A Minor) (Publication of Information)* [1977] Fam. 58. It was for this reason, no doubt, that Lord Widgery C.J. in this case stressed the element of "flouting" the authority of the court. Though I would not have chosen the word, I think it does reflect the essence of the offence, namely that the conduct complained of, in this case the publication, must be a deliberate frustration of the effort of the court to protect justice from interference.

In the present case the examining justices took a course which was a substitute for sitting in private. If, as I think, the device is an acceptable extension of the common law power of a court to control its proceedings by sitting in private, where necessary, in the court's judgment, to protect the administration of justice from interference, section 12 (1) of the Administration of Justice Act 1960 is relevant. For the principle governing contempt of court when a court sits in private must also govern the situation where the common law device is used in substitute for private session. The subsection is in these terms:

> "The publication of information relating to proceedings before any court sitting in private shall not of itself be contempt of court except in the following cases, that is to say—(*a*) where the proceedings relate to the wardship or adoption of an infant or wholly or mainly to the guardianship, custody, maintenance or upbringing of an infant, or rights of access to an infant; (*b*) where the proceedings are brought under Part VIII of the Mental Health Act 1959, or under any provision of that Act authorising an application or reference to be made to a Mental Health Review Tribunal or to a county court; (*c*) where the court sits in private for reasons of national security during that part of the proceedings about which the information in question is published; (*d*) where the information relates to a secret process, discovery or invention which is in issue in the proceedings; (*e*) where the court (having power to do so) expressly prohibits the publication of all information relating to the proceedings or of information of the description which is published."

The subsection confers no new powers upon the court. It leaves the common law and statutory powers of sitting in private exactly as they were. Paragraphs (*a*), (*b*), (*d*), and (*e*) add nothing to the common law. It would be strange if the exception stated in paragraph (*c*) should prove alone to have made a fundamental modification in the law. I do not so interpret it. It provides for the case where at common law or by statute the court may sit in private for reasons of national security. The statutory power which the justices had under section 8 (4) of the Act of 1920 is not relevant, because the justices chose not to sit in private. The common law power is relevant, because the device employed was within the inherent power of the court at common law.

But since the common law power to sit in private arises only if the administration of justice be threatened, the third question becomes one of fact. What was the reason for the justices' ruling? If it was to avert an interference with the administration of justice, was there material upon

which the ruling could reasonably be based? The third question cannot therefore be answered without considering the facts. Here I find myself in a state of doubt.

I do not think that the Attorney-General has discharged the burden of proof upon him. Uncertainty surrounds, and continues to surround, the ruling made by the justices and its object. First, one cannot be sure that they took into account all the matters to which it was their duty to have regard if they were giving notice in open court that to protect the administration of justice the name of the witness was not to be published. The justices clearly had regard to national security, but did they understand that, in exercising their common law power, the national security risk must be shown also to be a risk to the administration of justice and assess the degree of the latter risk? Did they address themselves to that question at all? It cannot be said with any certainty that they did, or that the Crown adduced any material, by way of evidence or otherwise, to show that the national security issue was such that publication of the colonel's name would endanger the due administration of justice.

Secondly, there was, and remains, considerable doubt as to the nature of the " ruling." Was it a decision, an indication, or only a request? As all know who have experience of the forensic process in this country, courts frequently allow a witness to write down his name or address or to give some other specified evidence (e.g., a medical or welfare report) in writing and make it clear that they do not wish the matter to be mentioned in open court. A court may do so only to save a witness or a party from distress or pain, e.g., in a personal injury or matrimonial case. On the other hand, a court may, as the Attorney-General contends in this case, have in mind that publication outside, as well as inside, the court is to be prevented as an interference with the administration of justice. Unless the ruling in this case is to be interpreted as a decision taken to prevent interference with the administration of justice, the publication of information as to " Colonel B's " identity would be no contempt. If, upon its proper interpretation, the " ruling " was no more than an indication or request, publication would be no contempt. It is only if the ruling must be read as a prohibition of publication in the interests of the administration of justice, i.e., as falling within paragraph (*e*) of section 12 (1) of the Act of 1960, that the appellants can, in my judgment, be found guilty of contempt. After a careful study of the case and listening to full argument, I remain unsure as to the nature and object of the ruling.

I would summarise my conclusions thus. If a court is satisfied that for the protection of the administration of justice from interference it is necessary to order that evidence either be heard in private or be written down and not given in open court, it may so order. Such an order, or ruling, may be the foundation of contempt proceedings against any person who, with knowledge of the order, frustrates its purpose by publishing the evidence kept private or information leading to its exposure. The order or ruling must be clear and can be made only if it appears to the court reasonably necessary. There must be material (not necessarily evidence) made known to the court upon which it could reasonably reach its conclusion, and those who are alleged to be in contempt must be shown to have known, or to have had a proper opportunity of knowing, of the

existence of the order (see *In re F. (orse. A.) (A Minor) (Publication of Information)* [1977] Fam. 58).

Neither the Crown nor the examining justices made clear what they were seeking to do or upon what grounds the court was being asked, and decided, to act. That certainty which the criminal law requires before a man can be convicted of a criminal offence is lacking. I would, therefore, allow the appeals.

Appeals allowed with costs.

Solicitors: *Vizards; Seifert, Sedley & Co.; Director of Public Prosecutions.*

M. G.

[HOUSE OF LORDS]

HOSKYN . . . . . APPELLANT

AND

METROPOLITAN POLICE COMMISSIONER . . RESPONDENT

1978 Jan. 23, 24; April 6

Lord Wilberforce, Viscount Dilhorne, Lord Salmon, Lord Edmund-Davies and Lord Keith of Kinkel

Crime—Evidence—Witness, compellable—Defendant charged with personal violence against woman—Woman becoming his wife before trial—Wife called as witness for Crown—Competent witness—Whether also compellable

Where a husband is indicted for inflicting personal injury on his wife the wife although a competent witness is not a compellable witness for the Crown.

Where, therefore, a woman who was unwilling to give evidence was called as a prosecution witness, having married the man who was charged with wounding her with intent to do grievous bodily harm two days before his trial:—

Held (Lord Edmund-Davies dissenting), that the woman was not a compellable witness and his conviction could not stand.

Rex v. *Lapworth* [1931] 1 K.B. 117; 22 Cr.App.R. 87, C.C.A. overruled.

Dicta in *Leach* v. *The King* [1912] A.C. 305; 7 Cr.App.R. 157, H.L.(E.) applied.

Decision of the Court of Appeal (Criminal Division) reversed.

The following cases are referred to in their Lordships' opinions:

Advocate, H.M. v. *Commelin* (1836) Swinton's Justiciary Reports, vol. 1, p. 291.

Audley's (Lord) Case (1631) 3 St.Tr. 402.

Bentley v. *Cooke* (1784) 3 Doug. 422.

A

Court of Appeal

*H *v* News Group Newspapers Ltd

Practice Note

[2011] EWCA Civ 42

B

2011 Jan 14; 31 Lord Neuberger of Abbotsbury MR, Maurice Kay, Smith LJJ

Human rights — Respect for private and family life — Interference with — Freedom of expression — Reporting restrictions — Newspaper report concerning private life of well-known sportsman — Claimant obtaining injunction to restrain publication of further confidential information with anonymity in proceedings — C *Balance of competing Convention rights — Proper approach when determining whether anonymity to be ordered — Human Rights Act 1998 (c 42), Sch 1, Pt I, arts 8, 10*

On an application for an order prohibiting the publication of private information the judge, in balancing the individual's right to respect for his private and family life protected by article 8 of the Convention for the Protection of D Human Rights and Fundamental Freedoms[1] against the article 10 right to freedom of expression, must be satisfied before he makes such an order that the facts and circumstances of the case are sufficiently strong to justify encroaching on the cardinal rule of open justice and, if they are, ensure that the restrictions on publication are the minimum necessary to satisfy the need for the encroachment. An order for anonymity and reporting restrictions may not be made simply because the parties consent to it since they cannot waive the rights of the public. The judge E should call for argument to persuade him to approve any part of an order which restricts or prevents publication of any aspect of the proceedings and about which he has any doubts or worries. If the court permits the identity of the claimant to be revealed it will almost invariably mean that significantly less information about the proceedings can be published than if the proceedings were anonymised. If, on the other hand, the claimant is accorded anonymisation, it will almost always be appropriate to permit more details of the proceedings to be published than if the F claimant were identified. In making the choice between revealing the identity of the claimant or revealing the general nature of the information which he is seeking to keep private, the judge is not exercising a discretion but performing a balancing exercise. An appellate court, which is usually exercising a reviewing function, should in principle be slow to interfere with the judge's conclusion and should not allow the appeal unless satisfied that the judge was wrong. Where an anonymity order is made or reporting restrictions ordered a publicly available judgment G should normally be given, edited as necessary. The media will generally be better able to discover and report on what the courts are doing if they can publish the

[1] Human Rights Act 1998, Sch 1, Pt I, art 8: "1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

H Art 10: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority . . . 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society . . . for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

details of the type of case rather than the name of the individual who is seeking to protect an unspecified aspect of his or her private life by means of an injunction (post, paras 12, 21–22, 25, 26, 32–33, 35, 43, 44). A

Flood v Times Newspapers Ltd [2011] 1 WLR 153, CA applied.

Orders of Tugendhat J [2010] EWHC 2818 (QB); [2011] EMLR 177 and [2010] EWHC 2979 (QB) varied.

The following cases are referred to in the judgment of Lord Neuberger of Abbotsbury MR: B

Donald v Ntuli (Guardian News & Media Ltd intervening) [2010] EWCA Civ 1276; [2011] 1 WLR 294, CA
Flood v Times Newspapers Ltd [2010] EWCA Civ 804; [2011] 1 WLR 153, CA
Gray v UVW [2010] EWHC 2367 (QB)
Guardian News and Media Ltd, In re [2010] UKSC 1; [2010] 2 AC 697; [2010] 2 WLR 325; [2010] 2 All ER 799, SC(E) C
R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2) (Guardian News and Media Ltd intervening) [2010] EWCA Civ 65; [2010] EWCA Civ 158; [2011] QB 218; [2010] 3 WLR 554; [2010] 4 All ER 91; [2010] 4 All ER 177, CA
Scott v Scott [1913] AC 417, HL(E)
Von Hannover v Germany (2004) 40 EHRR 1

D

The following additional cases were cited in argument:

Browne of Madingley (Lord) v Associated Newspapers Ltd [2007] EWCA Civ 295; [2008] QB 103; [2007] 3 WLR 289, CA
Cream Holdings Ltd v Banerjee [2004] UKHL 44; [2005] 1 AC 253; [2004] 3 WLR 918; [2004] 4 All ER 617, HL(E)
S (A Child) (Identification: Restrictions on Publication) In re [2004] UKHL 47; [2005] 1 AC 593; [2004] 3 WLR 1129; [2004] 4 All ER 683, HL(E) E

The following additional cases, although not cited, were referred to in the skeleton arguments:

A v B plc [2002] EWCA Civ 337; [2003] QB 195; [2002] 3 WLR 542; [2002] 2 All ER 545, CA
Armonienė v Lithuania (2008) 48 EHRR 1252 F
Assicurazioni Generali SpA v Arab Insurance Group (Practice Note) [2002] EWCA Civ 1642; [2003] 1 WLR 577; [2003] 1 All ER (Comm) 140, CA
Attorney General v Leveller Magazine Ltd [1979] AC 440; [1979] 2 WLR 247; [1979] 1 All ER 745, HL(E)
B v United Kingdom (2001) 34 EHRR 529
Bergens Tidende v Norway (2000) 31 EHRR 430
Bonnard v Perryman [1891] 2 Ch 269, CA G
British Broadcasting Corpn, In re [2009] UKHL 34; [2010] 1 AC 145; [2009] 3 WLR 142; [2010] 1 All ER 235, HL(E)
Campbell v MGN Ltd [2004] UKHL 22; [2004] 2 AC 457; [2004] 2 WLR 1232; [2004] 2 All ER 995, HL(E)
Cleveland Bridge UK Ltd v Multiplex Constructions (UK) Ltd [2005] EWHC 2101 (TCC)
Designers Guild Ltd v Russell Williams (Textiles) Ltd (trading as Washington DC) [2000] 1 WLR 2416, HL(E) H
Douglas v Hello! Ltd [2001] QB 967; [2001] 2 WLR 992; [2001] 2 All ER 289, CA
Guardian Newspapers Ltd, Ex p [1999] 1 WLR 2130; [1999] 1 All ER 65, CA
Hodgson v Imperial Tobacco Ltd [1998] 1 WLR 1056; [1998] 2 All ER 673, CA

A *KJH v HGF* [2010] EWHC 3064 (QB)
Leempoel v Belgium (Application No 64772/01) (unreported) given 9 November 2006, ECtHR
Lykiardopulo v Lykiardopulo [2010] EWCA Civ 1315; [2011] 1 FLR 1427, CA
Micallef v Malta (2009) 50 EHRR 920, GC
Murray v Express Newspapers plc [2008] EWCA Civ 446; [2009] Ch 481; [2008] 3 WLR 1360, CA
B *Pink Floyd Music Ltd v EMI Records Ltd (Practice Note)* [2010] EWCA Civ 1429; [2011] 1 WLR 770, CA
Pro Sieben Media AG v Carlton UK Television Ltd [1999] 1 WLR 605, CA
R v Legal Aid Board, Ex p Kaim Todner [1999] QB 966; [1998] 3 WLR 925; [1998] 3 All ER 541, CA
Reynolds v Times Newspapers Ltd [2001] 2 AC 127; [1999] 3 WLR 1010; [1999] 4 All ER 609, HL(E)
C *Secretary of State for the Home Department v AP (No 2)* [2010] UKSC 26; [2010] 1 WLR 1652; [2010] 4 All ER 459, SC(E)
Sunday Times v United Kingdom (1979) 2 EHRR 245
Terry v Persons Unknown [2010] EWHC 119 (QB); [2010] EMLR 400
Todd v Adams and Chope (trading as Trelawney Fishing Co) [2002] EWCA Civ 509; [2002] 2 All ER (Comm) 97; [2002] 2 Lloyd's Rep 293, CA

D **APPEAL** from Tugendhat J

By an application dated 13 August 2010 the claimant, JIH, applied for an interlocutory injunction to restrain the publication of private information by the defendant, News Group Newspapers Ltd. On the same day Nicol J in the interim applications court granted the injunction sought, which was served on other media organisations in addition to the defendant.

By a claim form dated 16 August 2010 the claimant sought an order against
E the defendant to restrain misuse of private information and applied for the continuation of the interim injunction. On 20 August, by agreement between the parties, Nicol J continued the injunction until the return date. On 21 October 2010 the parties requested the court to make a consent order which included provisions for anonymity and reporting restrictions. On 5 November 2010 the judge, having heard argument on the breadth of the terms of the draft order, approved it in part and made an order by consent restraining the defendant from
F publishing the information set out in the confidential schedule, save for information in an open court judgment, and imposing reporting restrictions, but refused to order that the claimant's identity was not to be disclosed. He refused permission to appeal but stayed the implementation of the refusal of anonymity until the hearing of an appeal. The claimant applied to the judge for reconsideration of his refusal to grant anonymity. On 18 November 2010 Tugendhat J refused the application and permission to appeal, but the stay was continued until the Court of
G Appeal hearing.

By an appellant's notice the claimant sought permission to appeal against both orders on the ground, inter alia, that the judge had wrongly refused to make an order requiring the action to be anonymised which was necessary to protect the claimant's article 8 rights. On 14 January 2011, the Court of Appeal granted permission to appeal and proceeded to hear the appeal.

The facts are stated in the judgment of Lord Neuberger of Abbotsbury MR.

H

Hugh Tomlinson QC and *David Sherborne* (instructed by *Berwin Leighton Paisner LLP*) for the claimant.

Richard Spearman QC (instructed by *Farrer & Co*) for the defendant.

The court took time for consideration.

31 January 2011. The following judgments were handed down.

LORD NEUBERGER OF ABBOTSBURY MR

Introductory

1 The courts are not infrequently asked to make orders preventing the publication of private information, concerning, for instance, the details of a person's finances, health, sexual activities, or family life. In such cases, the claimant is normally (but by no means always) a public figure, and at least one of the defendants is normally (but by no means always) a member of the national media.

2 When considering what order to make on such applications, it is normally necessary to balance two competing legal rights, each of which constitutes a fundamental feature of a civilised modern democratic society. Those competing rights are an individual's right to "respect for his private and family life", as stipulated in article 8 of the European Human Rights Convention and relied on by the claimant, and the more general right to "freedom of expression", relied on by the defendant and laid down by article 10 of the Convention, which also refers to the "right . . . to receive and impart information and ideas".

3 In many cases, this balancing exercise is difficult. This is partly because the two rights are rather different in their constituent factors, partly because there are often powerful arguments pointing in opposite directions, partly because each case depends very much on its own particular facts, and partly because the exercise can involve a significant degree of subjectivity.

4 When the balance comes down in favour of preventing publication, a further problem sometimes arises, namely the extent to which, and the way in which, the parties' evidence and arguments, and the court's reasoning and order, in the particular case can be reported. It would be wrong to permit unrestrained reporting in the normal way, as that would involve publishing the name of the claimant and the details of the information whose publication he seeks to prevent, thereby rendering the court's order pointless. On the other hand, public coverage of court proceedings is a fundamental aspect of freedom of expression, with particular importance: the ability of the press freely to observe and report on proceedings in the courts is an essential ingredient of the rule of law. Indeed the right to a "fair and public hearing" and the obligation to pronounce judgment in public, save where it conflicts with "the protection of the private lives of the parties" or "would prejudice the interests of justice", are set out in article 6 of the Convention.

5 The appeal in this case is concerned with this issue of reporting restrictions, and, as both Mr Hugh Tomlinson QC (who appears for the claimant with Mr David Sherborne) and Mr Richard Spearman QC (who appears for the defendant) contend, it therefore raises a point of general concern and of some importance. However, the determination of the precise extent of what can be reported about the proceedings themselves is every bit as fact-sensitive as the anterior exercise of deciding whether to make an order restraining publication of the private information in the first place.

6 As Maurice Kay LJ said in a recent case raising a somewhat similar issue, *Donald v Ntuli (Guardian News & Media Ltd intervening)* [2011] 1 WLR 294, para 52, when deciding whether, and if so to what extent, to impose reporting restrictions in relation to legal proceedings, "as part of its consideration of all the circumstances of a case, a court will have regard to the respective and sometimes competing Convention rights of the parties". He went on to say this, two paragraphs later:

> "This is an essentially case-sensitive subject. Plainly [the claimant] is entitled to expect that the court will adopt procedures which ensure that any ultimate vindication of his article 8 case is not undermined by the way in which the court has processed the interim applications and the trial itself. On the other hand, the

A principle of open justice requires that any restrictions are the least that can be imposed consistent with the protection to which [the claimant] is entitled."

An outline of the facts

7 The facts of this case (in so far as they can fairly be set out in a publicly available judgment concerning information about the claimant's private life, which it is accepted should not be published, at least for the moment, and as they were B described by Mr Tomlinson in open court) are as follows. The claimant, known for present purposes as JIH, is a well known sportsman, who has, for some time, been in an apparently long-term and conventional relationship with another person, to whom I shall refer as "XX". Since his relationship with XX had started, but before August 2010, a story had been published, without JIH having received any prior notice, suggesting that he had had a sexual liaison with another person, whom I shall call "YY".

C 8 The story whose publication JIH is seeking to prevent concerns an alleged sexual encounter he had with a different person, to whom I shall refer as "ZZ", last year. In August 2010, JIH discovered that the defendant, News Group Newspapers Ltd, had been told of this alleged encounter by ZZ.

9 On learning that the defendant intended to publish a story in *The Sun*, based on the information provided by ZZ, JIH began the present proceedings in August 2010 without revealing his identity in the publicly available court papers. D He immediately made an application seeking an order, on an interlocutory basis (i e until the trial of his action), preventing the publication of information contained in a "confidential schedule". That schedule referred to "[i]nformation concerning a sexual relationship or alleged sexual relationship between [JIH] and [ZZ] during the period of his relationship with [XX] . . . including the fact or any details of such relationship" (and I think it is clear that "such relationship" is that with ZZ).

10 JIH's proceedings were served on seven other media companies, and E the application was granted in the form of a short term injunction by Nicol J on 13 August 2010, while the defendant and the other media companies had the opportunity to consider their respective positions.

11 Thereafter, having considered JIH's claim and, no doubt, having taken legal advice, the defendant entered into negotiations with JIH, with a view to agreeing terms pending the trial of his claim. These negotiations resulted in an agreed form of order in which, to summarise the essence of the agreement for present purposes, until F the trial of these proceedings (or further order in the meantime), (a) the defendant would submit to an injunction preventing it from publishing "all or any part of the information contained in the confidential schedule", save to the extent that any such information was in an open judgment of the court, and, crucially for present purposes; (b) the identity of JIH would not be disclosed; and (c) the hearing of the application be in private, and not be reported. The basis of the order was that the defendant accepted that, at least until trial, publication of the information in the G schedule would arguably infringe JIH's article 8 rights, which would outweigh the article 10 rights relied on by the defendant.

12 When the draft agreed order ("the draft order") was presented for approval to Tugendhat J, he decided that he was not prepared to make the order, at least without having heard argument which persuaded him that it was appropriate to do so. In taking that course, he was following the approach which he had adopted in *Gray v UVW* [2010] EWHC 2367 (QB), where he had held that "an order for H anonymity and reporting restrictions cannot be made simply because the parties consent: parties cannot waive the rights of the public" (quoting from the judgment below in this case [2010] EWHC 2818 (QB) at [3]). I agree both with the principle there identified, and with the consequent right, indeed obligation, of a judge to take the course which Tugendhat J took in this case on being presented with the draft order, namely to call for argument to persuade him to approve any part of an order

which restricts or prevents publication of any aspect of the proceedings, and about which he has any doubts or worries.

13 The reason that the judge called for argument as to the terms of the draft order was not concerned with the principle of whether an interlocutory injunction restraining publication of the information in question should be made: the judge plainly thought that such an injunction was justified. What worried the judge was the breadth of the draft order so far as the reporting restrictions it contained: he thought that they went too far.

14 Having heard argument on the terms of the draft order concerning restraints on publication, Tugendhat J gave judgment on 5 November 2010. In that judgment, he concluded that the draft order should be approved, subject to the important exception that he should refuse JIH's application to continue Nicol J's order granting him anonymity [2010] EWHC 2818. Although Tugendhat J refused permission to appeal, he sensibly stayed the implementation of the order so as to give JIH the opportunity to appeal to this court.

15 Thereafter, there was some media reporting of the case, which revealed more than was permitted by Tugendhat J's order of 5 November. As a result, JIH brought the matter back before the judge, asking him to reconsider his refusal to accord JIH anonymity. That application was refused in a judgment given on 18 November [2010] EWHC 2979 (QB). The judge refused JIH permission to appeal against that order also.

The present application

16 JIH then applied, initially in writing in the normal way, for permission to appeal against both decisions to this court. I ordered that JIH's applications for permission to appeal against the two judgments should be heard by three members of the Court of Appeal, with any appeal to follow immediately if either application succeeded. This is not normally a procedure I favour, but, on this occasion, where there were two potential appeals, where any refusal of permission would have resulted in a renewed application which would have involved a hearing, where the matter was urgent for the parties, and where the issues raised might well be of wider significance, it seemed right to make such an order.

17 The hearing of the applications was held in open court. It was obviously right, as a matter of principle, to have the hearing in public if it was possible to do so. As both counsel very sensibly accepted, this was indeed possible, on the basis that, at the hearing, the identity of JIH was not revealed, and some of the facts, and some of the contents of the documents were referred to in rather coded or referential terms.

18 Mr Tomlinson argued that JIH should have been accorded anonymity, either on the basis of the position as it was as at the first hearing before Tugendhat J, or in view of the publicity which occurred thereafter. Mr Spearman presented the case for the defendant to the contrary with commendable restraint, bearing in mind, on the one hand, that his client had agreed the order for anonymity, and, on the other hand, that he wished to give the court all the assistance that he could. The case against anonymity was supported by written submissions from Ms Gillian Phillips, Director of Legal Services of Guardian News and Media, and from Mr Marcus Partington on behalf of the Media Lawyers Association.

Open justice and the need for restraint

19 The cardinal importance of open justice is demonstrated by what is stated in article 6 of the Convention. But it has long been a feature of the common law. It was famously articulated in the speeches in *Scott v Scott* [1913] AC 417—see particularly at [1913] AC 417, 438, 463 and 477, per Viscount Haldane LC, Lord Atkinson, and Lord Shaw of Dunfermline respectively. The point was perhaps most pithily made by Lord Atkinson when he said "in public trial is to be found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means

for winning for it public confidence and respect". For a more recent affirmation of the principle, see *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2) (Guardian News and Media Ltd intervening)* [2011] QB 218, paras 38–42, per Lord Judge CJ.

20 However, as with almost all fundamental principles, the open justice rule is not absolute: as is clear from article 6, there will be individual cases, even types of cases, where it has to be qualified. In a case involving the grant of an injunction to restrain the publication of allegedly private information, it is, as I have indicated, rightly common ground that, where the court concludes that it is right to grant an injunction (whether on an interim or final basis) restraining the publication of private information, the court may then have to consider how far it is necessary to impose restrictions on the reporting of the proceedings in order not to deprive the injunction of its effect.

21 In a case such as this, where the protection sought by the claimant is an anonymity order or other restraint on publication of details of a case which are normally in the public domain, certain principles were identified by the judge, and which, together with principles contained in valuable written observations to which I have referred, I would summarise as follows: (1) The general rule is that the names of the parties to an action are included in orders and judgments of the court. (2) There is no general exception for cases where private matters are in issue. (3) An order for anonymity or any other order restraining the publication of the normally reportable details of a case is a derogation from the principle of open justice and an interference with the article 10 rights of the public at large. (4) Accordingly, where the court is asked to make any such order, it should only do so after closely scrutinising the application, and considering whether a degree of restraint on publication is necessary, and, if it is, whether there is any less restrictive or more acceptable alternative than that which is sought. (5) Where the court is asked to restrain the publication of the names of the parties and/or the subject matter of the claim, on the ground that such restraint is necessary under article 8, the question is whether there is sufficient general, public interest in publishing a report of the proceedings which identifies a party and/or the normally reportable details to justify any resulting curtailment of his right and his family's right to respect for their private and family life. (6) On any such application, no special treatment should be accorded to public figures or celebrities: in principle, they are entitled to the same protection as others, no more and no less. (7) An order for anonymity or for reporting restrictions should not be made simply because the parties consent: parties cannot waive the rights of the public. (8) An anonymity order or any other order restraining publication made by a judge at an interlocutory stage of an injunction application does not last for the duration of the proceedings but must be reviewed at the return date. (9) Whether or not an anonymity order or an order restraining publication of normally reportable details is made, then, at least where a judgment is or would normally be given, a publicly available judgment should normally be given, and a copy of the consequential court order should also be publicly available, although some editing of the judgment or order may be necessary. (10) Notice of any hearing should be given to the defendant unless there is a good reason not to do so, in which case the court should be told of the absence of notice and the reason for it, and should be satisfied that the reason is a good one.

22 Where, as here, the basis for any claimed restriction on publication ultimately rests on a judicial assessment, it is therefore essential that (a) the judge is first satisfied that the facts and circumstances of the case are sufficiently strong to justify encroaching on the open justice rule by restricting the extent to which the proceedings can be reported, and (b) if so, the judge ensures that the restrictions on publication are fashioned so as to satisfy the need for the encroachment in a way which minimises the extent of any restrictions.

23 In the present case, as in many cases where the court grants an injunction restraining publication of information, the claimant's case as to why there is a need

for restraints on publication of aspects of the proceedings themselves which can normally be published is simple and cogent. If the media could publish the name of the claimant and the substance of the information which he is seeking to exclude from the public domain (i e what would normally be information of absolutely central significance in any story about the case—who is seeking what), then the whole purpose of the injunction would be undermined, and the claimant's private life may be unlawfully exposed.

24 In the course of his judgment [2010] EWHC 2818 at [8] and [9], Tugendhat J accepted the proposition advanced before him by Mr Tomlinson for JIH that:

> "Where the court has accepted that the publication of private information should be restrained, if the court is to avoid disclosing the information in question it must proceed in one of two alternative ways: (1) If its public judgment or order directly or indirectly discloses the nature of the information in question then it should be anonymised; (2) If the claimant is named in the public judgment or order then the information should not be directly or indirectly identified."

25 While that is not an unfair assessment in the present case, in other cases the position will sometimes be a little less stark. However, in any case, it is plainly correct that, where the court permits the identity of the claimant to be revealed, it is hard to envisage circumstances where that would not mean that significantly less other information about the proceedings could be published than if the proceedings were anonymised. Thus, if the identity of JIH could be published in the context of the present proceedings, it would not be appropriate to permit the publication of even the relatively exiguous information contained in paras 7–9 above. As the judge went on to say, the obvious corollary is that, if the claimant is accorded anonymisation, it will almost always be appropriate to permit more details of the proceedings to be published than if the claimant is identified.

The reasoning of Tugendhat J in this case

26 The judge gave a full and careful judgment on 5 November 2010, in which he concluded that anonymity should not be accorded to JIH. While that decision did not involve the exercise of a discretion, it involved a balancing exercise, with which, at least as a matter of general principle, an appellate court should be slow to interfere. When considering an appeal against such a decision, an appellate court is normally exercising a reviewing function, and should not allow the appeal unless satisfied that the judge was wrong. As I said in *Flood v Times Newspapers Ltd* [2011] 1 WLR 153, para 49, "Where the determination is a matter of balance and proportionality, it is, generally speaking, difficult for an appellant to establish that the judge has gone wrong". All the more so, where, as here, the judge is very respected and highly experienced in the particular area of practice, and has given the issue very careful consideration.

27 However, in this particular case, I am satisfied that, owing to a misunderstanding or an oversight, the judge's decision cannot stand. As he pointed out, the draft order was too restrictive in the extent to which it prevented the reporting of these proceedings. And, it should be added, it was only because of Tugendhat J's vigilance that this point was identified: had he not read and considered the draft order when it was sent to him for approval, and had he simply approved it, this point would have gone by default.

28 As the judge held, the draft order was too restrictive in that it both gave JIH anonymity and prevented the reporting of any aspect of the evidence. As explained above, it is clear that, if anonymity was refused, so that JIH was identified in the media, the information contained in paras 7–9 above could not also be published. However, if anonymity was granted, it seems equally clear that that information could be published, without undermining the purpose of the injunction. So the judge was right in concluding that the choice to be made was between revealing the identity

of JIH or revealing the general nature of the information which he was seeking to keep private.

29 The judge's decision to opt for revealing JIH's identity, rather than revealing the general nature of the information sought to be protected, was based on the propositions that (a) it was common ground between the parties, as demonstrated by the draft order, that the general nature of the information should not be revealed, and (b) it had not been submitted on behalf of JIH that this should be reconsidered. Accordingly, as even the general nature of the information was not to be published, it followed that JIH's identity should not be withheld from the public, given that restrictions on reporting should always be kept to a minimum. That this was the reasoning of the judge is clear from what he said [2010] EWHC 2818 at [63]; [2010] EWHC 2979 at [18].

30 In my view, this approach was, on analysis, erroneous, although I understand how the error arose. Once the judge had, rightly, called for argument as to the terms of the draft order so far as reporting restrictions were concerned, all aspects of the draft order in that connection were up for consideration. Furthermore, although Mr Spearman's analysis of JIH's skeleton argument below has established how it might have been understood otherwise, and the point appears to have been made only relatively briefly in oral submission, I am satisfied that Mr Tomlinson did argue below that, if the restrictions in the draft order on reporting this case were to be reduced, it was the general details of the story which should be reportable in the media, and JIH's anonymity should be retained.

31 Accordingly, the judge reached his conclusion in his judgment on a mistaken basis. In my view, we should therefore give JIH permission to appeal, and, as indicated when the application was listed for hearing, we should go ahead and decide the appeal. Furthermore, I consider that, rather than sending the case back, which would incur further delay and cost, we should decide the issue ourselves; indeed, the parties did not suggest otherwise.

Discussion

32 As I have explained, the choice we face is either permitting JIH to be identified or permitting all the information contained in this judgment, and in particular in paras 7–9 above, to be published. I have reached the conclusion that, on the facts of this case, it would be right to accede to JIH's claim for anonymisation, and that, as a result, the information contained in this judgment (but no other information about the facts about or giving rise to the case, at least if they could assist in JIH being identified) can be published.

33 If the identity of JIH is revealed, then the only details of the case which it would be realistically possible to permit to be published, would be the fact that he is seeking a permanent injunction, and has obtained an interlocutory injunction, to restrain *The Sun* from publishing information about him which he contends is of a private nature. At least on the face of it, there is obvious force in the contention that the public interest would be better served by publication of the fact that the court has granted an injunction to an anonymous well known sportsman, in the circumstances described in paras 7–9 above, than by being told that it has granted an injunction to an identified person to restrain publication of unspecified information of an allegedly private nature.

34 In *In re Guardian News and Media Ltd* [2010] 2 AC 697, para 22, Lord Rodger of Earlsferry JSC referred to the "recent efflorescence of anonymity orders", although it is right to emphasise that this was in a rather different context from the present type of case. There is a belief in some quarters that there may be no way of assessing the extent to which, and the circumstances in which, the courts are granting orders preventing the publication of allegedly private or otherwise confidential information, because of the inclusion of reporting restrictions in such orders. There may be nothing in that belief, but in recent years there has been an increase in the

number of such orders, which itself gives rise to concern, as does the fact that the belief is understandable. A

35 The concern would, I think, be substantially met if courts comply with the principle that judgments and orders are made available as mentioned in para 21(9) above, and those judgments and orders disclose as much as possible about the case. More particularly, there is much in the point that the media will be generally better able to discover, and report on, what the courts are doing if they can publish (a) details of the type of case (for instance, as in this case, a sexual liaison between B an unidentified well known sportsman, in an apparently monogamous relationship, and a third party) rather than (b) the name of the individual who is seeking to protect an unspecified aspect of his or her alleged private life by means of an injunction. As Mr Tomlinson puts it, the former information would normally enable the public to have a much better idea of why the court acted as it did than the latter information.

36 Having said that, I acknowledge the importance of being able to name JIH as C the claimant. As Lord Rodger JSC famously said, in the *Guardian* case [2010] 2 AC 697, para 63, "What's in a name? 'A lot' the press would answer". Two paragraphs on, he explained that "if newspapers can identify the people concerned, they may be able to give a more vivid and compelling account which will stimulate discussion". And he went on to say that "Concealing . . . identities simply casts a shadow over entire communities". However, as Mr Tomlinson says, that was said in a context where there was no question but that the nature of the allegations and D contents of the court order could be freely published. Unlike the present case, Lord Rodger was not concerned with a trade-off between revealing the identity of a party and publishing the substance of the allegations and order. None the less, the judgment vividly illustrates the importance of being able to identify, and put a name to, parties to litigation which is potentially of interest to the public.

37 It is not, of course, for the media to dictate to the courts whether an anonymity order, or some other sort of order, is appropriate. However, as E Mr Spearman points out, if a story is of less interest to the media and the public, it is less likely to be reported or read, and media reporting "contribut[es] to any debate of general interest": per the European Court of Human Rights in *Von Hannover v Germany* (2004) 40 EHRR 1, para 65.

38 There are other arguments. An anonymity order runs the risk of unintentionally encouraging suspicion and gossip in relation to innocent third parties. In the present case, as even a casual inspection of blog and twitter sites would F reveal, vouchsafing the fact that the injunction was granted at the request of a well known sportsman may well lead to suspicions or allegations against well known people other than JIH. On the other hand, it is true that, at least in many cases, identification of the claimant will be more likely to result in public speculation, or even deduction by journalists or members of the public, as to the nature of the information which he is trying to keep out of the public domain. Indeed, there is something in the point that such speculation could be even more damaging to JIH than if no injunction had been granted at all. G

39 As I have already emphasised, when deciding on questions of this sort, each case will turn on its own facts. Accordingly, it is not appropriate to suggest that there is some sort of general rule that anonymisation is more, or indeed less, likely to result in greater interference with free speech and maintaining public scrutiny of the courts than precluding the publication of more extensive information about the proceedings.

40 In this case, I consider that the crucial factor is the previous story about JIH's H alleged liaison with YY, which had already been published, without JIH's prior knowledge or permission. That earlier story involved a very similar allegation about JIH to that which the defendant was proposing to publish as a result of ZZ's allegations. If we permitted JIH's identity to be revealed without permitting the nature of the information of which he is seeking to restrain to be published, then it

would none the less be relatively easy for the media and members of the public to deduce the nature of that information: it would be a classic, if not very difficult, jigsaw exercise. It is true that the very fact that this decision means that we are revealing that JIH is a person about whose alleged sexual activity a previous story has been published, and that this will immediately narrow the field for those seeking to identify him, but, in my view, that point is of limited force: there have been quite a few stories of this nature relating to different well known people published in the printed and electronic media in the past two or three years.

41 Given that I consider that, in the absence of the point just discussed, the argument would, from the point of view of the defendant, be at best very finely balanced, it follows that I conclude that JIH is entitled to retain anonymity in connection with these proceedings—until trial or further order in the meantime.

Conclusion

42 For these reasons, I would allow JIH's appeal against the order of 5 November 2010 to the extent that I would direct that he is to be granted anonymity in connection with these proceedings until trial or further order. I would also direct that the extent to which the facts of, and individuals involved in, this case can be reported is limited to the facts and matters in this judgment and the two judgments of Tugendhat J. It is therefore unnecessary to consider JIH's appeal against the judgment of 18 November 2010, but it is right to record that, had I decided to uphold the decision of 5 November, I would have upheld the decision of 18 November. If the judge had been right to conclude on 5 November that anonymity should be refused, he was well within the margin of discretion available to him to decide that the events subsequent to that date did not justify going back on that conclusion.

MAURICE KAY LJ

43 I agree.

SMITH LJ

44 I also agree.

Appeal allowed.
Order for anonymity granted to claimant.
Costs reserved to trial judge.

SUSAN DENNY, Barrister

TC07226

PROCEDURE – application for anonymity – mental health issues – risk of reputational damage – application REFUSED – this decision anonymised to give appellant choice whether to proceed with appeal and/or seek permission to appeal this decision

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: xxxxx

BETWEEN

JK **Appellant**

-and-

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: JUDGE BARBARA MOSEDALE

Decided on the papers after an application made by the appellant in person

DECISION

INTRODUCTION

1. The appellant applied to the Tribunal on 25 May 2018 for permission to lodge a late appeal with HMRC against 7 assessments spanning the tax years 2003/4-2009/10 which were all dated 22 May 2012 but which he did not seek to appeal until 8 July 2014, and which appeal by letter dated 31 July 2014 HMRC refused to accept on the grounds that he did not have a reasonable excuse for the late lodging of it.

2. The hearing originally called to hear the application was adjourned; the Tribunal is in the process of re-listing the hearing. On 5 March 2019, the appellant made an application for the case to be heard 'anonymously on the advice of the appellant's police safeguarding team'. No further explanation was given, although the Tribunal was provided with a copy of a psychiatric report on the appellant dated 11 February 2019.

3. By letter dated 4 April 2019, the Tribunal gave the appellant the opportunity to say more about his application for anonymity and drew to his attention the need to establish solid grounds for anonymisation. The Tribunal also drew his attention to the recent case of *Zeromsky-Smith v United Lincolnshire Hospitals NHS Trust* [2019] EWHC 552 on the basis that, while factually very different, it contained an informative discussion the principles courts and tribunals would take into account when deciding an application for anonymisation.

4. By letter dated 23 April 2019, the appellant provided further but still brief grounds in support of his application for anonymity. By letter dated 17 April, HMRC had already said that they remained neutral in the application.

GROUNDS OF THE APPLICATION

5. The grounds the appellant put forward to support his application for anonymisation were as follows:

(1) HMRC did not object to the application;

(2) Case-law such as *Zeromsky-Smith* was irrelevant as, unlike the appellant in that case, he was not suing for damages;

(3) He relied on his mental health as grounds in his application to be allowed to appeal out of time, but publication of details of his mental health might cause reputational damage to his business;

(4) Discussion of his mental health would inevitably result in references to his previous criminal behaviour and thus have 'safeguarding' issues for him;

(5) Case-law such as my decision in *The Appellant* [2016] UKFTT 839 (TC) supported anonymisation of cases where mental health issues were concerned.

MY APPROACH TO THE FACTS IN THIS APPLICATION

6. The grounds of the appellant's application for anonymity are closely allied to his grounds for seeking permission to appeal out of time and that is his case that he has a life-long mental disorder and in particular hyperkinetic disorder, more commonly referred to as attention deficit hyperactivity disorder or ADHD for short.

7. The first procedural question I have to address is when to make a decision on the application for anonymity in an appeal in circumstances when the evidence relied on is also the evidence to be relied on in the substantive issue in the hearing. On the one hand, it is inappropriate and unfair for me to make findings of fact relevant to the question of whether

he should be allowed to lodge his appeal late before the hearing of that issue takes place, while, on the other hand, the question of whether that hearing should be in private really needs to be decided in advance. It needs to be decided in advance as the Tribunal will need to know whether members of the public must be excluded and it is fairest if the appellant himself knows whether the hearing will be in public before it takes place.

8. I have therefore decided to proceed on the basis that, for the purpose of this application for anonymisation only, I will proceed on the assumption that the appellant can prove all that he claims about his mental condition. If, having made those assumptions, I do not consider anonymisation justified then I will refuse the application and the parties will know in advance that the hearing of the late appeal application will not be in private and the decision after the hearing will be published referring to the appellant by name. If, however, having made those assumptions, I would be minded to grant anonymisation, it seems to me that the only fair way of proceeding would be to hold the hearing in private at which both the application for anonymisation and late appeal would be decided on the basis of the facts as actually found and not assumed. Then, if the anonymisation application failed at the hearing, the decision recording the outcome of the appeal would be published naming the appellant.

9. Having decided to precede in making this determination about anonymisation on the basis of assumed facts, what are those assumed facts? The assumed facts are as follows:

(1) The appellant suffers from ADHD. It is a condition which has affected him since birth, making him restless, impulsive, disorganised and have difficulties with concentration. He has poor memory and is easily distracted when working.

(2) His professional career was in giving tax and accountancy advice, first in HMRC and then in professional firms. His ADHD made it difficult for him to hold down employment and he became self-employed in around 2004.

(3) Due to his ADHD, he has a personality that is prone to addiction and in the period 2009-12 he engaged in substance abuse; he took cocaine and drank up to a bottle of gin per day. He considered that in the past he also had an addiction to sex, and at some point he was convicted of an offence relating to pornography for which he was given two years' probation and a Sexual Offences Prevention Order.

(4) He was diagnosed with ADHD in 2017. Since then, he has been on medication which makes the symptoms less severe and he is now less distracted and less disorganised and more able to run his tax/accountancy business effectively.

10. As I have said, I have only assumed these facts for the purpose of this determination. They remain unproved and would have to be proved at the hearing of the late appeal application if the appellant wishes to rely on them. Whether the facts as alleged would be sufficient for him to be successful at the hearing of his late appeal application is something that must also be left to that hearing.

11. I move on to consider the law relating to anonymisation of judicial hearings and decisions.

THE LAW

12. The rules of the High Court (CPR) do not bind this Tribunal but they are a guide to how it should exercise its discretion. It seems to me that the rules in the CPR on anonymisation of decisions are a good guide. High Court case law makes clear the importance of open justice:

> 'The hearing of a case in public may be, and often is, no doubt, painful, humiliating or deterrent both to parties and to witnesses, ….but all this is tolerated and endured, because it is felt that in public trial is to found, on the

> whole, the best security for the pure, impartial and efficient administration of justice, the best means for winning for it public confidence and respect.'
>
> Per Lord Atkinson in *Scott v Scott* [1913] AC 417

13. Having said that, the courts have always recognised that that in some circumstances, in order to truly administer justice, anonymity has to be granted. So cases involving the insane or children, or cases where publication of the subject matter would defeat the purpose of the litigation, have been held in private and/or anonymised. The CPR expressly recognise the case law on this by authorising anonymisation where:

> (d) a private hearing is necessary to protect the interests of any child or protected party; or … (g) the court considers this to be necessary in the interests of justice. (CPR 39.2(3))

14. The appellant is not the first to suggest that open justice is still served if the decision is published but the claimant's name anonymised. This was considered in *In re Guardian News and Media Ltd* [2010] 2 AC 697 where Lord Rodger stated (§§63-65) that freedom of the press and open justice required the names of all parties to be public because the public find stories about real individuals more interesting than bland decisions from which identifying information is removed.

15. And, as I have said, this Tribunal has applied a similar test to that in the Courts. In *In Re Mr A* [2012] UKFTT 541 (TC) – later republished as *Moyles)*, the Tribunal said:

> There is an obvious public interest in its being clear that the tax system is being operated even-handedly, an interest which would be compromised if hearings before this Tribunal were in private save in the most compelling of circumstances.

16. Applications have been refused by this Tribunal where a celebrity risked reputational damage (*Moyles,* above, and *Martin Clunes* [2017] UKFTT 204 (TC)*),* and where a professional risked being barred by his professional body (*Chan* [2014] UKFTT 256 (TC)*)* and where a doctor wanted to keep her private tax affairs confidential from her patients (*In Re Banerjee* [2009] EWHC 1229 (Ch)). In that last case, Henderson J said:

> "[34] … In my opinion any taxpayer has a reasonable expectation of privacy in relation to his or her financial and fiscal affairs, and it is important that this basic principle should not be whittled away. However, the principle of public justice is a very potent one, for reasons which are too obvious to need recitation, and in my judgment it will only be in truly exceptional circumstances that a taxpayer's rights to privacy and confidentiality could properly prevail in the balancing exercise that the court has to perform.
>
> [35] …taxation always has been, and probably always will be, a subject of particular sensitivity both for the citizen and for the executive arm of government. It is an area where public and private interests intersect, if not collide; and for that reason there is nearly always a wider public interest potentially involved in even the most mundane seeming tax dispute. …. in tax cases the public interest generally requires the precise facts relevant to the decision to be a matter of public record, and not to be more or less heavily veiled by a process of redaction or anonymisation. The inevitable degree of intrusion into the taxpayer's privacy which this involves is, in all normal circumstances, the price which has to be paid for the resolution of tax disputes through a system of open justice rather than by administrative fiat."

17. The appellant referred me to my own decision in *The Appellant* [2016] UKFTT 839 (TC) where I ordered anonymity as the taxpayer was a paranoid schizophrenic, saying at [16]:

> …..While it is in the interests of justice being seen to be done that decisions are not ordinarily anonymised, in this case I considered that the appellant's illness was an exceptional circumstance. This was because mental illness should not be a bar to challenging HMRC decisions, so it is right to grant anonymization of this decision, so other litigants with mental illness are not discouraged from appealing.

18. On reflection, however, it seems to me that in light of the above binding authorities such as *Scott v Scott* (above), while my decision to grant anonymity in that case was correct, the reasoning ought to have been better expressed. In particular, it is clear from the citation above from *Scott v Scott* that the mere fact that holding the hearing in public and/or publishing the decision might deter would-be litigants from litigation is not enough to justify anonymisation. The test is whether anonymisation is necessary for justice to be done. So if the harm from publication is likely to be sufficiently serious such that a litigant would not realistically be able to assert his or her rights then it can be said that anonymisation is necessary for justice. For instance, asylum seekers might be granted anonymity in immigration tribunal hearings where the Tribunal considers there is a real risk of serious reprisals against the asylum seeker or his family back in the country from which the litigant seeks asylum.

19. The special position which justifies anonymisation for underage or insane litigants may in part be to ensure that they are not discouraged from litigation but also appears to be on the basis that actions taken as children or while insane should not be known about them or held against them when adult or restored to mental health. It seems to me that children and the insane are in a special position because their decision making is impaired by reason of their disability; they cannot be regarded as responsible adult human beings. The same protection is not routinely justified for adults who are not insane.

Summary of the law

20. To justify anonymity the appellant would have to satisfy me that it was necessary for the proper administration of justice. That means I would have to be satisfied that, despite the very real need for justice to be seen to be done, justice could not be done if it was done in public in this particular case. While the category of cases where this is true is not closed, most cases where anonymity has been granted could be summarised as cases where the risk of harm to the litigant from publication was very significant such that justice could not be done if done in public.

CONSIDERATION OF THE APPELLANT'S CASE FOR ANONYMITY

21. As I set out above, the appellant put forward five reasons for anonymity and I will deal with each but not in the same order as given by the appellant.

HMRC did not object to the application?

22. It must be the case that HMRC's failure to object to the application does not in law support the application. HMRC's neutrality is to be expected: they have nothing to gain or lose if the application is allowed. But it certainly does not mean that the application will be nodded through (see [21] of *Zeromska-Smith)*.

23. While HMRC might be neutral, the public at large might have objections: the Tribunal is established to administer justice and justice must not only be done, but be seen to be done.

The public at large cannot voice objections but, as stated in *Zeromska-Smith,* the Press Association, as a proxy for the public, can voice objections if made aware of the application. I would need to consider making the Press Association aware of this application if I was minded to grant it.

The applicability of *Zeromska-Smith*?

24. I dismiss the appellant's second objection, which was that *Zeromska-Smith* was irrelevant as it concerned a claim for damages; the appellant was told when the case was drawn to his attention that it was being pointed out to him for the legal principles it contained and not because of any similarly in the nature of the legal proceedings. On the contrary, I find the decision a useful summary of the case law and in that sense relevant to this application.

Mental illness?

25. There is a category of person knowledge of whose condition is normally kept from the public. It clearly encompasses the insane or those suffering with certain mental illness. But whether this protection should extend to more minor mental illness or to what are referred to as personality disorders or other non-neuro-typical behaviours should be determined by reference to the reason why the protection is given.

26. My conclusion at §19 above is that the special protection is given to those who cannot, by reasons of age or mental disability or disturbance, be regarded as responsible adult human beings.

27. And it seems to me that the appellant cannot claim protection on these grounds. While I am making the assumption that he can prove that he suffers from ADHD and is prone to addiction, and that this impacts on his behaviour, it is also his case that he can function as an adult and can run a business.

28. It may be difficult if not impossible to draw the line between certain non-neuro typical personalities, behaviours disorders and illnesses which do not of themselves justify the protection of anonymity and others which do, but I am clear that on the appellant's own description of his situation he has not crossed that line.

29. He relies on my decision in *The Appellant* concerning a paranoid schizophrenic. But paranoid schizophrenia is a serious mental illness that on the evidence in that case meant the appellant could not function as a responsible adult. While it was true that by some means or another she was able to let property which she had acquired before her illness incapacitated her from earning her living, it was also true that she did not act as a responsible adult (see [26]), apparently regularly and unjustifiably complaining to the police about her tenants, behaviour which was against her own interests as a landlord and quite likely in breach of the tenancy agreement (see [24]). She also lacked insight into her own mental condition (see [19]) and even in the hearing demonstrated irrational behaviour driven by her paranoia (see [17]-[19]).

30. While it is true that the appellant's case in this appeal, which I assume to be true for the purpose of this decision, is that his ADHD and addictions means that he does not always act in his own long-term best interests, it is also his position that he is capable of and does run a successful business. He is also clearly capable of recognising the shortcomings in his behaviour. The degree of his impairment, even on his own case, is much less than that of a paranoid schizophrenic and in my mind has clearly not crossed the line to justifying anonymity as being a person who should be protected by reason of incapacity.

Risk of harm to reputation

31. The second related ground put forward by the appellant was that public knowledge of his ADHD and other behaviour issues risks reputational damage for his business, such that it might mean his right of appeal would in practice be difficult to exercise: defending the appeal risks jeopardising his livelihood.

32. I reject that as a ground justifying anonymity. While I accept that in the case of asylum seekers referred to at §18 above anonymity can be justified because the right of appeal is impossible to exercise without real risk of serious physical harm, the case law also makes clear that risk of reputational damage does not fall into that same category. See the citation from *Scott v Scott* and the cases referred to at §16 above.

33. Indeed, it might be said that justice positively requires the hearing to be in public. And that is because justice requires that the courts do not, and are not seen to be, assisting the appellant in putting forward inconsistent images of himself. On the one hand, it is his case that his ADHD is both the cause and excuse for his failure to file his own tax returns; while on the other hand, he does not desire his clients and potential clients to know of his ADHD as it may make them doubt his ability as a tax adviser.

34. Having said that, the appellant's position here is probably more nuanced. His position is that his ADHD *in the past* was the cause and the excuse for his failure to file his own tax returns in the years and lodge a timely appeal: it is his position that now, on the prescribed medication, he is capable of running a tax advisory service.

35. But, on reflection, I do not think that it makes a difference to the application: reputational damage would not usually justify anonymity and that is particularly so when, even on the appellant's case, he is putting forward a seeming paradox (which he may be able to explain) of claiming an impairment in dealing with his own tax affairs while (at least to some extent) it appears at the same time he was holding himself out as able to deal with other persons' tax affairs.

Risk of harm - safeguarding issues

36. The appellant does not make clear what he means by 'safeguarding' issues. I can only assume he means that he does not want it known that he has had addiction issues and a criminal conviction in his past because of the concern that criminals might use the information against him, such as trying to sell him drugs again or blackmail him over his conviction.

37. However, that risk will always be there to a greater or lesser extent in any case where a litigant has a history that is an embarrassment to him- or herself. It is clear from *Scott v Scott* that is insufficient reason for the decision to be anonymised.

38. Nevertheless, it seems to me that that risk does justify the tribunal withholding the appellant's contact details: in practice it would be rare indeed for the contact details for an appellant to be included in a decision notice and I am quite prepared to order that they should not be published in this appeal. The appellant's contact details are, so far as I can see, quite irrelevant to the case and there would be no reason to publish them in any event. Private addresses are sometimes referred to in a hearing so I am also prepared to order in this case that the appellant's contact details should not be referred to in open court and should be redacted from any documents to which the public would have access.

39. Withholding the appellant's contact details minimises the risk of contact from strangers while at the same time does not compromise the principle that justice should be seen to be done.

DECISION

40. I refuse the application for anonymity. I do not consider it justified on any grounds put forward by the appellant. It seems to me that the appellant now has the choice referred to by Lord Atkinson in *Scott v Scott*. He may pursue his appeal in public with the consequent risk of reputational damage if in his appeal he relies on his diagnosis, or he may choose not to pursue the appeal. (If he goes ahead with the proceedings, I would make the order to keep his contact details private as set out in §38.)

41. Nevertheless, I am anonymising this decision on the anonymisation application. That is for two reasons.

42. Firstly, I have said that the appellant should be given the choice: pursue his appeal in public, or withdraw it. It is for him to make that decision. I am not going to make that an empty choice by publishing this decision under his name.

43. Secondly, in any event, he may (as explained below) seek permission to appeal this decision: I will not prejudge any application for permission to appeal nor render it nugatory by publishing his name at this point.

44. The best way of implementing this limited anonymity seems to me to be as follows: this decision will be anonymised. If the appellant pursues his application for permission to make a late appeal and does not successfully apply to appeal my refusal of anonymisation, the Tribunal's hearing of his late appeal application will take place in public and the resulting decision, if published, will be published without anonymity.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

45. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 27 JUNE 2019

Supreme Court

*Regina (OWD Ltd (trading as Birmingham Cash & Carry) (in liquidation)) *v* Revenue and Customs Commissioners

Regina (Hollandwest Ltd and another) *v* Revenue and Customs Commissioners

[On appeal from Regina (ABC Ltd) v Revenue and Customs Commissioners]

[2019] UKSC 30

2018 July 12;
2019 June 19

Lord Reed DPSC, Lady Black, Lord Briggs JJSC, Lord Sumption, Lord Hughes

Revenue — Customs and excise — Alcohol duty — Revenue refusing to grant trader approval to sell controlled liquor wholesale — Whether revenue having power to grant trader temporary approval pending appeal — Alcoholic Liquor and Duties Act 1979 (c 4), s 88C[1] *(as inserted by Finance Act 2015 (c 11), s 54) — Commissioners for Revenue and Customs Act 2005 (c 11), s 9*[2]

Injunction — Interim — Restraint of decision pending appeal — Revenue refusing to grant trader approval to sell controlled liquor wholesale — Whether High Court having jurisdiction to grant interim relief pending appeal — Senior Courts Act 1981 (c 54), s 37[3]

The three claimant companies carried on business as wholesalers of alcohol. In each case the revenue refused the claimant's application for approval under section 88C of the Alcoholic Liquor Duties Act 1979, as inserted, to sell controlled liquor wholesale on the grounds that it was not a fit and proper person to carry on that activity. The claimants appealed to the First-tier Tribunal and, since the tribunal had no power to grant interim relief to enable them to continue to trade lawfully pending their appeals, applied to the revenue for temporary approval pending the appeals. The revenue refused to grant such approval on the grounds that it had no power to do so. The claimants sought judicial review of that refusal, contending that the revenue was empowered to grant the approval sought, if not under section 88C of the 1979 Act, then pursuant to its ancillary powers under section 9(1) of the Commissioners for Revenue and Customs Act 2005. In each case the judge refused to grant permission to proceed with the claim for judicial review. The Court of Appeal granted permission to proceed and allowed the claimants' claims, concluding that the revenue did have power, under section 88C of the 1979 Act, to permit temporary trading pending appeal, although it had no such power under section 9 of the 2005 Act. Accordingly it remitted the matter to the revenue for reconsideration under section 88C. The revenue appealed the decision on section 88C of the 1979 Act and the claimants appealed the decision on section 9 of the 2005 Act.

On the appeals—

Held, (1), allowing the revenue's appeal, that, under section 88C(3) of the Alcoholic Liquor Duties Act 1979, the revenue had power to allow a wholesaler to continue trading in alcohol for a limited period or under conditions or restrictions if satisfied that the wholesaler was a fit and proper person to do so; but that, pursuant to section 88C(2), if the revenue was not so satisfied it had no power to allow the

[1] Alcoholic Liquor Duties Act 1979, s 88C, as inserted: see post, para 12.
[2] Commissioners for Revenue and Customs Act 2005, s 9(1): see post, para 28.
[3] Senior Courts Act 1981, s 37(1): "The High Court may by order (whether interlocutory or final) grant an injunction . . . in all cases in which it appears to the court to be just and convenient to do so."

A wholesaler to continue trading, regardless of any conditions or time limit which could be imposed; and that, accordingly, since the revenue had concluded that the claimants were not such fit and proper persons it had no power under section 88C to authorise the claimants to continue to trade on a temporary basis pending their appeal to the First-tier Tribunal (post, paras 38, 40–41, 74, 76).

(2) Dismissing the claimants' appeal, that section 9 of the Commissioners for Revenue and Customs Act 2005 concerned ancillary powers which were "necessary B or expedient" in connection with the revenue's exercise of their functions, or "incidental or conducive to" that exercise, not ancillary powers which undermined or contradicted those functions; that if recourse could be had to those powers as a means of providing an alternative route to time limited approval for alcohol wholesalers, supplementing the provisions of section 88C of the 1979 Act, it would not only contradict the terms of section 88C itself but undermine the entire scheme of section 88C in that the revenue would be appearing to hold someone as a fit and C proper person to sell alcohol wholesale when they had formed the opposite view; that the fact that the revenue's decision under section 88C was subject to an appeal did not alter that conclusion; and that, accordingly, the revenue had no power, under section 9 of the 2005 Act, to authorise the claimants to continue trading pending their appeal to the First-tier Tribunal (post, paras 45–49, 75, 76).

Per Lord Hughes and Lord Sumption. The scheme introduced by section 88C of the 1979 Act may potentially be incompatible with the rights, under articles 6 and 13 of the Convention on the Protection of Human Rights and Fundamental Freedoms, of D an existing trader who has been refused registration if his right of appeal to the First-tier Tribunal is rendered illusory or nugatory because he is forced out of business before a good case on appeal can be determined. Those responsible for legislation may wish to consider giving either the First-tier Tribunal or the High Court a limited power to impose a stay pending appeal in defined circumstances (post, paras 77–78).

Quaere. Whether the High Court has jurisdiction to issue a mandatory injunction under section 37 of the Senior Courts Act 1981, ordering the revenue to E authorise a wholesaler to continue trading in alcohol pending an appeal, when to do so would require the revenue to regard the wholesaler as a fit and proper person to trade in alcohol in circumstances where, pursuant to its determination under section 88C of the 1979 Act, the revenue did not so regard the wholesaler (post, paras 70–71, 76).

Decision of the Court of Appeal [2017] EWCA Civ 956; [2018] 1 WLR 1205 reversed in part. F

The following cases are referred to in the judgment of Lady Black JSC:

Airey v Ireland CE:ECHR:1979:1009JUD000628973; 2 EHRR 305
CC & C Ltd v Revenue and Customs Comrs [2014] EWCA Civ 1653; [2015] 1 WLR 4043, CA
Harley Development Inc v Comr of Inland Revenue [1996] 1 WLR 727, PC
Hazell v Hammersmith and Fulham London Borough Council [1992] 2 AC 1; [1991] G 2 WLR 372; [1991] 1 All ER 545, HL(E)
R (Wilkinson) v Inland Revenue Comrs [2005] UKHL 30; [2005] 1 WLR 1718; [2006] 1 All ER 529; [2006] STC 270, HL(E)
Tre Traktörer AB v Sweden CE:ECHR:1989:0707JUD001087384; 13 EHRR 309

The following additional cases were cited in argument:

H *Corbelli v Revenue and Customs Comrs* [2017] UKFTT 615 (TC)
J P Whitter (Water Well Engineers) Ltd v Revenue and Customs Comrs [2018] UKSC 31; [2018] 1 WLR 3117; [2018] 4 All ER 95; [2018] STC 1394, SC(E)
R (Public Law Project) v Lord Chancellor (Office of the Children's Comr intervening) [2016] UKSC 39; [2016] AC 1531; [2016] 3 WLR 387; [2017] 2 All ER 423, SC(E)
Revenue and Customs Comrs v Smart Price Midlands Ltd [2017] UKUT 465 (TCC)

APPEAL from the Court of Appeal

By a claim form filed on 10 February 2017 the claimant wholesaler, OWD Ltd (trading as Birmingham Cash & Carry) (in liquidation), sought judicial review by way of (i) an order to quash the decision of the Revenue and Customs Commissioners on 22 December 2016 to refuse its application for temporary authorisation to continue trading pending the outcome of its appeal against the revenue's decision on 14 December 2016 to refuse approval of the claimant as a wholesaler of alcohol under section 88C of the Alcoholic Liquor Duties Act 1979, as inserted, and (ii) interim injunctive relief. By an order dated 14 February 2017 William Davies J [2017] EWHC 814 (Admin) refused to grant the claimant permission to proceed with the claim and interim injunctive relief. By an appellant's notice filed on 15 February 2017 the claimant appealed. By an order dated 29 March 2017 the Court of Appeal (Thirlwall LJ) granted the claimant (i) permission to appeal against the judge's refusal to grant the interim injunctive relief sought, (ii) permission to proceed with its claim for judicial review which it directed to be determined by the Court of Appeal, and (iii) an interim injunction to maintain the claimant's trading position until either the judicial review proceedings or the appeal to the First-tier Tribunal had been concluded, whichever was the later.

By a claim form filed on 4 January 2017 the claimant wholesalers, Hollandwest Ltd and Budge Brands Ltd, sought judicial review by way of (i) an order to quash the decision of the Revenue and Customs Commissioners on 29 December 2016 to refuse their application for temporary authorisation to continue trading pending the outcome of their appeal against the revenue's decision on 19 December 2016 to refuse approval of the claimants as wholesalers of alcohol under section 88C of the Alcoholic Liquor Duties Act 1979, as inserted, and (ii) interim injunctive relief. By an order dated 3 February 2017 Andrew Baker J [2017] EWHC 384 (Admin) refused to grant permission to proceed with the claim for judicial review or to grant interim injunctive relief. By an appellant's notice filed on 10 February 2017 the claimants appealed. By an order dated 28 March 2017 the Court of Appeal (Burnett LJ) granted the claimants (i) permission to appeal against the judge's refusal to grant the interim injunctive relief sought, (ii) permission to proceed with its claim for judicial review which it directed to be determined by the Court of Appeal, and (iii) an interim injunction to maintain the claimant's trading position until either the judicial review proceedings or the appeal to the First-tier Tribunal had been concluded, whichever was the later.

The Court of Appeal (Patten, King and Burnett LJJ) heard the appeals in both cases together and by a judgment dated 7 July 2017 [2017] EWCA Civ 956; [2018] 1 WLR 1205 allowed the claimants' claims for judicial review, quashing the decisions of the revenue and remitting them for the revenue's reconsideration, but dismissed the claimants' appeals against the refusal of interim relief.

On 20 December 2017 the Supreme Court (Lord Mance DPSC, Lord Reed and Lord Lloyd-Jones JJSC) gave both the revenue and the claimants limited permission to appeal in respect of, inter alia, the following agreed issue: "Where the revenue has refused a person's application for approval under section 88C of the 1979 Act, as inserted, on the basis that the revenue is not satisfied that that person is a fit and proper person to carry on the

A controlled activity, does the revenue have any power to permit that person to carry on the controlled activity pending the outcome of that person's appeal to the First-tier Tribunal against the refusal?"

The facts are stated in the judgment of Lady Black JSC, post, paras 1–2.

Sir James Eadie QC and *Amy Mannion* (instructed by *Solicitor, Revenue and Customs Commissioners*) for the revenue.

B *Philip Coppel QC* and *David Bedenham* (instructed by *Rainer Hughes, Shenfield*) for the claimants.

The court took time for consideration.

19 June 2019. The following judgments were handed down.

C **LADY BLACK JSC** (with whom **LORD REED DPSC**, **LORD BRIGGS JJSC** and **LORD SUMPTION** agreed)

1 The Finance Act 2015 introduced a regulatory scheme requiring wholesalers supplying duty-paid alcohol to be approved by Her Majesty's Revenue and Customs Commissioners ("HMRC" or "the Commissioners") under section 88C of the Alcoholic Liquor Duties Act 1979. Approval may D only be given if HMRC are satisfied that the person seeking to carry on the activity is a fit and proper person to do so.

2 OWD, Hollandwest and Budge Brands ("the wholesalers") were already involved in the wholesale supply of duty-paid alcohol when the scheme was introduced. They needed HMRC approval to continue to trade. Approval was refused because HMRC were not satisfied that they were fit E and proper. Each wholesaler appealed to the First-tier Tribunal ("FTT") against the decision, inviting HMRC to permit them to continue trading whilst the appeals were pending. When HMRC refused to permit this, the wholesalers brought judicial review proceedings in the High Court challenging that refusal, and seeking orders that would permit them to carry on trading until after the determination of the FTT appeal. Having failed in the High Court, they obtained a measure of relief in the Court of Appeal, but F on terms that they did not find satisfactory. Both they and HMRC appeal to this court against aspects of the Court of Appeal's decision.

The principal questions for determination in this court

3 Two principal questions arise for determination on the appeal. The first, in broad outline, is this: when HMRC have refused a person's G application for approval under section 88C of the 1979 Act, what, if any, power do they have to permit that person to carry on trading pending the determination of an appeal to the FTT?

4 HMRC's case is that they have no power to grant temporary approval pending the determination of a wholesaler's appeal. The wholesalers argue that section 88C of the 1979 Act enables HMRC to grant such approval or, failing that, HMRC can do so under section 9 of the Commissioners for H Revenue and Customs Act 2005. The Court of Appeal held that temporary approval can be granted to a person under section 88C of the 1979 Act, but not under section 9 of the 2005 Act. However, contrary to the wholesalers' argument, it held that considerations of hardship and the impact on the person's appeal rights were irrelevant to the decision whether to grant

temporary approval to cover the appeal period, and that HMRC's focus must be purely on whether the person was fit and proper for that limited purpose. The issues that require attention in relation to this first question are, therefore, whether HMRC have any power at all, and if so, on what basis it is to be exercised.

5 The second question concerns the position if HMRC either do not have power to permit trading pending the determination of an appeal to the FTT, or have power but decline to exercise it. In those circumstances, what interim relief, if any, can the High Court grant to ensure that the appeal to the FTT is not thwarted by the wholesaler going out of business whilst awaiting its determination?

6 The Court of Appeal held that the High Court was able to grant injunctive relief under section 37 of the Senior Courts Act 1981. Drawing on *CC & C Ltd v Revenue and Customs Comrs* [2015] 1 WLR 4043 ("*CC & C Ltd*"), it held that relief would only be granted in rare circumstances, but that this could include where there was a clear and properly evidenced claim that a failure to grant interim relief would render the appeal to the FTT illusory. This accorded with the position of HMRC. The wholesalers disagreed with the narrow limits imposed by the Court of Appeal on the scope for relief, but were refused permission to appeal to this court on that ground. Accordingly, the hearing before us began on the basis that the High Court had power to grant injunctive relief, exercisable in exceptional circumstances.

7 As a result of questions which arose in the course of oral argument about the High Court's power, we received further written submissions on the point, after the hearing. Although both parties continued to support the existence of a power in the High Court, the issue needs attention in this judgment.

The regulatory scheme: background

8 The regulatory scheme introduced by the Finance Act 2015 was designed to combat fraud in relation to tax due on alcohol. Alcoholic liquors are subject to excise duty. Generally the charge to duty arises at the moment of importation into the United Kingdom, or at the moment of production here. The charge normally falls exclusively on the distiller/manufacturer/importer of alcohol. The duty paid is then reflected in the price of the alcohol as it passes down the supply chain. Alcohol was, however, entering the supply chain without the requisite duty being paid, resulting in a significant loss of tax revenue. There had long been a requirement for those dealing in duty-suspended alcohol to be approved by HMRC, but there was no equivalent requirement for those dealing in duty-paid alcohol. The introduction of the present scheme, known as the Alcohol Wholesaler Registration Scheme ("AWRS"), closed that gap.

The statutory provisions

9 Section 54 of the Finance Act 2015 inserted Part 6A and Schedule 2B into the 1979 Act. Much of the fine detail of the statutory provisions is not necessary for present purposes and what follows is, at times, a broad summary only.

A **10** A central concept is "controlled activity". By virtue of section 88A(8), "controlled activity" means selling controlled liquor wholesale, offering it for sale wholesale, or arranging in the course of a trade or business for it to be sold or offered for sale wholesale. By section 88A(2), a sale is of "controlled liquor" if it is a sale of dutiable alcoholic liquor on which duty is charged under the Act at a rate greater than nil, with the excise duty point for the liquor falling at or before the time of the sale. By section 88A(3), B subject to some exceptions, the sale is "wholesale" if the seller makes the sale, in the course of his trade or business, to a trade or business buyer, for the buyer to sell or supply in the course of his trade or business. It must be noted that one of the exceptions is, by section 88A(3)(d), "an excluded sale". Section 88A(7) defines a sale as an "excluded sale" if it is "of a description prescribed by or under regulations made by the Commissioners".

C **11** Section 88B gives the Commissioners power to make provision, by regulations, for certain matters, including as to the cases in which sales are, or are not, to be treated for the purposes of Part 6A as (amongst other things) wholesale sales, and sales of controlled liquor.

12 Section 88C deals with approval to carry on controlled activity. It provides:

D "*Approval to carry on controlled activity*

"(1) A UK person may not carry on a controlled activity otherwise than in accordance with an approval given by the Commissioners under this section.

"(2) The Commissioners may approve a person under this section to carry on a controlled activity only if they are satisfied that the person is a fit and proper person to carry on the activity.

E "(3) The Commissioners may approve a person under this section to carry on a controlled activity for such periods and subject to such conditions or restrictions as they may think fit or as they may by or under regulations made by them prescribe.

"(4) The conditions or restrictions may include conditions or restrictions requiring the controlled activity to be carried on only at or F from premises specified or approved by the Commissioners.

"(5) The Commissioners may at any time for reasonable cause revoke or vary the terms of an approval under this section.

"(6) In this Part 'approved person' means a person approved under this section to carry on a controlled activity."

13 Section 88D obliges HMRC to maintain a register of approved G persons. It is to contain "such information relating to approved persons as the Commissioners consider appropriate" (section 88D(2)). HMRC may make publicly available "such information contained in the register as they consider necessary to enable those who deal with a person who carries on a controlled activity to determine whether the person in question is an approved person in relation to that activity" (section 88D(3)). This publicly available information is important as section 88F provides that "A person H may not buy controlled liquor wholesale from a UK person unless the UK person is an approved person in relation to the sale".

14 Section 88G supports the statutory scheme by establishing various criminal offences. For example, section 88G(1) makes it an offence to contravene section 88C(1) by selling liquor wholesale knowing, or having

reasonable grounds to suspect, that the buyer is carrying on a trade or business and the liquor is for sale or supply in the course of that trade or business. Buying controlled liquor from an unapproved person, contrary to section 88F, is also an offence, if the person knows or has reasonable grounds to suspect the unapproved status of the supplier.

The Wholesaling of Controlled Liquor Regulations 2015

15 The Wholesaling of Controlled Liquor Regulations 2015 (SI 2015/1516) were made under Part 6A of the 1979 Act. They provide for the manner in which an application for approval is to be made and processed.

16 In the present context, the following provisions of the Regulations are of note:

(i) The application must be on a prescribed form, regulation 3(1).

(ii) If HMRC refuse an application, they must notify the applicant of that and give reasons, regulation 4(4).

(iii) In addition to any conditions or restrictions imposed by HMRC under section 88C(3) of the 1979 Act, "the approval of a person is subject to such conditions and restrictions as the Commissioners may prescribe", regulation 7.

(iv) HMRC may prescribe descriptions of sales that are excluded sales for the purposes of Part 6A of the 1979 Act, regulation 10.

(v) Part 6 of the Regulations provides for dutiable alcoholic liquor to be subject to forfeiture where a person contravenes section 88C or section 88F or any condition or restriction imposed under Part 6A of the 1979 Act or under the Regulations.

(vi) By regulation 2, "prescribed" means "prescribed by the Commissioners in a published notice".

Excise Notice 2002: Alcohol Wholesaler Registration Scheme

17 *Excise Notice 2002: Alcohol Wholesaler Registration Scheme* ("EN2002") was made under the 1979 Act and the 2015 Regulations. It explains what the AWRS is about and addresses various particular aspects of it. It has been amended many times since its first publication in November 2015. The version which is relevant to the decisions of HMRC in this case is that in force between 21 June 2016 and 26 March 2017; unless otherwise specified, references are to that version.

18 Existing wholesalers who sought approval after the introduction of the scheme were informed, by the relevant version of EN2002, that they could continue to trade as normal until receipt of HMRC's decision (para 6.5).

19 Para 6.10 set out how HMRC would assess whether an applicant was fit and proper to carry on a controlled activity. It contains a list of relevant points, and a general statement that: "HMRC must be satisfied the business is genuine and that all persons with an important role or interest in it are law abiding, responsible, and don't pose any significant threat in terms of potential revenue non-compliance or fraud."

20 Para 10 dealt with conditions and restrictions. It said that HMRC may decide to apply specific conditions or restrictions where they consider that a wholesaler "is fit and proper to be approved but some additional

controls are still needed", which would be used to address specific concerns HMRC had about the business. In contrast, if HMRC considered a wholesaler was not fit and proper to be approved, approval would be refused or revoked rather than allowing the wholesaler to trade subject to added conditions.

21 In para 15(4), which dealt with revocation by HMRC of an existing approval, circumstances were identified in which approval was likely to be revoked, and it was pointed out that the controlled activity could not be carried on after revocation. However, the paragraph ended with a passage to which it will be necessary to return: "Where HMRC think the circumstances merit, they may allow a reasonable period of time to wind down the business, for example, to dispose of any legitimate stock."

22 Doubts have been expressed about HMRC's power to allow a period of grace in this way. The version of EN2002 published on 27 March 2017 put the position in relation to disposal of stock on winding down on a rather firmer footing by providing, under regulation 10 of the 2015 Regulations, for such sales to be excluded sales.

Challenging a refusal of approval

23 A wholesaler can challenge HMRC's refusal of approval by seeking a review of it by HMRC and/or appealing to the FTT. Sections 13A to 16 of the Finance Act 1994 (as amended by article 1(2) of and Schedule 1 to the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 (SI 2009/56)) govern the review and appeal process.

24 Reviews are covered by section 15A to 15F. By section 15F, the nature and extent of the review are such as appear appropriate to HMRC in the circumstances, but account must be taken of representations made. The review may conclude that the decision is to be upheld, varied, or cancelled.

25 An appeal to the FTT can be brought either as an alternative to seeking a review or, where there has been a review, against the review decision. The provisions as to appeals are set out in section 16. A central concept is that of a "relevant decision". This is defined in section 13A which, in subsection (2)(a)–(j), lists the decisions which are relevant decisions. A decision for the purposes of Part 6A of the 1979 Act as to whether or not a person is to be approved and registered, or as to the conditions or restrictions on approval and registration, features in subsection (2)(j). By section 16(8) of the 1994 Act, such a decision is classed as an "ancillary matter". Section 16(4) sets out the FTT's powers on an appeal in relation to any decision as to an ancillary matter, or any decision on the review of such a decision. It provides that the tribunal's powers:

> "shall be confined to a power, where the tribunal are satisfied that the Commissioners or other person making that decision could not reasonably have arrived at it, to do one or more of the following, that is to say— (a) to direct that the decision, so far as it remains in force, is to cease to have effect from such time as the tribunal may direct; (b) to require the Commissioners to conduct, in accordance with the directions of the tribunal, a review or further review as appropriate of the original decision; and (c) in the case of a decision which has already been acted on or taken effect and cannot be remedied by a review or further review as appropriate, to declare the decision to have been unreasonable and to give

directions to the Commissioners as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in future."

26 These limited powers contrast with the wider powers available to the FTT, under section 16(5), when dealing with other relevant decisions which are not classed as decisions as to "ancillary matters". In those appeals, the FTT can also vary the decision or quash it and substitute its own decision.

27 It is to be noted that, in the 1979 Act appeals such as the present ones, the 1994 Act gives the FTT no power to suspend the effect of a challenged decision pending an appeal, nor is any such power contained in the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (SI 2009/273). This contrasts with the position in appeals relating to relevant decisions which come within section 13A(2)(a)–(h) of the 1994 Act, which include a variety of decisions as to payment of duties, levies, assessments, security and penalties. Normally, by section 16(3) of the 1994 Act, an appeal in such a case will not be entertained unless the amount of duty which HMRC have determined, by the challenged decision, is payable has been paid or deposited with them. However, the appeal can proceed without full payment if HMRC issue a certificate stating that they have accepted such security as appears to them to be adequate, or that, on the grounds of the hardship that would otherwise be suffered by the appellant, they do not require security or have accepted such lesser security as they consider appropriate. If no certificate is issued, the appellant will be able to bring the appeal none the less, if the FTT decides that the certificate should not have been refused, and are satisfied that HMRC have been given such security (if any) as it would have been reasonable for them to accept. The Court of Appeal in the present case said (para 29) that this amounts to the FTT having "a circumscribed power to provide interim relief".

The Commissioners for Revenue and Customs Act 2005, section 9

28 Section 9(1) of the 2005 Act confers "ancillary powers" on HMRC in the following terms: "The Commissioners may do anything which they think— (a) necessary or expedient in connection with the exercise of their functions, or (b) incidental or conducive to the exercise of their functions."

29 Section 51(2) of the 2005 Act provides the following assistance in interpreting the meaning of "functions":

> "In this Act— (a) 'function' means any power or duty (including a power or duty that is ancillary to another power or duty), and (b) a reference to the functions of the Commissioners or of officers of Revenue and Customs is a reference to the functions conferred— (i) by or by virtue of this Act, or (ii) by or by virtue of any enactment passed or made after the commencement of this Act."

Issue 1A: what powers do HMRC have under section 88C the 1979 Act to permit trading pending the determination of an appeal to the FTT?

30 When HMRC refuse approval under section 88C, do they nevertheless have power under that section to grant temporary approval pending a wholesaler's appeal to the FTT? To recap, HMRC deny that they have any such power under section 88C, whereas the wholesalers support

A the conclusion of the Court of Appeal that there is power, but challenge the Court of Appeal's conclusion that hardship and the impact on a wholesaler's appeal rights are irrelevant to the exercise of the power.

31 The Court of Appeal's reasoning for its conclusion about section 88C is to be found in paras 52–54 of the judgment of Burnett LJ, with whom the other members of the court agreed. Para 52 deals with HMRC's submissions. As Burnett LJ explained, it had been "readily accepted" on behalf of B HMRC through their counsel (then, as now, Sir James Eadie QC) that "subsections (2) and (3) [of section 88C] 'hang together' ". It was not a question simply of whether, in the abstract, a person was fit and proper, HMRC accepting that it was "feasible for persons to fail to satisfy HMRC that they are fit and proper to conduct a wholesale alcohol business without conditions, but to satisfy them that they are fit and proper subject to C conditions". Nevertheless, HMRC submitted that "a temporary approval lasting a finite period could not be a proper basis to use the combined operation of the two subsections". It is important to identify the precise reason for this submission, which is reflected in HMRC's submissions to this court as well. It was, as summarised in the concluding lines of para 52:

> D "because there would have been no relevant change of circumstance relating to fitness since the general decision was made. Mr Eadie QC accepted that the statute envisaged an approval being given for a limited time but only, as he put it, if HMRC were satisfied on day one that the person concerned was fit and proper."

32 Para 53 set out the following examples of situations in which approval might properly be limited in some way:

E

> "It is possible to envisage that HMRC might have well founded concerns about the operation of a business at one of is locations, but not others. A condition limiting trading to specified sites might follow. They might consider the involvement of a particular proprietor, director or senior employee as critical to the grant of approval. By contrast, they might consider the involvement of a particular person to be inimical to F the grant of approval. They might limit the period of approval to coincide with the known plans for retirement of an individual of significance in the business. They might limit the period to enable systems to be improved about which there is some concern. They might insist on the production of regular information to meet underlying concerns about record keeping and the like."

G **33** In the following two paragraphs, Burnett LJ set out his conclusion in these terms:

> "54. A conclusion that a person is not fit and proper for unconditional approval does not preclude conditional approval of that person. In my view HMRC have power under section 88C(3) to grant a temporary approval pending appeal if they conclude that a person is fit and proper H for that limited period, perhaps with additional conditions. That is a possible conclusion that might be reached even if a general approval is being denied. In substance, if not in form, that is what HMRC were doing before 27 March when they purported to grant 30 days or more grace. The focus of a decision would remain whether the person was fit

and proper but for the more limited purpose. Hardship and the impact on appeal rights would be extraneous considerations. section 88C does not confer upon HMRC a broad discretionary power of approval but it is possible that they could conclude that a person is fit and proper for a limited time to continue trading. To the extent that HMRC apprehended that they had no power to do what was asked of them by the claimant, in my view they erred.

"55. . . . there is nothing in the statutory scheme relied upon by HMRC which excludes the possibility of what amounts to an ancillary application for temporary approval in the face of a refusal of the general application."

34 In the light of these conclusions, Burnett LJ determined (para 87) that HMRC's decisions that they had no power to grant temporary approval to the wholesalers to trade pending appeal should be quashed, and the question returned to them for reconsideration.

35 HMRC submit that the Court of Appeal was wrong to conclude that they had power to grant temporary approval to the wholesalers under section 88C. However, if it is found that section 88C does confer such power then, in HMRC's submission, the Court of Appeal was correct as to the criteria for the exercise of the power.

36 It is necessary to appreciate exactly how HMRC put their criticism of the Court of Appeal. The following passage from their written case goes to the heart of the argument:

"It is therefore submitted that HMRC could not properly conclude someone was not fit and proper '*to carry on the controlled activity*' (even on conditions which include the power to approve for a limited time only); yet *then separately* conclude in response to a request that the same business and leadership might be fit and proper to carry on the controlled activity pending appeal to the FTT against the first finding . . ." (Emphasis in the original.)

From this, it is clear that HMRC's argument is addressed to a situation in which they have already concluded that someone is not fit and proper even for a limited period, and whatever conditions might be imposed. In their submission, the introduction of an extraneous factor which has nothing to do with fitness and propriety (i e the fact that an appeal is pending) cannot alter this assessment of fitness.

37 The wholesalers appear to interpret HMRC's argument rather differently. They have taken HMRC to be contending that whether a person is fit and proper is an absolute question, that must be determined without considering whether the imposition of a time limit or other conditions might make it possible to approve someone as fit and proper. For example, they refer, in their written case, to

"HMRC's thesis that unless it is satisfied that a person is fit and proper to carry on a controlled activity (i e without consideration of whether that person might be fit and proper for a period, with conditions, with restrictions or any combination of these) it cannot approve a person under section 88C . . ."

A **38** If HMRC *were* advancing the "thesis" there set out, it would be an untenable one, in my view. But as I have said, they are not doing so. They are not insisting that absolute fitness and propriety is required in all cases, but addressing the situation where, as here, they have concluded that no conditions or limitations will enable them to be satisfied that the person is fit and proper. The power to incorporate such conditions/limitations is always present, and the relevant technical guidance given to HMRC officers making
B AWRS decisions specifically drew attention to the option of approval with conditions, including an example of imposing a time limit on the approval. On the facts of these appeals, HMRC had nevertheless concluded that the wholesalers were not fit and proper. I would accept their argument that in those circumstances there is no power to grant temporary approval pending appeal. If the person is not fit and proper for even a limited period of time,
C that holds good whatever purpose the time limited approval would be designed to achieve. If considerations of hardship and the impact that maintaining the decision would have on the efficacy of the appeal were relevant to HMRC's decision, it might be different. But I am satisfied that the Court of Appeal was right to conclude that such considerations are not to the point. Section 88C operates through the medium of HMRC being "satisfied that the person is a fit and proper person to carry on the activity",
D and the impact upon the person, or his business, of a refusal of approval is not material to that evaluation.

39 The wholesalers invite attention to HMRC's practice, prior to the 27 March 2017 version of EN2002, of allowing a winding down period to a business whose approval was revoked, where they thought the circumstances merited it (see para 21 above). They submit that such
E temporary approval was granted under section 88C, noting that the Court of Appeal saw it that way (para 54), and submitting that it demonstrates the existence of the power that HMRC now deny. HMRC respond that the provision of a winding down period is different in character from temporary approval pending appeal, being closed-ended, and presuming the rationality of the refusal.

40 In my view, the practice (now, of course, ceased) of continuing
F approval during a winding down period cannot prove the existence of the power for which the wholesalers contend. It may serve to provoke a closer look at the scope of section 88C, but if, after that exacting inspection, the conclusion is reached that it does not encompass the power to grant temporary approval pending appeal, the fact that HMRC may have proceeded, in the past, on the basis of a looser construction of the section,
G does not alter that conclusion. It may not be irrelevant that HMRC took the opportunity in the 27 March 2017 EN2002 to regularise the position through the route of excluded sales (see para 22 above).

41 Notwithstanding the earlier practice relating to a winding down period, I remain of the view that section 88C does not permit the temporary approval for which the wholesalers argue.

H *Issue 1B: can HMRC give temporary approval pending appeal under section 9 of the 2005 Act?*

42 The wholesalers' primary argument in the Court of Appeal, renewed as part of their case before this court, was that HMRC have power to grant approval pending appeal under section 9 of the 2005 Act. Section 9, which

is set out in full at para 28 above, permits the Commissioners to do anything which they think necessary or expedient in connection with, or incidental or conducive to, the exercise of their functions. The Court of Appeal was not prepared to accept that this permitted the temporary approval sought. Burnett LJ gave this summary of his reasons for rejecting that construction (at para 35):

> "In my judgment section 9 of the 2005 Act does not provide HMRC with power to approve persons as fit and proper to trade in wholesale alcohol pending appeal to the FTT, when they have concluded they are not fit and proper persons. Such an action could not be either necessary or expedient in connection with the exercise of their functions; nor would it be incidental or conducive to the exercise of their functions. It would be inconsistent with the statutory scheme."

43 The wholesalers argue that there is nothing inconsistent with the statutory scheme in section 9 being interpreted as enabling HMRC to approve them to trade pending appeal. HMRC say, first, that the only route by which permission can be granted is the section 88C route, and secondly that to use section 9 for temporary approvals would run counter to the statutory scheme as a whole. Their first point is shortly stated: section 88C(1) provides that a person "may not carry on a controlled activity otherwise than in accordance with an approval given by the Commissioners *under this section*" (my italics). The wholesalers reply that there is nothing in section 88C(1) that prohibits HMRC from granting permission by a different route, and complain that if the provision were to be interpreted in this way, there would be no scope for the use of the powers set out in section 9. It is put this way in their written case:

> "Allowing a decision-maker to do something that that decision-maker could otherwise not do in the performance of a function is precisely what ancillary and incidental powers do. If an ancillary power never enables the decision-maker to do something that the decision-maker otherwise lacks the power to do, then the ancillary power is left with nothing to do."

44 I have no doubt that there are situations in which the sort of considerations identified by the wholesalers in this passage would lead the court to accept that the Commissioners have indeed got ancillary powers of one sort or another. But it all depends upon the general attributes, and detailed provisions, of the particular statutory scheme in relation to which the question arises, and the nature of the ancillary powers being considered. There are, in the authorities, plentiful statements to this effect, made in various contexts, see for example the following, from *Hazell v Hammersmith and Fulham London Borough Council* [1992] 2 AC 1, 31: "The authorities deal with widely different statutory functions but establish the general proposition that when a power is claimed to be incidental, the provisions of the statute which confer and limit functions must be considered and construed."

45 Section 9 concerns ancillary powers which are necessary or expedient in connection with the Commissioners' exercise of their functions, or incidental or conducive to that exercise, not ancillary powers which undermine or contradict those functions. I do not accept that recourse can be had to it to provide an alternative route to time limited approval,

supplementing section 88C in the way that the wholesalers suggest. I say that not only because of the terms of section 88C itself, which permit authorisation only under that section ("approval given by the Commissioners under this section"), but also because of the attributes of the whole scheme of which section 88C forms part. Rather than assisting the Commissioners' exercise of their functions under the scheme, such a use would, in my view, undermine the scheme.

46 To start with section 88C itself, it is important to take sections 88C(1) and (2) together. By subsection (1), a person may not carry on a controlled activity otherwise than in accordance with an approval given by the Commissioners under section 88C. By subsection (2), the Commissioners may only give the required approval if they are satisfied that the person is a fit and proper person to carry on the activity. So where, as here, they are *not* so satisfied, they may not give approval under section 88C, and without approval under section 88C, the person may not carry on the controlled activity. Amongst the consequences that follow if he does act without approval, the person will be guilty of an offence (section 88G). It can hardly be said to be necessary or expedient to the exercise of the functions under that tightly drafted scheme, which has at its heart that the Commissioners will only approve people to sell controlled liquor wholesale if satisfied that they are fit and proper to do so, for the Commissioners to be able to draw upon the ancillary powers in section 9 to grant approval to someone in relation to whom they are not satisfied, nor yet can that be said to be incidental or conducive to the exercise of their functions under the scheme. Furthermore, approval granted under section 9 would not be of any practical assistance to the wholesaler unless he were also put on the register of approved persons under section 88D. By sections 88F and 88G, a person may commit a criminal offence by buying from a person who is not approved, and would need to have recourse to the register to confirm the status of the wholesaler before buying. By using section 9 powers to enter the wholesaler on the register, HMRC would appear to be holding out as fit and proper a person in relation to whom they have formed the opposite view. It is unreal to suggest, as the wholesalers do, that this could be satisfactorily addressed by HMRC including information about the wholesaler under section 88D(2), to the effect that the approval is only temporary pending the outcome of the wholesaler's appeal to the FTT and that actually HMRC do not consider the person fit and proper.

47 But, says Mr Coppel QC for the wholesalers, it is necessary to look at HMRC's functions as a whole, not just their functions under section 88C, or under Part 6A of the 1979 Act. I readily accept that as a general proposition, but I do not think that it justifies HMRC using section 9 to grant temporary approval. Mr Coppel relies on the fact that HMRC's section 88C decisions are attended by a review and appeal process, in which HMRC have a role, including a duty to give effect to whatever decision the FTT reaches. He argues that, as part and parcel of their functions in the appeal process, HMRC must be able to take steps to ensure the effectiveness of the wholesaler's right to have his appeal heard, especially bearing in mind that, even if it ultimately turns out that approval was wrongly refused, the wholesaler will receive no compensation for the damage suffered whilst awaiting the appeal, including potentially the final closure of the business. So, where implementation of the challenged decision pending appeal is likely

to result in the wholesaler suffering substantial, and irreversible, harm, he submits that HMRC must take as their starting point that temporary approval should be granted so as to keep the appeal right alive, although he would concede that the starting point could be displaced if the likelihood and scale of harm to the revenue would be greater, if temporary approval were to be granted, than the likelihood and scale of the harm to the wholesaler from a refusal.

48 I am not persuaded by this argument. I do not accept that the fact that HMRC's decision is subject to an appeal, to which they are a party, is a proper foundation upon which to conclude that it is necessary or expedient, incidental or conducive, to the exercise of their functions to assume a power to grant temporary approval so as to preserve the wholesaler's position pending that appeal. With certain other types of relevant decision, HMRC do have a role in facilitating an appeal to the FTT, by relaxing the normal requirement for duty to be paid prior to an appeal. As can be seen from para 27 above, they can effectively waive the standard security required under section 16(3) of the 1994 Act on the grounds of hardship, and, if they are not prepared to do so, the FTT can intervene to allow the appeal to proceed nevertheless, if it decides that HMRC should not have refused to provide the required certificate. It cannot be said, therefore, that the review and appeal provisions were drafted without heed to the possibility that HMRC/the FTT might need powers to allow relief pending appeal, but when it comes to ancillary decisions such as the decisions in question here, there is nothing in sections 13A to 16 of the 1994 Act (see above at para 23 et seq), or in the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, conferring any power on either HMRC or the FTT to suspend, or circumvent, the consequences of the decision that is being challenged pending determination of the appeal.

49 *R (Wilkinson) v Inland Revenue Comrs* [2005] 1 WLR 1718 offers some insight as to how this absence of express power might bear upon the operation of a general provision such as section 9 of the 2005 Act. It concerned bereavement allowance, which at that time was payable only to widows and not to widowers. The House of Lords rejected the argument that section 1 of the Taxes Management Act 1970, which said that income tax "shall be under the care and management of the Commissioners of Inland Revenue", could be construed as giving the revenue a discretionary power to grant an extra-statutory concession allowing a widower to claim the equivalent to a widow's bereavement allowance. Lord Hoffmann observed at para 21, with the agreement of the rest of the House, that the power could not be construed "so widely as to enable the Commissioners to concede, by extra-statutory concession, an allowance which Parliament could have granted but did not grant". Although the context was not the same as in the present case, section 1 of the Taxes Management Act 1970 not being concerned with ancillary powers in quite the same way as section 9 of the 2005 Act, it can similarly be said here that section 9 should not be construed as conferring on HMRC a power to grant temporary approval pending appeal which Parliament could have conferred through Part 6A or the the 1994 Act, but did not. That temporary approval pending appeal is not part of the scheme is perhaps underlined also by the fact that express provision was made in section 54(12) of the Finance Act 2015 for the time from which the prohibition on trading in section 88C was to apply, namely

A when the wholesaler's application to HMRC was "disposed of" (i e by section 54(13), has been determined by HMRC, withdrawn, abandoned, or otherwise ceases to have effect), rather than from the conclusion of any appeal against the decision on the application.

Issue 2: High Court powers

B *(1) The approach of the Court of Appeal in CC & C Ltd and in the present case*

50 In the Court of Appeal, it was common ground that the High Court has power to grant injunctive relief to assist a wholesaler pending his appeal to the FTT, but there was a dispute between the parties as to the basis on which relief could be granted. In determining this issue, the Court of Appeal drew heavily upon its earlier decision in *CC & C Ltd* [2015] 1 WLR 4043 C and it will be necessary to look, therefore, at that decision.

51 There are considerable similarities between *CC & C Ltd* and the present case, although *CC & C Ltd* concerned wholesale trade in duty-suspended goods, not duty-paid goods. Those trading wholesale in duty-suspended goods were required to be approved and registered by HMRC. The claimant company had been approved and registered for some D years, when HMRC revoked the registration on the basis that it was no longer fit and proper. Like HMRC's decisions in the present case, the decision in *CC & C Ltd* was classed, for the purposes of sections 13A to 16 of the the 1994 Act, as a decision relating to an ancillary matter. The company appealed to the FTT against the decision and also commenced proceedings in the Administrative Court to obtain interim relief pending the E determination of the appeal, claiming that there was a risk that it would be irreparably damaged meanwhile.

52 Underhill LJ, with whom the other members of the court agreed, had "no doubt that the court has jurisdiction, in the formal sense, under section 37(1) of the [Senior Courts Act 1981] to make an order of the kind sought" (para 38, and see also Lewison LJ's short judgment commencing at para 48). The court was concerned with the approach that should be taken F to the exercise of that jurisdiction. At para 39, Underhill LJ said that it was trite law that where Parliament has enacted a self-contained scheme for challenging decisions, it would normally be wrong for the High Court to permit such decisions to be challenged by way of judicial review. He cited a passage from a judgment of the Privy Council, in *Harley Development Inc v Comr of Inland Revenue* [1996] 1 WLR 727, 735–736, culminating in the G following:

> "Their Lordships consider that, where a statute lays down a comprehensive system of appeals procedure against administrative decisions, it will only be in exceptional circumstances, typically an abuse of power, that the courts will entertain an application for judicial review of a decision which has not been appealed."

H

53 Underhill LJ set out in paras 41 and 42 why, where Parliament could have made provision for suspensory orders to be made pending appeal to the FTT but had not done so, the court was not entitled to intervene to grant a trader interim relief simply on the basis that there is a pending appeal with a realistic chance of success. But, he said, it did not follow that there were no

circumstances in which the court may grant such relief, and he noted that HMRC did not so contend. He went on, in paras 43 and 44, to set out when relief may be granted. He said that:

> "where the challenge to the decision is not simply that it is unreasonable but that it is unlawful on some other ground, then the case falls outside the statutory regime and there is nothing objectionable in the court entertaining a claim for judicial review or, where appropriate, granting interim relief in connection with that claim. A precise definition of that additional element may be elusive and is unnecessary for present purposes. The authorities cited in the *Harley Development* case refer to 'abuse of power', 'impropriety' and 'unfairness'. [Counsel for HMRC] referred to cases where HMRC had behaved 'capriciously' or 'outrageously' or in bad faith. Those terms sufficiently indicate the territory that we are in, but I would sound a note of caution about 'capricious' and 'unfair'. A decision is sometimes referred to rhetorically as 'capricious' where all that is meant is that it is one which could not reasonably have been reached; but in this context that is not enough, since a challenge on that basis falls within the statutory regime. As for 'unfair', I am not convinced that any allegation of procedural unfairness, however closely connected with the substantive unreasonableness alleged, will always be sufficient to justify the intervention of the court: [counsel for HMRC] submitted that cases of unfairness would fall within the statutory regime to the extent that the unfairness impugned the reasonableness of the decision. As I have noted above, the types of unfairness contemplated in [*R v Inland Revenue Comrs, Ex p Preston* [1985] AC 835]—which is the source of the use of the term in the *Harley Development* case—were of a fairly fundamental character. But since procedural unfairness is not relied on in this case I need not consider the point further."

54 Summarising his conclusion at para 44, he said that the court may entertain a claim "where it is arguable that the decision was not simply unreasonable but was unlawful on one of the more fundamental bases identified above". He said that such cases "will, of their nature, be exceptional". *CC & C Ltd* [2015] 1 WLR 4043 was not one of them, and relief was not available.

55 In the present case, Burnett LJ analysed the ratio of *CC & C Ltd* as having the following components (at para 61):

> "(i) The High Court has jurisdiction to grant an injunction maintaining registration pending appeal to the FTT, which has been revoked by HMRC, when a parallel challenge to that decision is made in judicial review proceedings.
>
> "(ii) The jurisdiction should not be exercised simply on the basis that the person concerned has a pending appeal with a realistic chance of success.
>
> "(iii) If the decision is challenged only on the basis that HMRC could not reasonably have come to it, the case falls within section 16 of the Finance Act 1994 and the court should not intervene.
>
> "(iv) If the challenge to the decision is on some other ground outside the statutory regime the court may entertain judicial review or grant interim relief.

A "(v) A definition of the additional element needed is elusive but would include 'abuse of power', 'impropriety' and 'unfairness' as envisaged in *Harley Development Inc v Comr of Inland Revenue* [1996] 1 WLR 727."

56 Having lost their argument that *CC & C Ltd* had been decided per incuriam or should be distinguished, the wholesalers accepted that their cases did not fall within any of what Burnett LJ described (para 73) as the B "exceptions identified as examples" in *CC & C Ltd* but submitted that interim relief should be granted because otherwise there was a risk that their rights under article 6 and article 1 protocol 1 ("A1P1") of the Convention on the Protection of Human Rights and Fundamental Freedoms ("ECHR") would be violated. The argument, both in relation to article 6 and A1P1, was put on the basis that by the time the appeal is heard, the wholesalers would have ceased to be viable and their appeals to the FTT would be C ineffective. The Court of Appeal found it sufficient to deal with the argument by focusing on article 6 alone, finding it unnecessary to explore "the altogether more complicated route of A1P1", para 82, and in due course I will take the same approach.

57 Burnett LJ's conclusion was as follows, at para 81:

D "In my opinion, a statutory appeal against a refusal of approval which is unable to provide a remedy before an appellant has been forced out of business, rendering the appeal entirely academic (or theoretical or illusory in the language of the Strasbourg court) is capable of giving rise to a violation of article 6 which the High Court would be entitled to prevent by the grant of appropriate injunctive relief under section 37 of the 1981 Act. To that extent, the exceptions enumerated by Underhill LJ in the *CC* E *& C Ltd* case [2015] 1 WLR 4043 can be expanded to include cases in which a claimant can demonstrate, to a high degree of probability, that the absence of interim relief would violate its ECHR rights. Moreover, such an injunction need not be ancillary to a claim for judicial review of any decision of HMRC, although it might be."

58 Burnett LJ's reasoning for his conclusion (see paras 77–81) involved F the following steps:

(i) The dispute concerns "civil rights and obligations" for the purposes of article 6, see *Tre Traktörer AB v Sweden* (1989) 13 EHRR 309, in which the Strasbourg court concluded that there was a violation of article 6 where a company had its licence to sell alcohol revoked by two administrative bodies, neither of which was a court or tribunal.

G (ii) Unlike in the *Tre Traktörer AB* case, the wholesalers have appeals to the FTT which satisfy the requirement for a hearing by a tribunal.

(iii) However, the ECHR is intended to guarantee rights that are "practical and effective", not "theoretical or illusory", see *Airey v Ireland* (1979) 2 EHRR 305 and other authorities set out at para 80 of Burnett LJ's judgment.

H (iv) If an appellant is forced out of business before the statutory appeal concludes, the appeal is rendered theoretical or illusory.

59 It is important to recognise the lack of debate that there was in the Court of Appeal about this element of the case. At para 76, Burnett LJ recorded that Sir James Eadie accepted on behalf of HMRC that the High Court may grant an interim injunction to vindicate the Convention rights of

the wholesalers, though emphasising (1) that (as Burnett LJ himself expressly accepted) the first port of call must be the FTT itself, which could be expected to expedite the appeal to avoid the problem, and (2) that proper evidential support would be required for an argument based on the ECHR. It was not argued on behalf of the wholesalers that interim relief should issue automatically, without it being demonstrated that the wholesaler could not survive until the appeal was heard. As Burnett LJ set out at para 83, Mr Coppel recognised that factors such as the strength of the appeal and the nature of the concern that led to the refusal to approve would be factors to be weighed when considering whether to grant an injunction, reflecting the fact that the scheme exists to protect the public purse and legitimate traders. Burnett LJ set out the sort of compelling evidence that would be required before relief would be granted (at para 85):

> "A claimant seeking an injunction would need compelling evidence that the appeal would be ineffective. It would call for more than a narrative statement from a director of the business speaking of the dire consequences of delay. The statements should be supported by documentary financial evidence and a statement from an independent professional doing more than reformulating his client's stated opinion. Otherwise, a judge may be cautious about taking prognostications of disaster at face value. It should not be forgotten that a trader who sees ultimate failure in the appeal would have every incentive to talk up the prospects of imminent demise of the business, in an attempt to keep going pending appeal. Equally, material would have to be deployed which provided a proper insight into the prospects of success in an appeal. There is no permission filter for an appeal to the FTT. The High Court would not intervene in the absence of a detailed explanation of why the decision of HMRC was unreasonable. It must not be overlooked that the FTT is not exercising its usual appellate jurisdiction in these types of case where it makes its own decision. Finally, there would have to be detailed evidence of the attempts made to secure expedition in the FTT and the reasons why those attempts failed."

60 Burnett LJ anticipated that the circumstances in which it was appropriate for injunctive relief of this kind to issue would be rare, as practical relief would be achievable by obtaining temporary approval from HMRC under section 88C (not a route that I consider available for the reasons set out earlier) or, failing that, by seeking expedition from the FTT.

61 The evidence in support of injunctive relief in the present cases had not been sufficient to satisfy either of the two judges who entertained the proceedings at first instance that the appeals would be rendered nugatory without interim relief, as Burnett LJ set out (at para 86):

> "In the *ABC Ltd* case William Davies J considered himself bound by the *CC & C Ltd* case to refuse injunctive relief even if the claimants could show that the appeal would be rendered 'nugatory'. However, at para 48 he concluded that the evidence did not suggest that was inevitable. The evidence demonstrated that there was a prospect that the appeal would be rendered nugatory, no more. In the *X Ltd and Y Ltd* case, Andrew Baker J dealt with the strength of the evidence relating to the business prospects of the claimants in paras 39 and 40. He was unpersuaded by the assertions that they would not survive the appeal process. In those

A circumstances, even if either judge had considered a free-standing injunction by reference to rights guaranteed by article 6 of the ECHR, it would have been refused."

(2) The limited scope of Issue 2

62 This court's engagement in the issue as to the High Court's powers is
B narrowly confined for procedural reasons. Only the wholesalers sought to appeal against the Court of Appeal's determination on this aspect of the case. Their notice of appeal sought permission to appeal on three grounds. The first ground challenged the Court of Appeal's decision that section 9 of the 2005 Act did not give HMRC any power to permit temporary trading pending the outcome of an appeal to the FTT. Permission was given for this ground to be pursued and I have addressed it above. Ground 2 was that the
C Court of Appeal were wrong to conclude that it was only in exceptional circumstances that the High Court could grant interim relief pending an appeal to the FTT. Ground 3 was that the Court of Appeal were wrong to conclude that even where implementation of HMRC's decision prior to the outcome of an appeal to the FTT would violate a wholesaler's ECHR rights, the High Court should not grant interim relief as the first port of call must be
D to the FTT to expedite the appeal. Permission to appeal was not granted in relation to either of these grounds.

63 In these circumstances, both parties understandably approached the appeal to this court on the basis that the High Court *has* power to grant injunctive relief where the wholesaler's article 6 rights would otherwise be infringed by the business ceasing to be viable before the FTT could consider
E the matter, rendering the appeal provided by statute entirely academic, and that the circumstances in which that power would be exercised were as set out in *CC & C Ltd* [2015] 1 WLR 4043, as interpreted by the Court of Appeal in the present case. This court's refusal of permission to appeal in relation to the High Court's injunctive powers immunises that position from challenge in the present proceedings. Furthermore, it has not been the role of this court to review the established finding that the evidence produced by the
F wholesalers in support of their application for injunctive relief on an article 6 basis failed to meet the required standard (see para 86 of Burnett LJ's judgment, set out above).

64 The question that arose during the course of the hearing before us was the discrete question of what form the High Court's order could legitimately take, where a case for injunctive relief *was* made out. If minded
G to make an order, what, if anything, could the High Court order HMRC to do to protect the position of a wholesaler pending appeal? Supplementary written submissions were provided following the hearing directed to this point.

(3) The parties' supplementary submissions

65 In their supplementary submissions, both sides adhere to the
H position that the Court of Appeal was correct to conclude that the power in section 37 of the Senior Courts Act 1981 *could* be exercised in the AWRS context, in exceptional cases.

66 HMRC emphasise the breadth of the High Court's power under section 37, being a power to make orders and grant interim relief whenever

it considers it just and convenient to do so, including when necessary to protect effective rights of access to court, whether derived from article 6 of the ECHR or the common law. This enables it, they say, to make an order which will have the effect of holding the ring pending the appeal, unconstrained by the limitations and conditions imposed upon HMRC by the legislation and public law principles. They also submit that Parliament can be taken to have enacted the AWRS on the basis that the High Court's powers to grant interim relief remain intact.

67 In their submission, an order can be made requiring them to give the wholesaler provisional approval, under section 88C, to sell controlled liquor, and also to add the wholesaler to the section 88D register. They support this on the basis that, although they could not act in this way of their own initiative, they could do so pursuant to a court order because the court's role is part of the statutory scheme. In the alternative, HMRC propose that an order could be made requiring them to exercise their power, under regulation 10 of the 2015 Regulations (see para 16 above), to exclude certain descriptions of sales from the 1979 Act. As with temporary approval, HMRC would not, they stress, independently use this power to exclude sales in circumstances like the present, but they would do so if ordered by the court to do that. If this route were to be taken, the wholesaler would be outside the1979 Act regime whilst the appeal to the FTT was pending. It would be necessary, therefore, for the court to impose conditions that would need to be met by the wholesaler for the exclusion to continue, for example as to record keeping and due diligence.

68 HMRC seek to explain why their own exclusion of sales to allow a winding down period (see above) should not be taken to indicate that they have power, without court intervention, to grant a wholesaler relief pending an appeal. They draw a distinction between their limited exercise of power, which is consistent with the statutory scheme, and an open-ended exclusion pending appeal. The latter would, in their view, be a stretch too far for them, but not for the High Court when intervening on the basis that the case was exceptional and that there was a need to protect effective access to justice.

69 Like HMRC, the wholesalers also submit that the High Court can order HMRC to approve and register a wholesaler temporarily under section 88C and section 88D. They say this on the basis that unless HMRC has decided that the wholesaler is not fit and proper to carry on any controlled activity for any period of time, regardless of all conditions and restrictions HMRC might impose, there is a residual power in the High Court to order HMRC to act under section 88C and D. Failing that, they propose that the order could focus upon section 9 of the 2005 Act. If neither of those routes is available, they rely upon section 8(1) of the Human Rights Act 1998, which they say gives the court power to act to ensure the efficacy of the appeal to the FTT, as required by article 6 of the ECHR (and, they say, A1P1).

(4) Discussion

70 It will be apparent, from what I have set out of their submissions, that the parties do not share the court's anxieties as to what, if any, form of order the High Court could make to safeguard the position of a wholesaler, without requiring HMRC to trespass impermissibly outside the statutory provisions relevant to the AWRS. As a result of this, the court has not had

A the benefit of any testing analysis, in the written or oral argument, of the parties' essentially agreed position. This is not intended as a criticism (the parties were entitled to make the legal submissions they considered appropriate) but the result is that the process has not entirely dispelled the court's unease about the form that the High Court's order might legitimately take. To illustrate the point, let me take the suggestion that the High Court could order HMRC to grant temporary approval under section 88C to a B wholesaler whose application they have rejected, but who has appealed to the FTT and has established an article 6 case for relief pending the appeal. Section 88C approval, whether indefinite or limited in time, depends on HMRC being satisfied that the wholesaler is fit and proper to carry on the controlled activity; that is an essential condition for approval under the section. For matters to have reached this point, however, HMRC must C necessarily have concluded that they are *not* satisfied that the wholesaler is fit and proper, even for a limited period of trading. If the High Court orders HMRC to grant temporary approval to the wholesaler in these circumstances, it is necessarily requiring HMRC to be satisfied when they are not satisfied, and I question how that can properly be done.

71 That example points to a more fundamental concern. Generally the High Court's power to order a person to do something by mandatory D injunction is exercisable for the purpose of making that person do something that he has it within his powers to do and should have done, but has failed to do. Here, the court has concluded, and HMRC agree, that there is in fact nothing which HMRC can properly do in the exercise of their statutory functions. They may fairly be said to have no relevant power which they could legitimately exercise in this context without straying outside the E purpose for which the power was given. In such circumstances, a conclusion that the High Court could none the less solve the problem by granting an injunction looks worryingly like endorsing the exercise of some sort of inherent authority to override an Act of Parliament, on the basis that the end justifies the means. It would take a lot of persuading for me to conclude that this would be a proper exercise of the High Court's undoubtedly wide power to grant injunctive relief, but the parties' agreement that it is permissible has F closed off adversarial submissions on the point.

72 The absence of debate between the parties makes it undesirable to make any definitive pronouncement as to whether an appropriate form of order might be found as a vehicle for the exercise, by the High Court, of its power to grant relief to a wholesaler pending an appeal to the FTT. Since the case for relief was not, in fact, made out on the evidence in the present case G (see para 86 of the Court of Appeal judgment, set out at para 61 above), it is unnecessary to do so, and I will say no more on the subject.

73 It should be noted that Mr Coppel invites the court to broaden its interpretation of section 88C of the 1979 Act and section 9 of the 2005 Act by viewing them with ECHR considerations in mind, and/or bearing in mind article 47 of the Charter of Fundamental Rights and Freedoms of the European Union. Just as I am uneasy about accepting that the statutory H scheme can be interpreted in such a way as to enable the High Court to come to the assistance of a wholesaler whose ECHR rights are in issue, so I do not readily see how section 88C and section 9 could be more broadly interpreted to the same end. I need not say more on the subject, however, as Mr Coppel's argument would not, in any event, assist the wholesalers in this

case, given that their evidence did not establish that their ECHR rights are endangered.

Conclusions

74 I would allow HMRC's appeal against the Court of Appeal's order remitting to HMRC the question of whether the wholesalers should be given temporary approval under section 88C. HMRC do not, in my view, have power, in circumstances such as the present ones, to grant such temporary approval under that section.

75 I would dismiss the wholesalers' appeal against the Court of Appeal's determination that HMRC do not have power to grant temporary approval under section 9 because, in my view, the Court of Appeal were right.

LORD HUGHES (with whom **LORD SUMPTION** agreed)

76 For the reasons so clearly set out by Lady Black JSC, I agree that: (i) HMRC has no power under section 88C of the Alcoholic Liquor Duties Act 1979 to approve temporarily an existing trader whom it has determined not to be a fit and proper person even for a short period and even subject to conditions; and (ii) nor has HMRC any power to do this under section 9 of the Commissioners for Revenue and Customs Act 2005; moreover (iii) although this is not for decision in the present case, it is also difficult to see, where a trader has been refused registration, on the grounds that HMRC is not satisfied that it is a fit and proper person, even for a limited period or on conditions, that a power to preserve its ability to trade pending appeal to the FTT can be found in the High Court.

77 As to (iii), it is highly significant that HMRC, which sponsored the legislation in question, thought it right to contend in these proceedings that the High Court does have the third-mentioned kind of power pending appeal, albeit only in cases where it is clearly established that otherwise good grounds of appeal would be rendered nugatory if the power did not exist. The principle underlying that approach is correct, and responsible. Neither in English law nor under the ECHR is there any general right to an appeal against an adverse decision, such as the one here under consideration, viz a determination that a trader is not a fit and proper person to be approved under the 1979 Act. But in this instance a right of appeal has been conferred by section 16 of the Finance Act 1994, albeit the grounds upon which it can succeed are limited: see para 25 of Lady Black JSC's judgment. Where such a right exists in law it would potentially be a breach of article 6 ECHR (right to a fair trial), read with article 13 (right to an effective remedy) if it were rendered illusory or nugatory by the absence of any power to suspend or stay the adverse decision of HMRC until the appeal can be determined. In the particular case of a trader who had an existing business at the time when the registration scheme introduced by section 88C of the 1979 Act, his right of appeal to the FTT *might* be rendered illusory or nugatory if he would be forced out of business before a good case on appeal could be determined. There may be few who are genuinely in this position, and with the passage of time those thus affected must be a reducing number. But some are enough to result in potential incompatibility of the legislation with the ECHR.

78 It is not possible for courts to invent a remedial legislative provision where, as seems here to be the case, the language of the self-executing scheme adopted by the 1979 Act and of the appellate structure adopted by the Finance Act 1994 do not admit of a construction which allows for a power to stay a decision of HMRC pending appeal. Nor, if the court's reading of the legislation is correct, can there be a remedy under section 8 of the Human Rights Act, since there is no unlawfulness if no other course is possible—see section 6(2). But if potential incompatibility is to be avoided, those responsible for legislation in this field may wish urgently to address amendment, for example to give either the FTT or the High Court a limited power to impose a stay pending appeal in defined circumstances.

Revenue's appeal allowed.
Claimant's appeal dismissed.

MS B L SCULLY, Barrister

Supreme Court

Cardtronics Europe Ltd and others *v* Sykes and others (Valuation Officers)

2019 May 22 Lord Kerr of Tonaghmore, Lord Carnwath, Lady Arden JJSC

APPLICATION by the valuation officers for permission to appeal from the decision of the Court of Appeal [2018] EWCA Civ 2472; [2019] 1 WLR 2281

Permission to appeal was given.

Neutral Citation Number: [2019] EWHC 552 (QB)

Case No: HQ17C00300

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/03/2019

Before:

MR JUSTICE MARTIN SPENCER

- -

Between:

Justyna Zeromska-Smith	**Claimant**
- and -	
United Lincolnshire Hospitals NHS Trust	**Defendant**

- -
- -

Miss Susan Rodway QC (instructed by **Shoosmiths LLP**) for the **Claimant**
Mr Charles Feeny (instructed by **Browne Jacobson LLP**) for the **Defendant**
Hearing dates: 25th and 26th February 2019

- -

Approved Judgment on anonymity

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE MARTIN SPENCER

MR JUSTICE MARTIN SPENCER:

Introduction and Background

1. In this matter in which the Claimant seeks damages for psychiatric injury arising out of the stillbirth of her daughter on 27 May 2013, an application has been made for anonymity on the part of the Claimant. The trial was listed to start on Friday, 22 February 2019 and Miss Rodway QC indicated that she would be making the anonymity application. The application was made on Monday, 25 February 2019 but I "parked" the application to enable the Press Association to be served with the notice. On 26 February, I received submissions in writing from the Press Association and Miss Rodway resumed her application. Having heard argument, I refused the application and these are the reasons for that decision.

2. The brief background facts are that the Claimant, who is Polish, and was born on 26 September 1980, moved to England in July 2004 and soon thereafter met and formed a relationship with Mark Smith. They married on 28 July 2007. They always planned to have a family and moved from London to Lincolnshire where they were able to purchase a large property which could accommodate their family.

3. In about October 2012, the Claimant discovered that she was pregnant and her first booking appointment at the hospital was on 24 October 2012. A 12 week scan on 2 November 2012 gave an estimated date of delivery of 15 May 2013. A further scan on 28 December 2012 revealed that the baby was a girl and the Claimant and her husband were overjoyed. The Claimant had set her heart on having a daughter. They agreed a name for the baby, Megan, decorated and prepared a nursery for the baby and prepared themselves for the baby's birth.

4. A membrane sweep was carried out at 40 weeks' gestation on 15 May 2013 and a second membrane sweep was carried out a week later on 22 May 2013, neither of which precipitated labour. Therefore, the Claimant was admitted to the Defendant's hospital on 26 May 2013 for induction of labour. This was now term +10. At 01:00 in the early hours of 27 May 2013, a CTG trace was started which sadly revealed that there was no heartbeat and in fact the baby had died in utero. The labour had to proceed, it lasted some 18 hours, the baby was delivered by forceps and was stillborn. The Claimant was discharged the following day, 28 May 2013.

5. Liability for the stillbirth of the baby has been admitted by the Defendant and it is further conceded that the Claimant is entitled to damages to represent her loss arising out of the fact that the pregnancy was not brought to a successful conclusion. However, the Claimant also seeks substantial damages for what is claimed to be a pathological grief reaction combined with depression, which has proved intractable.

6. In December 2014, the Claimant fell pregnant again with an estimated date of delivery of 12 September 2015. This time the baby was a boy and the child was delivered by elective caesarean section on 1 September 2015. A further child, also a boy, was delivered on 8 May 2018. It is part of the Claimant's case that she suffers from pathological separation anxiety in relation to both her children, as a result of her psychiatric condition consequent upon the stillbirth of Megan.

The Application for Anonymity

7. In support of the application for anonymity, the solicitor with conduct of the claim on behalf of the claimant, Ms Kiran Deo, has made a statement in which she has stated that the claim, involving substantial damages and a schedule of loss exceeding six million pounds is one which is bound to attract publicity and the interest of the press. Miss Deo goes on to say:

> "10. One of the consequences of the Claimant's illness is that she now suffers from disabling separation anxiety and has to have her two young sons in her sight at all times …
>
> 11. The claim has already had a substantial impact on the Claimant's children and has put a significant amount of added pressure on the Claimant's marriage. There is also a definite risk of suicide. Having to relive and discuss such painful past events and for those events to be shared with the public in such a way that the family can be identified will be very difficult and could easily lead to irreparable damage to the family unit. This risk of interference with private family life, which is self-evident, can be alleviated with the making of an anonymity order.
>
> 12. Part of the Claimant's objective for bringing an action against the Defendant was to try and achieve justice for what has happened and to ensure the Defendant is held accountable for the mistakes that have been made. However, I would respectfully argue that the public interest can be served without the need for disclosure of the Claimant's identity."

8. Supplementing Miss Deo's statement, Miss Rodway QC, who represents the Claimant, has argued that the principle of open justice is satisfied by the Defendant being identified without identification of the Claimant. She submits that the trial includes matters of a deeply personal and private nature concerning the Claimant's mental health, her relationship with her two children, her intimate medical history and her past suicidal ideation which included thoughts of ending her life as well as that of her son. Although she is not a protected party she is described as a "highly vulnerable individual" and the interests of her young children should, it is submitted, be weighed in the balance. It is submitted that publication of the Claimant's identity will serve no useful public purpose but will risk considerable further harm to the Claimant's already precarious mental health and harm to her children and family. Personal privacy is said to be all important to the Claimant such that she changed jobs because her work colleagues were aware of the stillbirth of the Claimant's daughter and she then concealed this background from her new employers and work colleagues. She avoids interaction with strangers.

9. Miss Rodway further submits as follows:

> "iv) In the current climate of swift and widespread dissemination via social media, there is always the risk that some individuals may react in an extreme and negative way to

> parts of the evidence … it is not fanciful to consider her receiving harmful abuse which would have repercussions for the Claimant and her family. There is also the risk, knowing that the Claimant is Polish, this could extend to racial abuse;
>
> v) The publication of the Claimant's identity would necessarily identify her children. Public knowledge of the facts of their mother's mental health issues risks real harm to them. In addition it would provide the opportunity for her children, at a later stage, to discover and read facts of the case concerning them which would be likely to cause them considerable harm and distress;
>
> vi) If the Claimant is awarded damages, the revelation of her identity would also potentially expose her and her family to unwanted attention from strangers, potential unscrupulous attempts to persuade her to invest unwisely or begging letters pleading for financial help;
>
> vii) The principle of open justice can readily be met in the present case without the need to identify the Claimant or her family."

10. When the application was made at the start of the trial, I adjourned the application and ordered that it should be served on the Press Association to give them the chance to consider the application and make any submissions they wanted to in response. On the morning of 25 February 2019, I received written submissions by the Press Association which, whilst acknowledging that the Claimant's Article 8 ECHR rights are engaged in this case, argued that these rights are to be weighed against the Article 10 rights of the press. Having made submissions in relation to the legal principles and previous decisions, which I consider later in this judgment, the Press Association submitted that anonymity orders in cases where the party seeking them is not a protected party should only be made in exceptional circumstances and where necessary in the interest of the administration of justice. They submit that the order sought in this case would represent a departure from the previous jurisprudence and that the granting of anonymity would set an unfortunate precedent. They state:

> "22. As signatories to the Independent Press Standards Organisation Code of Conduct, we submit many of the concerns raised by the application could be met by our responsibilities under that code, particularly those sections of the guidance relating to privacy, children, suicide and intrusion into grief or shock.
>
> 23. It is also submitted that many of the details of the case, especially those of a sensitive nature, would not necessarily need to be made public. Some parts of the evidence could, for example, be heard in private or protected by reporting restrictions."

On that basis, the application is opposed.

The legal background

11. The starting point is the fundamental principle of common law that justice is administered in public and judicial decisions are pronounced publicly. This "open justice" principle is both integral to protecting the rights of the parties and also essential for the maintenance of public confidence in the administration of justice. This principle was emphasised by the House of Lords in *Scott v Scott* [1913] A.C. 417 where Lord Atkinson said:

> "The hearing of a case in public may be, and often is, no doubt, painful, humiliating or deterrent both to parties and to witnesses, and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trial is to found, on the whole, the best security for the pure, impartial and efficient administration of justice, the best means for winning for it public confidence and respect."

At the time of the decision in *Scott v Scott,* there were two recognised exceptions to the principle of open justice: cases involving wards of court or lunatics and cases involving a secret process where the effect of publicity would be to destroy this subject matter. This was explained by Viscount Haldane L.C. at page 437 where he said:

> "While the broad principle is that the courts of this country must, as between parties, administer justice in public, this principle is subject to apparent exceptions, such as those to which I have referred. But the exceptions are themselves the outcome of a yet more fundamental principle that the chief object of Courts of justice must be to secure that justice is done. In the two cases of wards of court and of lunatics the court is really sitting primarily to guard the interests of the ward or the lunatic. Its jurisdiction is in this respect parental and administrative, and the disposal of controverted questions is an incident only in the jurisdiction. It may often be necessary, in order to attain its primary object, that the court should exclude the public. The broad principle which ordinarily governs it therefore yields to the paramount duty, which is the care of the ward or the lunatic. The other case referred to, that of litigation as to a secret process, where the effect of publicity would be to destroy the subject matter, illustrates a class which stands on a different footing. There it may well be that justice could not be done at all if it had to be done in public. As the paramount object must always be to do justice, the general rule as to publicity, after all only the means to an end, must accordingly yield. But the burden lies on those seeking to displace its application in the particular case to make out that the ordinary rule must of necessity be superseded by this paramount consideration. The question is by no means one which, consistently with the spirit of our jurisprudence, can be

> dealt with by the judge as resting in his mere discretion as to what is expedient. The latter must treat it as one of principle, thus turning, not on convenience, but on necessity."

These last words, referring to the criterion of necessity, are the ones that express the principle in cases which do not fall within one of the established exceptional categories such as wards, lunatics and secret processes.

12. The principles are now reflected in part 39 of the Civil Procedure Rules. Rule 39.2(1) provides:

> "The general rule is that a hearing is to be in public."

Rule 39.2(3) provides:

> "A hearing, or any part of it, may be in private if … (d) a private hearing is necessary to protect the interests of any child or protected party; or … (g) the court considers this to be necessary in the interests of justice."

CPR Rule 39.2(4) provides:

> "The court may order that the identity of any party or witness must not be disclosed if it considers non-disclosure necessary in order to protect the interests of that party or witness."

Again, I emphasise the use in CPR 39.2(4) of the word "necessary".

13. In the present case, it is argued on behalf of the Claimant that the principle of open justice is perfectly well satisfied by the name of the Defendant being published but without publication of the Claimant's name. The interests of the press in being able to report the identity of both parties was considered by Lord Rodger of Earlsferry in *In re Guardian News and Media Ltd* [2010] 2 AC 697 at 723:

> "63. What's in a name? 'A lot', the press would answer. This is because stories about particular individuals are simply much more attractive to readers than stories about unidentified people. It is just human nature. And this is why, of course, even when reporting major disasters, journalists usually look for a story about how particular individuals are affected. Writing stories which capture the attention of readers is a matter of reporting technique, and the European court holds that article 10 protects not only the substance of ideas and information but also the form in which they are conveyed … The judges are recognising that editors know best how to present material in a way that will interest the readers of their particular publication and so help them to absorb the information. A requirement to report it in some austere, abstract form, devoid of much of its human interest, could well mean that the report would not be read and the information would not be passed on. Ultimately, such an approach could

> threaten the viability of newspapers and magazines, which can only inform the public if they attract enough readers and make enough money to survive.
>
> 64. Lord Steyn put the point succinctly in *In re S* [2005] 1 AC 593, 608, para. 34 when he stressed the importance of bearing in mind that
>
> > 'from a newspaper's point of view a report of a sensational trial without revealing the identity of the defendant would be a very much disembodied trial. If the newspapers choose not to contest such an injunction, they are less likely to give prominence to reports of the trial. Certainly, readers will be less interested and editors will act accordingly. Informed debate about criminal justice will suffer.'
>
> Mutatis mutandis, the same applies in the present cases. A report of the proceedings challenging the freezing orders which did not reveal the identities of the appellants would be disembodied. Certainly, readers would be less interested and, realising that, editors would tend to give the report a lower priority. In that way informed debate about freezing orders would suffer.
>
> 65. On the other hand, if newspapers can identify the people concerned, they may be able to give a more vivid and compelling account which will stimulate discussion about the use of freezing orders and their impact on the communities in which the individuals live. Concealing their identities simply casts a shadow over entire communities"

Thus, revelation of the identity of the parties is an important part of the principle of open justice and the principle is generally diminished where a newspaper is allowed to report the identity of only one of the parties.

14. In *JXMX v Dartford and Gravesham NHS Trust* [2015] EWCA Civ 96, the court was concerned with an application to anonymise the name of the claimant in relation to an application for approval of a compromise for a claim for damages for personal injury brought by a child. Pursuant to CPR 21.10, all settlements or compromises of claims by or against children must be approved by the court if they are to be binding on the parties. Similarly, approval is required for any settlement or compromise of any claim by or against a protected party. In that case, at paragraph 17, the court reiterated the principles to which I have already referred stating:

> "Whenever the court is asked to make an order [restricting publication of a party's name], therefore, it is necessary to consider carefully whether a derogation of any kind is strictly necessary, and if so what is the minimum required for that purpose. The approach is the same whether the question be viewed through the lens of the common law or that of the

> European Convention on Human Rights, in particular articles 6,8 and 10."

The court referred to a series of cases in which Tugendhat J sought to apply the established principles to applications for anonymity orders in the context of applications for the approval of settlements of claims by children and protected parties. In each case, the judge had proceeded on the basis that such orders were to be considered on a case by case basis, regardless of the consent of the defendant, rightly emphasising the need for any derogation from the principle of open justice to be based on necessity.

15. On the appeal, the Personal Injury Bar Association intervened in support of the application for an anonymity order and their counsel, Mr Robert Weir QC, invited the court to hold that normally the identity of the claimant should not be disclosed in reports of approval hearings. He put forward three main justifications for such an approach:

i) The court's function when approving settlements is essentially protective and fundamentally different from its normal function of resolving disputes between the parties to proceedings;

ii) The publication of highly personal information about the claimant's medical condition involves a serious invasion of his and his family's rights to privacy;

iii) Unlike adult litigants at full capacity, who are free to settle their claims in private, the children and protected parties have no choice but to seek the court's approval of their settlements in proceedings open to the public and are thus placed at a significant disadvantage to other litigants in obtaining respect for their private and family lives contrary to article 14 ECHR.

Mr Weir submitted that anonymization of reports for approval hearings would ensure that the discrimination against children and protected parties which is necessary to ensure that their interests are properly protected is no greater than necessary and proportionate to the end sought to be achieved.

16. The court essentially accepted Mr Weir's submissions. In the course of his judgment Moore-Bick LJ said:

> "29. Although, as we have indicated, we do not think that approval hearings lie outside the scope of the principle of open justice, we think there is force in the argument that in the pursuit of justice the court should be more willing to recognise a need to protect the interests of claimants who are children and protected parties, including their right and that of their families to respect for their privacy in relation to such proceedings. Such a willingness is reflected both in the Family Procedure Rules and in the Court of Protection Rules. It might be thought that approval hearings, whether involving children or protected parties, are comparable in nature and deserve to be viewed in a similar light, although it has not been suggested that in general such hearings should be held in private. The function which

> the court discharges at an approval hearing is essentially one of a protective nature, as it was when it exercised the function of parens patriae on behalf of the Crown in relation to wards of court and lunatics. The court is concerned not so much with the direct administration of justice as with ensuring that through the offices of those who act on his or her behalf the claimant receives proper compensation for his or her injuries. The public undoubtedly has an interest in knowing how that function is performed and the principle of open justice has an important part to play in ensuring that it is performed properly, but its nature is such that the public interest may usually be served without the need for disclosure of the claimant's identity.
>
> 30. By virtue of article 14 of the Convention children and protected parties are entitled to the same respect for their private lives as litigants of full age and capacity (who are free to settle their claims with resort to the court), subject only to the need to ensure that their interests are properly protected. In many, if not all, cases of this kind the court will need to consider evidence of a highly personal nature relating to the claimant's injuries, current medical condition, future care needs and matters of a similar nature. In our view that is an important matter which the court is bound to take into account when deciding whether anonymity is necessary in order to do justice to such a claimant, notwithstanding the public interest which is served by the principle of open justice. Withholding the name of the claimant mitigates to some extent the inevitable discrimination between these different classes of litigants. In some cases it will be possible to identify a specific risk of dissipation of the sum awarded as damages when the claimant reaches the age of majority (as was the case, for example, in *JXF v York Hospitals*). If such a risk exists it will provide an additional argument in favour of anonymization. Although a fear of intrusive Press interest is sometimes said to provide grounds for relief, we accept Mr Dodd's submission that in general the Press seeks to act responsibly in reporting matters of this kind."

This latter reference reflects submissions made on behalf of the Press which I have referred in paragraph 10 above.

17. The court then went on to decide that in approval applications in relation to protected parties and children, an anonymity order should normally be made and that has become the norm in relation to such applications.

Discussion

18. In my judgment, the reasoning in *JXMX v Dartford and Gravesham NHS Trust* and the practice whereby anonymity orders are routinely made is peculiar to approval hearings in relation to children and protected parties, and Claimants in cases such as

the present can derive no support or comfort from that decision where they are adults of full capacity who bring their claims by choice and in respect of whom any publicity which arises in the reporting of the proceedings stems from that choice rather than from the inability to settle the claim without obtaining the court's approval. In cases such as the present, even where the case involves exploration of intimate details of the Claimant's private and family life, her psychiatric condition and her relationship with her two young children, the full force of the "open justice" principle and the interests of the press in reporting the proceedings, including the names of the parties, should not be derogated from, for the reasons already set out in the judgment of Lord Rodger (see paragraph 13 above). In respectful agreement with the reasoning of Lord Rodger, I do not consider that, in a case such as the present, the principle of "open justice" is adequately satisfied by the name of the Defendant being published, but not the name of the Claimant.

19. Miss Rodway, in making her application, relied on the decision of Nicol J in *ABC v St George's Healthcare Trust* [2015] EWHC 1394 (QB) where an anonymity order was made in relation to a claimant who was not a child or a protected party. However, in my judgment that decision does not assist the Claimant here. Rather, that case illustrates that the general principle is not absolute, and can be departed from where such departure is necessary in circumstances which are truly exceptional. The order was made because of the exceptional circumstances of that particular case and Nicol J explained his reasons for making the order as follows:

> "44. … As is clear from the judgment above, the Claimant's father has been diagnosed with Huntington's Disease. This is a genetic condition. A sufferer's child has a 50% chance of inheriting it. The Claimant has subsequently discovered that she too has Huntington's Disease. It is her case that if she was given the information when she should have been, she would have terminated the baby she was then carrying. She was not. That child was born. It is her daughter. It is usual not to test a child for Huntington's Disease until she is an adult. The daughter does not at present know her mother has Huntington's Disease. The daughter does not know that she has a 50% chance of inheriting itself. I accepted that there could be serious consequences for the daughter if she found out about these matters through a report of the present proceedings. This together with the rights of the Claimant and her daughter not to have their private lives interfered with by the action of the court, appeared to me to justify the restriction on publicity which the Claimant sought."

It seems to me that the harm to the claimant's daughter from finding out that she had a 50% chance of having inherited Huntington's Disease by chance rather than through a managed mechanism whereby she was informed of this at an age which was considered appropriate and in circumstances where she was given appropriate advice and counselling, was a powerful reason for making the anonymity order in that case on a wholly exceptional basis.

20. In the present case, the revelation of the matters personal to this claimant and her family are inherent and intrinsic to a claim of this nature, relating as it is to psychiatric injury suffered by the Claimant from the stillbirth of her daughter. Having chosen to bring these proceedings in order to secure damages arising out of that tragedy, the Claimant cannot avoid the consequences of having made that decision in terms of the

principle of open justice and the consequent publicity potentially associated with such proceedings being heard in open court.

21. Finally, I wish to say something about the timing of any application for anonymity in cases which are not approval hearings for protected parties or children. Here, the application was made at the start of the trial, without any notice having been given to The Press Association in advance. This put the court reporter in an awkward position, and did not allow for full consideration of the issues or properly prepared submissions on behalf of the Press. Mr Feeny, for the Defendant, understandably took a neutral stance, although, when I adjourned the application, he helpfully provided to the court some additional authorities, for which I was very grateful. But, in general, it seems to me that such an application should be made and heard in advance of the trial, and should be served on the Press Association. There are two reasons for this. First, and most obviously, it gives the Press Association a proper opportunity to make representations, whether orally at the application or in writing in advance. Secondly, the outcome of the application may inform any decision taken by a Claimant in relation to settlement. Thus, if a Claimant in a sensitive case such as the present knows that, if the matter goes to trial, her name will be published in the press, she may consider that to be an important factor in deciding whether or not to accept an offer of settlement – in some cases it could tip the balance. For these reasons, an application for anonymity should be made well in advance of the trial and Claimants (and their advisers) should not assume that the application will be entertained at the start of the trial (because of the disruption to the trial which may ensue, if the application needs to be adjourned to enable the Press Association time to prepare submissions), nor that it will be "nodded through" by the judge, where the Defendant takes a neutral stance and there is only a court reporter to represent the interests of the press..

22. In the circumstances, the application for anonymity is refused.

Court of Appeal

Regina (Guardian News and Media Ltd) *v* City of Westminster Magistrates' Court and another (Article 19 intervening)

Guardian News and Media Ltd *v* Government of the United States of America and another

[2012] EWCA Civ 420

2012 Feb 7; April 3

Lord Neuberger of Abbotsbury MR, Hooper, Toulson LJJ

Crime — Practice — Disclosure — Newspaper publisher seeking after conclusion of extradition proceedings to be provided with copies of or to be allowed to inspect written evidential and other material referred to but not read out in open court — Documents sought to enable newspaper to stimulate informed debate on justice system and extradition — District judge refusing application — Whether open justice principle requiring disclosure — Whether press and public entitled to inspect documents referred to and relied on but not read out in open court — Whether Convention right to freedom of expression engaged — Whether conferring on press unfettered right of access to documents referred to in open court in criminal proceedings — Human Rights Act 1998 (c 42), Sch 1, Pt I, art 10

The Government of the United States of America brought proceedings under the Extradition Act 2003 seeking the extradition of two British citizens on corruption charges. Following hearings in open court both were ordered to be extradited. Journalists working for the claimant, which published newspapers, had attended part of the hearings, at which certain documents had been referred to by counsel but not read out in detail. Those documents included the skeleton arguments of counsel, affidavits and witness statements submitted by the United States prosecutors and correspondence between the United States Department of Justice and the Serious Fraud Office. The claimant applied to the district judge for an order that it be provided with copies of, or be allowed to inspect, those documents, contending that, since it had become common practice for courts to be supplied with documents before a case was heard and for judges to read them beforehand in the interests of efficiency, it was not possible to understand the full case against those extradited without seeing those documents, which included affidavits, witness statements and correspondence, and that as a result the claimant was hampered in its journalistic purpose of stimulating informed debate about matters of public interest, including the way the justice system dealt with cases of suspected international corruption and the extradition of British citizens to the United States. The parties supplied their skeleton arguments to the claimant but opposed further disclosure. The district judge refused the application, on the basis that the principle of open justice did not confer on the public a right to inspect documents before the court in criminal proceedings, and a magistrates' court had no power either under the Criminal Procedure Rules 2010 or its inherent jurisdiction to make such an order. The claimant sought judicial review of the district judge's decision and appealed by way of case stated, contending that article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms[1] was engaged when the media sought disclosure of evidence given in court for the purpose of disseminating it in the public interest. The Divisional Court of the Queen's Bench Division dismissed the claim and the appeal, both at common law and under article 10.

[1] Human Rights Act 1998, Sch 1, Pt I, art 10.1: see post, para 41.

A On the claimant's appeal—

Held, (1) that the requirements of the common law constitutional principle of open justice were to be determined by the courts, subject to any statutory provision, in the exercise of its inherent jurisdiction; that those requirements applied to all tribunals exercising the judicial power of the state, irrespective of whether they were creatures of statute; that, unless the language of a statute made it plain beyond possible doubt that Parliament unequivocally intended to limit or control the way in B which the courts determined the scope of the open justice principle or how it should be applied in a particular case, it was not to be taken to have done so; that, in consequence, it could not be inferred from the exclusion of court documents from the Freedom of Information Act 2000 that Parliament had thereby intended to preclude the court from permitting a non-party to have access to documents if it considered such access to be proper under the open justice principle; that the power to allow access to documents therefore derived from the common law rather than the C Criminal Procedure Rules, the function of the Rules being merely to set out a process for the exercise of that common law power; that the practice of receiving evidence without it being read in open court potentially had the consequence of making the proceedings less intelligible to the press and public and accordingly it was necessary in some cases for public access to be granted to documents referred to in open court; that in a case where documents had been placed before a judge and referred to in the course of proceedings, the default position on an application for inspection should be D that access ought to be permitted on the open justice principle, and where access was sought for a proper journalistic purpose the case for allowing it would be particularly strong; and that on an application for access to documents the court was to carry out a fact-specific proportionality exercise, evaluating the potential value of the material in advancing the purpose of the open justice principle against any risk of harm which access might cause to the legitimate interests of others (post, paras 69–75, 83, 85, 92, 109).

E *SmithKline Beecham Biologicals SA v Connaught Laboratories Inc* [1999] 4 All ER 498, CA applied.

(2) Allowing the appeal, that the claimant had a serious journalistic purpose in seeking access to the documents, the way in which the justice system addressed international corruption and the operation of the Extradition Act 2003 being matters of public interest about which it was right that the public should be informed; that the courts ought to assist the exercise of informing the public on matters of public F interest unless there were strong countervailing arguments; that the principle of open justice was not necessarily satisfied if the proceedings were held in public and reporting of the proceedings was permitted since the purpose of the principle was not merely to allow the judge's conduct of the case to be monitored, but to enable the public to understand and scrutinise the justice system of which the courts were the administrators; that the fact that the claimant's application went further than the courts had considered necessary in the past was not decisive since the practice of G the courts was capable of changing; that in the face of credible evidence from the claimant the courts ought to be cautious about deciding the adequacy of material already available to the claimant for its journalistic purpose; that since the claimant had put forward good reasons for having access to the documents it sought, and since it had not been suggested that access would give rise to any risk of harm to any other party or place any great burden on the court, on the basis of the common law principle of open justice the claimant should be granted access to the documents H sought (post, paras 76–77, 79–80, 82, 87, 89, 91, 92, 109).

R v Waterfield [1975] 1 WLR 711, CA and *GIO Personal Investment Services Ltd v Liverpool and London Steamship Protection and Indemnity Association Ltd (FAI General Insurance Co Ltd intervening)* [1999] 1 WLR 984, CA distinguished.

Decision of the Divisional Court of the Queen's Bench Division [2010] EWHC 3376 (Admin); [2011] 1 WLR 1173; [2011] 3 All ER 38 reversed.

The following cases are referred to in the judgments:

Atkinson v United Kingdom (1990) 67 DR 244
Attorney General v Leveller Magazine Ltd [1979] AC 440; [1979] 2 WLR 247; [1979] 1 All ER 745, HL(E)
Attorney General of Nova Scotia v MacIntyre [1982] 1 SCR 175
Barings plc v Coopers & Lybrand [2000] 1 WLR 2353; [2000] 3 All ER 910, CA
Broadcasting Corpn of New Zealand v Attorney General [1982] 1 NZLR 120
Crook, In re [1992] 2 All ER 687; (1989) 93 Cr App R 17, CA
GIO Personal Investment Services Ltd v Liverpool and London Steamship Protection and Indemnity Association Ltd (FAI General Insurance Co Ltd intervening) [1999] 1 WLR 984, CA
Gaskin v United Kingdom (1989) 12 EHRR 36
Grupo Interpres SA v Spain (1997) 89B DR 150
Home Office v Harman [1983] 1 AC 280; [1982] 2 WLR 338; [1982] 1 All ER 532, HL(E)
Independent News and Media Ltd v A [2010] EWCA Civ 343; [2010] 1 WLR 2262; [2010] 3 All ER 32, CA
Independent Newspapers (Pty) Ltd v Minister for Intelligence Services [2008] ZACC 6; 2008 (5) SA 31
Kenedi v Hungary (2009) 27 BHRC 335
Leander v Sweden (1987) 9 EHRR 433
McPherson v McPherson [1936] AC 177, PC
Mahon v Rahn [1998] QB 424; [1997] 3 WLR 1230; [1997] 3 All ER 687, CA
Matky v Czech Republic (Application No 19101/03) (unreported) given 10 July 2006, ECtHR
R v Canadian Broadcasting Corpn 2010 ONCA 726
R v Howell [2003] EWCA Crim 486, CA
R v Waterfield [1975] 1 WLR 711; [1975] 2 All ER 40, CA
Romeo, In re Extradition of (No 87-0808RC) 1 May 1987, US District Ct (Mass)
Scott v Scott [1913] AC 417, HL(E)
SmithKline Beecham Biologicals SA v Connaught Laboratories Inc [1999] 4 All ER 498, CA
Társaság a Szabadságjogokért v Hungary (2009) 53 EHRR 130
Taylor v Director of the Serious Fraud Office [1999] 2 AC 177; [1998] 3 WLR 1040; [1997] 4 All ER 887; [1998] 4 All ER 801, CA and HL(E)
Television New Zealand Ltd v Rogers [2007] 1 NZLR 156; [2007] NZSC 91; [2008] 2 NZLR 277
United States v Amodeo (1995) 71 F 3d 1044

The following additional cases were cited in oral argument:

Chan U Seek v Alvis Vehicles Ltd (Guardian Newspapers Ltd intervening) [2004] EWHC 3092 (Ch); [2005] 1 WLR 2965; [2005] 3 All ER 155
Guardian News and Media Ltd, In re [2010] UKSC 1; [2010] 2 AC 697; [2010] 2 WLR 325; [2010] 2 All ER 799 (SC(E)
Guerra v Italy (1998) 26 EHRR 357
Kennedy v Information Comr [2011] EWCA Civ 367; [2011] EMLR 454, CA
Law Debenture Trust Corpn (Channel Islands) Ltd v Lexington Insurance Co [2003] EWHC 2297 (Comm); 153 NLJ 1551
R (Government of the United States of America) v Bow Street Magistrates' Court [2006] EWHC 2256 (Admin); [2007] 1 WLR 1157, DC
Richmond Newspapers Inc v Virginia (1980) 448 US 555
Roche v United Kingdom (2005) 42 EHRR 599, GC
S (A Child) (Identification: Restrictions on Publication), In re [2004] UKHL 47; [2005] 1 AC 593; [2004] 3 WLR 1129; [2004] 4 All ER 683, HL(E)

The following additional cases, although not cited, were referred to in the skeleton arguments:

Amand v Home Secretary and Minister of Defence of Royal Netherlands Government [1943] AC 147; [1942] 2 All ER 381, HL(E)
Ambrose v Harris [2011] UKSC 43; [2011] 1 WLR 2435, SC(Sc)
Attorney General v Guardian Newspapers Ltd (No 2) [1990] 1 AC 109; [1988] 2 WLR 805; [1988] 3 All ER 545, CA; [1990] 1 AC 109; [1988] 3 WLR 776; [1988] 3 All ER 545, HL(E)
British Broadcasting Corpn v Sugar (No 2) [2010] EWCA Civ 715; [2010] 1 WLR 2278; [2011] 1 All ER 101, CA
Brown v Stott [2003] 1 AC 681; [2001] 2 WLR 817; [2001] 2 All ER 97, PC
Comr of Police of the Metropolis v Times Newspapers Ltd [2011] EWHC 2705 (QB)
Coventry Newspapers Ltd, Ex p [1993] QB 278; [1992] 3 WLR 916; [1993] 1 All ER 86, CA
Gooch v Ewing [1986] QB 791; [1986] 2 WLR 445; [1985] 3 All ER 654, CA
Khan (Mehtab) v Government of the United States of America [2010] EWHC 1127 (Admin)
Lac d'Amiante du Québec Ltée v 2858–0702 Québec Inc 2001 SCC 51; [2001] 2 SCR 743
Mafart v Television New Zealand Ltd [2006] NZSC 33; [2006] 3 NZLR 18
New York Times Co, In re (1987) 828 F 2d 110
O (Restraint Order: Disclosure of Assets), In re [1991] 2 QB 520; [1991] 2 WLR 475; [1991] 1 All ER 330, CA
R v Chaytor [2010] EWCA Crim 1910; [2010] 2 Cr App R 394, CA
R v Felixstowe Justices, Ex p Leigh [1987] QB 582; [1987] 2 WLR 380; [1987] 1 All ER 551; 84 Cr App R 327, DC
R v Governor of Brixton Prison, Ex p Levin [1997] AC 741; [1997] 3 WLR 117; [1997] 3 All ER 289; [1998] 1 Cr App R 22, HL(E)
R v Lambeth Metropolitan Stipendiary Magistrate, Ex p McComb [1983] QB 551; [1983] 2 WLR 259; [1983] 1 All ER 321, DC and CA
R v Legal Aid Board, Ex p Kaim Todner [1999] QB 966; [1998] 3 WLR 925; [1998] 3 All ER 541, CA
R v Southampton Justices, Ex p Green [1976] QB 11; [1975] 3 WLR 277; [1975] 2 All ER 1073, CA
R (Al-Skeini) v Secretary of State for Defence (The Redress Trust intervening) [2007] UKHL 26; [2008] AC 153; [2007] 3 WLR 33; [2007] 3 All ER 685, HL(E)
R (Roberts) v Parole Board [2005] UKHL 45; [2005] 2 AC 738; [2005] 3 WLR 152; [2006] 1 All ER 39, HL(E)
R (Ullah) v Special Adjudicator [2004] UKHL 26; [2004] 2 AC 323; [2004] 3 WLR 23; [2004] 3 All ER 785, HL(E)
Reyes v Chile (unreported) 19 September 2006, Inter-American Court of Human Rights
Toronto Star Newspapers Ltd v Ontario 2005 SCC 41; [2005] 2 SCR 188
Vancouver Sun, In re 2004 SCC 43; [2004] 2 SCR 332
Wellington v Governor of Belmarsh Prison [2004] EWHC 418 (Admin); [2005] Extradition LR 1, DC

APPEAL from the Divisional Court of the Queen's Bench Division

By a claim form dated 16 July 2010 the claimant, Guardian News and Media Ltd, sought judicial review of the decision of District Judge Tubbs sitting at the City of Westminster Magistrates' Court on 20 April 2010, inter alia, to refuse its application for inspection of specified documents relied on by the parties and referred to in open court during the hearing of extradition proceedings brought by the Government of the United States of America against Jeffrey Tesler and Wojciech Chodan.

The claimant also appealed by way of case stated against the district judge's refusal to order disclosure of the specified documents. The question for the High Court was whether the magistrates' court had been correct in law in failing to provide for the inspection by, or disclosure to, the claimant of the court documents specified in the claimant's application.

On 21 December 2010 the Divisional Court of the Queen's Bench Division (Sullivan LJ and Silber J) [2011] 1 WLR 1173 dismissed the appeal and the claim.

By an appellant's notice dated 14 April 2011 and pursuant to permission granted by the Court of Appeal (Lord Neuberger of Abbotsbury MR, Jackson and Aikens LJJ) [2011] 1 WLR 3253 on 25 October 2011, the claimant appealed on the grounds, inter alia, that (1) the Divisional Court had been wrong to conclude that the decisions of the European Court of Human Rights in *Társaság a Szabadságjogokért v Hungary* (2009) 53 EHRR 130 and the Court of Appeal in *Independent News and Media Ltd v A* [2010] 1 WLR 2262 were of no assistance to the claimant's case and that article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms was not engaged upon the claimant's application; (2) the Divisional Court had erred in concluding that the absence of a positive statutory power to permit documents to be shown to the press was a bar to the order sought by the claimant; (3) the Divisional Court had wrongly concluded that *R v Waterfield* [1975] 1 WLR 711 was a bar to the order sought by the claimant; and (4) in rejecting the claimant's application, the Divisional Court had wrongly relied on the fact that the Freedom of Information Act 2000 could not have been used to obtain the documents sought in the claimant's application.

On 18 January 2012 the court (Lord Neuberger MR) granted Article 19, a non-governmental international human rights organisation promoting the right to freedom of expression, permission to intervene by written submissions only.

The facts are stated in the judgment of Toulson LJ.

Gavin Millar QC and *Adam Wolanski* (instructed by *Reynolds Porter Chamberlain LLP)* for the claimant.

The principle of open justice requires the disclosure to the media of documents relied on by the parties and read by the judge in extradition proceedings, but not read in open court, in order for the press to write accurate and informed reports of those proceedings and to conduct investigations into matters of general public interest, including the extradition arrangements between the United States of America and the United Kingdom. When an extradition hearing is listed before a district judge in the magistrates' court under the Extradition Act 2003 the district judge is sitting as a court of law exercising a statutory jurisdiction and has an inherent common law power to control the conduct of proceedings before it: see *Attorney General v Leveller Magazine Ltd* [1979] AC 440, 450C–D, 458B, 470H. The power to control the conduct of proceedings and the power to make directions under rule 3.5 of the Criminal Procedure Rules 2010 permits the district judge to grant disclosure of documents to a non-party. Disclosure to a non-party may be ordered of documents held on the court record after the conclusion of a case under CPR r 5.4 or

A r 32.13(1): see *Chan U Seek v Alvis Vehicles Ltd (Guardian Newspapers Ltd intervening)* [2005] 1 WLR 2965. In civil and criminal courts a judge's common law powers may be used to order disclosure of skeleton arguments read by the court even in the absence of procedural rules providing for that disclosure: see *Law Debenture Trust Corpn (Channel Islands) Ltd v Lexington Insurance Co* (2003) 153 NLJ 1551; *GIO Personal Investment*
B *Services Ltd v Liverpool and London Steamship Protection and Indemnity Association Ltd (FAI General Insurance Co Ltd intervening)* [1999] 1 WLR 984 and *R v Howell* [2003] EWCA Crim 486. Both under the Magistrates' Courts Act 1980 and at common law the magistrates' court has a power to regulate its own procedure in pursuit of the interests of justice when conducting a hearing. Specifically it has a power to take steps (including
C making orders) in relation to its own procedure which are required to reconcile the interests of the parties to the case and, where applicable, of third parties.

The press has a duty to report matters of public interest and the public has a right to receive information in the public interest. Disclosure sought in order to report matters of public interest is in a different category from other reasons for seeking disclosure, such as commercial reasons: see *Grupo*
D *Interpres SA v Spain* (1987) 89B DR 150; *Guerra v Italy* (1998) 26 EHRR 357 and *Roche v United Kingdom* (2005) 42 EHRR 599. Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms does not simply prevent states from interfering with freedom of expression. It may impose an obligation on states to take steps to facilitate the exercise of the right, depending on the circumstances. Where information is sought
E about the applicant on administrative records for personal reasons article 10 is not engaged (although article 8 may be): see *Leander v Sweden* (1987) 9 EHRR 433 and *Gaskin v United Kingdom* (1989) 12 EHRR 36. Different considerations apply to court proceedings where the media needs to be accurately informed about the proceedings to comply with its duty to inform the public about those proceedings in the public interest. In those
F circumstances article 10 is engaged: see *Grupo Interpres SA v Spain* 89B DR 150; *Guerra v Italy* 26 EHRR 357; *Társaság a Szabadságjogokért v Hungary* (2009) 53 EHRR 130 and *Kenedi v Hungary* (2009) 27 BHRC 335. This European Court of Human Rights line of authority is sufficiently clear on the general principles applicable to the issue of media access to information or evidence in court proceedings to be applied: see *Independent*
G *News and Media Ltd v A* [2010] 1 WLR 2262.

In criminal cases all evidence communicated to the court is communicated publicly: see *Attorney General v Leveller Magazine Ltd* [1979] AC 440, 450. This formulation is wide enough to cover private reading by the court but communicating the written or documentary evidence to the public through disclosure to the press. The court should act to ensure that the increased reading of material by the judges does not
H undermine the open justice principle: see *Law Debenture Trust Corpn (Channel Islands) Ltd v Lexington Insurance Co* 153 NLJ 1551; *SmithKline Beecham Biologicals SA v Connaught Laboratories Inc* [1999] 4 All ER 498 and *Chan U Seek v Alvis Vehicles Ltd (Guardian Newspapers Ltd intervening)* [2005] 1 WLR 2965.

A denial of a general statutory right of access to information held by a court in section 1(1)(a) of the Freedom of Information Act 2000 does not mean that a judge cannot order disclosure of evidence received in documentary form in a case tried in open court: see *Kennedy v Information Comr* [2011] EMLR 454. It is for the courts to determine their own disclosure policy according to the court's own rules. Freedom of the press to report criminal trials is of particular importance in furthering full and informed debate on a matter of public interest and in promoting confidence in the administration of justice: see *In re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593, para 30. The principles of open justice require public access to documents forming the basis of the decision in extradition proceedings: see *In re Extradition of Romeo* (No 87-0808RC) 1 May 1987.

David Perry QC and *Melanie Cumberland* (instructed by *Crown Prosecution Service*) for the Government of the United States of America, an interested party.

The principle of open justice is satisfied if (i) the proceedings are at all times in open court to which the press and public are admitted; (ii) all the evidence and argument are communicated to the court publicly; and (iii) there is no impediment to inhibit fair, accurate and contemporaneous reporting of the proceedings. Those three conditions also satisfy the requirements of article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The court is entitled to interfere with article 10 rights under article 10.2 where that interference is prescribed by law and is necessary in a democratic society, as in the case when making anonymity orders: see *In re Guardian News and Media Ltd* [2010] 2 AC 697, paras 34–36.

The principle of open justice in criminal proceedings does not extend to a right for the public or the press to inspect documents or other exhibits before the court: see *R v Waterfield* [1975] 1 WLR 711 and *In re Crook* [1992] 2 All ER 687. There is no right of access to the underlying documents a party relies on, either in court or subsequently. Extradition proceedings are criminal proceedings to which the normal rules of criminal evidence and procedure apply, subject to the provisions of the statutory scheme: see *R (Government of the United States of America) v Bow Street Magistrates' Court* [2007] 1 WLR 1157. In proceedings under the Extradition Act 2003 the court is prohibited from considering the sufficiency of evidence to be relied on at trial. The documents before the court are confined to the extradition requests, including the conduct alleged against the persons whose extradition has been requested, documents to satisfy the formal requirements of the 2003 Act and evidence relevant to the issues raised in opposition to the extradition. In consequence the press will not be able to assess the quality of the evidence against those whose extradition is sought even if access to the documentation is permitted. A careful explanation in open court of the issues before the court and the reasons for the decision to seek extradition are sufficient to meet the requirements of open justice. The press are entitled to be present at a hearing in open court, but not to copies of the parties' documents. A qualified right to the provision of skeleton arguments where the written submissions have been treated as if they had been deployed in oral

A argument in open court cannot establish a general right of disclosure: see *R v Howell* [2003] EWCA Crim 486.

The European Court of Human Rights has held and reaffirmed that article 10 does not establish any right to freedom of information or of access to documents: see *Leander v Sweden* (1987) 9 EHRR 433; *Gaskin v United Kingdom* (1989) 12 EHRR 36; *Grupo Interpres SA v Spain* (1997) 89B DR 150, *Guerra v Italy* (1998) 26 EHRR 357 and *Roche v United Kingdom* (2005) 42 EHRR 599. Article 10 imposes no positive obligation on the state to impart information, still less to assemble and prepare information for communication: see *Guerra v Italy* 26 EHRR 357, 376 and *Roche v United Kingdom* 42 EHRR 599, para 172. At the heart of the open justice principle is a hearing in open court. Where there is an interference with article 10, for example, because a court is sitting in private, justification under article 10.2 is required: see *Atkinson v United Kingdom* (1990) 67 DR 244. A departure from the open justice principle may amount to censorship or a monopoly on information and fail to satisfy the proportionality test in article 10.2: see *Társaság a Szabadságjogokért v Hungary* (2009) 53 EHRR 130, para 36. Article 10 does not provide a general right to obtain information: see *Matky v Czech Republic* (Application No 19101/03) (unreported) given 10 July 2006; *Kenedi v Hungary* (2009) 27 BHRC 335 and *Independent News and Media Ltd v A* [2010] 1 WLR 2262. Where the issues are explained and a fully reasoned argument presented in open court, article 10 is not engaged. In criminal proceedings where prosecution material is disclosed to the defence, there is an implied undertaking not to use the material for any other purpose: see *Taylor v Director of the Serious Fraud Office* [1999] 2 AC 177. The same principle applies to extradition proceedings.

The position with regard to the disclosure of information to a non-party has been made clear by the introduction of rule 5.8 of the Criminal Procedure Rules 2011, which sets out a detailed procedure entitling a reporter or member of the public only to the most basic details about a case. In the event that additional information is sought, that will be determined on an application by reference to a variety of competing factors, including the open justice principle, the Convention and the Data Protection Act 1998. There will no longer be room for any reliance on the court's inherent jurisdiction, which did not in any event extend to the disclosure of extensive documents held by the parties in criminal proceedings: see *Chan U Seek v Alvis Vehicles Ltd (Guardian Newspapers Ltd intervening)* [2005] 1 WLR 2965 and *GIO Personal Investment Services Ltd v Liverpool and London Steamship Protection and Indemnity Association Ltd (FAI General Insurance Co Ltd intervening)* [1999] 1 WLR 984. It is necessary to have simple, clear rules for the disclosure of material to the press and public to avoid satellite litigation on proportionality and to protect private rights to confidential and sensitive information. The most fundamental requirement of the principle of open justice is a hearing in open court: see *Richmond Newspapers Inc v Virginia* (1980) 448 US 555.

Millar QC replied.

Heather Rogers QC and *Ben Silverstone* (instructed by *Leigh Day & Co)* for the intervener, by written submissions only.

The imperative to open justice in the common law of England and Wales is fundamental: see *Scott v Scott* [1913] AC 417, 438 and *R v Legal Aid Board, Ex p Kaim Todner* [1999] QB 966, 977. It is well established that media reporting plays a central role in furthering the interest of open justice principles: see *Attorney General v Leveller Magazine Ltd* [1979] AC 440, 450B; *R v Felixstowe Justices, Ex p Leigh* [1987] QB 582, 591; *In re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593, para 30 and *R v Chaytor* [2010] 2 Cr App R 394, para 95. The importance of the open justice principle has been acknowledged in many other jurisdictions. To ensure that evidence communicated to the court is communicated to the public the media must be given access to the evidence which the court itself has, particularly where written evidence has taken the place of oral evidence and, crucially, where that evidence and other documentary material has been taken into account by the court in making its decision. The media are the "eyes and ears of the general public" (per Sir John Donaldson MR in *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 183) but if they cannot see material relevant to the court's decision (or even hear it when it has not been read out in full in open court) they cannot communicate that information to the public. The public is then deprived of information which it ought to have in relation to open court proceedings on a matter of public interest.

The right to freedom of expression is guaranteed by article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. It is included in many other international Conventions, including article 19 of the Universal Declaration of Human Rights 1948, article 19 of the International Covenant on Civil and Political Rights (1977) (Cmnd 6702), article 13 of the American Convention on Human Rights and article 9 of the African Charter of Human and Peoples' Rights. In each case the right includes not only the right to communicate information but also the right to seek and/or receive it. The public's right to receive information, particularly on matters of public interest, is a vital aspect of the right. The media have a key role in communicating information in a democracy. Recent judicial decisions have emphasised that the right of freedom of expression includes the right of access *to* information: see *Társaság a Szabadságjogokért v Hungary* (2009) 53 EHRR 130 and *Reyes v Chile* 19 September 2006, in the Inter-American Court of Human Rights. The United States Human Rights Committee and African Platform on Access to Information have also emphasised the importance of the individual's right to obtain information and the obligation on the state to provide access to it.

The principles of open justice and the right to freedom of expression require the court to recognise a principle of public access on the basis of which the court should generally grant access to court documents on the request of any individual, in particular a journalist. The court as a public authority has a positive obligation to provide access to information. Article 10 of the European Convention on Human Rights requires recognition of the existence of the principle. The scope of the public access principle should extend to all documents before the court (including witness statements, exhibits, correspondence or other documents). Where such

material has been considered by the court in reaching its decision, access to it is particularly important. The fact that, in modern court proceedings, documents are not read out at length, for reasons of efficiency, should not deprive non-parties of the opportunity to follow the proceedings. Derogations from the public access principle should be limited to those in article 10.2.

In a number of common law jurisdictions the courts have held that the public access principle is engaged by aspects of the court process beyond mere access to the court to hear oral evidence. A wide range of information generated in relation to court proceedings has been held to be subject to the public access principle and liable to be disclosed to a third party, subject to any relevant countervailing interest, including (i) search warrants and informations filed in support, regardless of whether such evidence was later relied on at trial (see *Attorney General of Nova Scotia v MacIntyre* [1982] 1 SCR 175); (ii) court records, exhibits and documents filed by the parties (see *Lac L'Amiante du Québec Ltée v 2858–0702 Québec Inc* [2001] 2 SCR 743); (iii) video recordings in relation to proceedings discontinued prior to trial (see *R v Canadian Broadcasting Corpn* 2010 ONCA 726); (iv) video footage of a confession ruled inadmissible (see *Television New Zealand Ltd v Rogers* [2008] 2 NZLR 277); (v) papers filed under seal in connection with a pre-trial motion by defendants to exclude evidence at trial (see *In re New York Times Co* (1987) 828 F 2d 110) and (vi) a sealed report filed with a district court in connection with an investigation into corruption allegations: see *United States v Amodeo* (1995) 71 F 3d 1044.

Statements of principle have reflected the broad reach of the public access principle in relation to court proceedings. In Canada the application of the right to freedom of expression has been held to govern all discretionary judicial orders limiting the openness of judicial proceedings: see *In re Vancouver Sun* [2004] 2 SCR 332. Where a party chooses to read part of an exhibit in court, the media's right of access extends to the whole document subject to any specific order to the contrary: see *R v Canadian Broadcasting Corpn* 2010 ONCA 726. The Supreme Court of New Zealand has taken a broad approach to the scope of the public access principle in the context of modern values and social attitudes: see *Mafart v Television New Zealand Ltd* [2006] 3 NZLR 18. Similar statements have been made by the South African Constitutional Court in *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services* 2008 (5) SA 31. The Law Commission of New Zealand's Report of 30 June 2006 *Access to Court Records*, which informed reforms to the rules governing third party disclosure in criminal cases, justified a similarly broad approach on the basis of transparency of the judicial process, the accuracy of media reporting and research into historic cases to investigate possible miscarriages of justice and other issues of public interest.

A range of policy reasons, relating both to the importance of public awareness of judicial proceedings in a democracy and the central role played by the media in informing and stimulating that awareness, have been relied on to explain the reach of the public access principle. Access to an exhibit or court document, even where not included in the oral proceedings, has been held to enable the public: (i) better to understand a court judgment (see *R v Canadian Broadcasting Corpn* 2010 ONCA 726; *Television New Zealand*

Ltd v Rogers [2008] 2 NZLR 277 and *United States v Amodeo* 71 F 3d 1044); (ii) to enter into an informed debate about the merits or consequences of a particular judicial decision (see *Television New Zealand Ltd v Rogers* [2008] 2 NZLR 277); (iii) to have confidence in courts for their promotion of transparency and rejection of a defensive attitude to their process (see *Television New Zealand Ltd v Rogers* [2008] 2 NZLR 277 and *Mafart v Television New Zealand Ltd* [2006] 3 NZLR 18); and (iv) to take a more vivid interest in court processes: see *Independent News and Media Ltd v A* [2010] 1 WLR 2262. Conversely, a refusal of access to a particular item of evidence or document may hinder the media's ability to inform the public by impairing its ability to provide accurate information (see *Atkinson v United Kingdom* (1990) 67 DR 244 and *Társaság a Szabadságjogokért v Hungary* 53 EHRR 130) or by deterring journalists from reporting on court-related matters: see *Társaság a Szabadságjogokért v Hungary* 53 EHRR 130. The matter of public interest arising from court proceedings may not necessarily be co-extensive with the subjects addressed in any judgment. A judgment or the statements of case cannot be relied on to communicate all public interest matters so as to preclude the need for access to exhibits or other documents, since judges and lawyers are not the arbiters of the public interest: see *Independent News and Media Ltd v A* [2010] 1 WLR 2262 and *In re Guardian News and Media Ltd* [2010] 2 AC 697, paras 63–66. Documents relating to the exercise of judicial power fall within the category of information to which, absent good reason to the contrary, the public ought in any event to have access as a matter of entitlement.

In *Reyes v Chile* 19 September 2006, the Inter-American Court of Human Rights provided a broad analysis of article 13 of the American Convention on Human Rights, which is comparable to article 10 of the European Convention, in terms of the protection of the right of the individual to receive state-held information and the positive obligation of the state to provide it, including giving a justification of any restriction of access in a specific case. Consonant with a human rights approach which prioritises substance over form, the courts assess the reach of the public access principle not by reference to a fixed categorisation of types of evidence or information, but in the course of a fact-sensitive and contextual inquiry, taking account of all the circumstances, including the purpose for which access is sought and the wider rationales for media reporting of court proceedings.

Once the public access principle has been found to apply to a particular court-related piece of information, a balancing exercise arises almost uniformly across the various jurisdictions. In general the principles of open justice and the right to seek and receive information are weighed up against a variety of competing interests such as privacy, confidentiality, fair trial rights and the proper administration of justice. The need for any limitation to the public access principle has to be demonstrated clearly, must be strictly necessary to advance another specified interest prescribed by law and must be no greater than necessary for that purpose in duration or scope. Considering the public access principle as an aspect of the right to freedom of expression, like any other restriction or limitation on the article 10.1 right, the need for any restriction on public access must be justified under article 10.2: it must be necessary in a democratic society; the necessity must

be convincingly established and it must be for the purposes of and no wider than required for one or more of the legitimate aims prescribed. The same applies if the principle is considered by reference to open justice principles: see Report of the Committee on Super-Injunctions: *Super-Injunctions, Anonymised Injunctions and Open Justice*, May 2011. The report concludes that open justice is a fundamental constitutional principle, and while derogations are permitted, they can properly be made only where, and to the extent that, they are strictly necessary to secure the administration of justice; there must be clear and cogent evidence to support any derogation from open justice; the court must scrutinise the position carefully and derogation must be the minimum necessary. All of those considerations apply in relation to access for information in extradition proceedings. The case law from other jurisdictions shows that there may be a presumption in favour of access when the evaluation exercise takes place: see *Television New Zealand Ltd v Rogers* [2008] 2 NZLR 277; *United States v Amodeo* 71 F 3d 1044 and *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services* 2008 (5) SA 31.

Applying the public access principle, taking a fact-sensitive and contextual approach to a request for documents in evidence and relied on by a judge but not read out in open court in extradition proceedings, a number of considerations support the grant of access in the present case, including that facts that (i) the information relates to matters plainly of public interest; (ii) the public interest elements may relate to but go beyond the contents of the judgment; (iii) the documents would enable the claimant to act for the public by testing the quality of the evidence assembled by the US Department of Justice and the judge's own assessment of that evidence; (iv) the claimant has taken an active and long-running interest in these matters; (v) copies of relevant documents were requested but to no avail so that the court is in a monopoly position in relation to them; (vi) the denial of access has significantly impeded the ability of the claimant's journalists to understand the proceedings; (vii) the documents were relied on by the district judge in reaching judgment and are therefore closely related to the adjudicative process, and (viii) since the Crown Prosecution Service itself has a policy of generally releasing information of a similar type to that sought, any policy arguments against the applicability of the public access principle are limited. Taken singly or together those factors are of compelling force. Access to the information is amply justified. There is no countervailing factor which could justify refusal of access. The extradition proceedings and the context in which they operate are a matter of public interest about which the public is entitled to be informed. Without access to the documents sought there is an unwarranted restriction on the flow of information. Matters of legitimate public interest transcend the issues in the extradition proceedings. Neither the judge nor counsel, who are concerned with their clients' interests, can be expected to address all the matters of public interest in relation to the present proceedings in the way that the media would. The court should recognise and endorse a general public access principle, giving effect to the right to freedom of expression.

The magistrates' court did not appear and was not represented.

The court took time for consideration.

3 April 2012. The following judgments were handed down.

TOULSON LJ

Introduction

1 Open justice. The words express a principle at the heart of our system of justice and vital to the rule of law. The rule of law is a fine concept but fine words butter no parsnips. How is the rule of law itself to be policed? It is an age old question. Quis custodiet ipsos custodes—who will guard the guards themselves? In a democracy, where power depends on the consent of the people governed, the answer must lie in the transparency of the legal process. Open justice lets in the light and allows the public to scrutinise the workings of the law, for better or for worse. Jeremy Bentham said in a well known passage quoted by Lord Shaw of Dunfermline in *Scott v Scott* [1913] AC 417, 477: "Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial."

2 This is a constitutional principle which has been recognised by the common law since the fall of the Stuart dynasty, as Lord Shaw explained. It is not only the individual judge who is open to scrutiny but the process of justice. In a valuable report by the Law Commission of New Zealand on *Access to Court Records* (2006) (Report 93), the commission summarised the principle at para 2.2:

> "Open justice is a fundamental tenet of New Zealand's justice system. It requires, as a general rule, that the courts must conduct their business publicly unless this would result in injustice. Open justice is an important safeguard against judicial bias, unfairness and incompetence, ensuring that judges are accountable in the performance of their judicial duties. It maintains public confidence in the impartial administration of justice by ensuring that judicial hearings are subject to public scrutiny, and that 'Justice should not only be done, but should manifestly and undoubtedly be seen to be done'."

3 The commission quoted, at para 2.11, the following passage from the judgment of the President of the Court of Appeal, Woodhouse P, in *Broadcasting Corpn of New Zealand v Attorney General* [1982] 1 NZLR 120, 122:

> "the principle of public access to the courts is an essential element in our system. Nor are the reasons in the slightest degree difficult to find. The judges speak and act on behalf of the community. They necessarily exercise great power in order to discharge heavy responsibilities. The fact that they do it under the eyes of their fellow citizens means that they must provide daily and public assurance that so far as they can manage it what they do is done efficiently if possible, with human understanding it may be hoped, but certainly by a fair and balanced application of the law to facts as they really appear to be. Nor is it simply a matter of providing just answers for individual cases, important though that always will be. It is a matter as well of maintaining a system of justice which requires that the judiciary will be seen day by day attempting to grapple in the same even fashion with the whole generality of cases. To the extent that public

confidence is then given in return so may the process may be regarded as fulfilling its purposes."

4 There are exceptions to the principle of open justice but, as Viscount Haldane LC explained in *Scott v Scott* [1913] AC 417, they have to be justified by some even more important principle. The most common example occurs where the circumstances are such that openness would put at risk the achievement of justice which is the very purpose of the proceedings.

5 While the broad principle and its objective are unquestionable, its practical application may need reconsideration from time to time to take account of changes in the way that society and the courts work. Unsurprisingly there may be differences of view about such matters.

6 In this case the question has arisen whether a district judge, who made two extradition orders on the application of the United States Government, had power to allow the Guardian newspaper to inspect and take copies of affidavits or witness statements, written arguments and correspondence, which were supplied to the judge for the purposes of the extradition hearings. They were not read out in open court but they were referred to during the course of the hearings. The judge, District Judge Tubbs, refused the Guardian's application. She found that she had no power to allow it to do so for reasons which she set out in a careful judgment. The Divisonal Court (Sullivan LJ and Silber J) agreed with her in an equally careful judgment delivered by Silber J. The Guardian appeals against the refusal of its applications with leave of the court. The court has allowed Article 19, a not for profit organisation which campaigns globally for free expression, to intervene in support of the Guardian's appeal by way of written submissions.

Facts

7 Extradition proceedings were brought by the US Government under the Extradition Act 2003 against two individuals alleged to have been involved in the bribery of Nigerian officials by Kellogg Brown and Root (KBR), a subsidiary of the well known US company Halliburton.

8 The two people were Geoffrey Tesler, a London based solicitor, and Wojciech Chodan, a former executive of MW Kellogg, a company associated with KBR. Both men are British citizens.

9 The Tesler extradition application was heard over five days between November 2009 and January 2010. The Chodan application was heard on 22 February 2010. The hearings were conducted in open court throughout. The US Government was represented by David Perry QC and the defendants were similarly represented by leading counsel. The district judge gave judgment in the Tesler case on 25 March 2010 and in the Chodan case on 20 April 2010. Both defendants were ordered to be extradited.

10 Prior to the delivery of the district judge's judgments, the Guardian wrote to the court asking to be provided with copies of various documents which had been referred to in the course of the extradition hearings. In summary the documents were:

1. The opening notes and skeleton arguments submitted on behalf of the US Government and the skeleton arguments submitted on behalf of the defendants.

2. Affidavits submitted by William Stuckwisch, the US senior trial attorney responsible for the conduct of the prosecutions. A

3. Other affidavits or witness statements submitted by prosecutors for the US Department of Justice.

4. Correspondence between the Serious Fraud Office ("SFO") and the US Department of Justice discussing which agency should prosecute the case.

5. Correspondence between solicitors acting for MW Kellogg and counsel for Mr Tesler on the subject of whether MW Kellogg was being prosecuted by the SFO and an accompanying witness statement from the solicitor acting for Mr Tesler, which had been handed up to the judge at the hearing on 28 January 2010. B

11 The judge gave a judgment on 20 April 2010 ruling against the Guardian. She acknowledged the importance of the principle of open justice. She emphasised that the public and press had not been excluded from any part of the proceedings. She stated that all the issues relied upon by any of the parties had been fully set out in oral submissions in open court by senior counsel—in one case over a period of four days and in the other case over a whole day. Every member of the public and the press in attendance heard the clear and able expositions of all the issues in great detail. Copies of her written judgments setting out her reasons for ordering extradition were available to any member of the public or press requesting them. After considering the case law and the Criminal Procedure Rules she held that "this court does not have the power to direct the provision of the documents requested". She concluded by referring to problems which would arise if she were wrong in her view of the law: C D

> "Practical problems would arise if the view was taken that the decision I have just outlined is wrong in principle and that members of the press and the public may require as of right to be provided with written copies of documents and exhibits relied upon in the open court proceedings. There are a very large and growing number of extradition cases, many with a high public profile, passing through this court in a very tight timetable required by the Extradition Act [2003]. To whom would any 'direction' for the provision of the material be directed? In this case the applicants wish to see affidavits and files of correspondence some of which are provided by the Government, some of which are provided by the defence. In these cases alone the requested documents run to hundreds of pages. The court itself is provided the papers by the parties in extradition proceedings. Those documents are not usually retained by the court at the conclusion of the hearing but are forwarded to the Secretary of State, the High Court or returned to the parties as appropriate. The court has very limited court staff time and photocopying facilities. The practical problems in producing copies of voluminous correspondence in sufficient time for contemporaneous reporting of the case for any member of the press or the contemporaneous understanding of any member of the public, who required them as of right, whether or not they had attended the court hearing, would be immense and lead to inevitable delays and public expense. Open justice requires that criminal proceedings are conducted in open court with access to the public and the press who may see, hear and report on those proceedings and subject them to proper E F G H

A public scrutiny. That course has been followed in both these cases. I am not granting the application."

The claim for judicial review

12 In its claim for judicial review of the district judge's decision, the Guardian argued that she was wrong to hold that she had no power to allow its application. It submitted that at common law a magistrates' court has power to regulate its own procedure, relying on *Attorney General v Leveller Magazine Ltd* [1979] AC 440, and it submitted that the general common law principle of open justice was now bolstered by the introduction of article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms through the Human Rights Act 1998.

13 On the facts of the present case, the Guardian submitted that it was wrong for it to be denied the documentation sought. In particular, (a) it had a serious journalistic purpose in seeking production of the documents, because the case raised issues of public interest; (b) allowing it to see the documents would not frustrate or render impracticable the administration of justice; and (c) allowing it to see the documents would not interfere with any rights of the parties to the case or of third parties.

14 The Guardian has long had an interest in investigating stories of bribery and corruption of public officials. It argued that the public interest issues in this case included the following. (a) What were the two British citizens alleged to have done when participating in the scheme to bribe foreign officials/politicians in Nigeria? (b) Was the scheme run through London because the United Kingdom then had weak laws against overseas corruption? (c) Why was the US Government, rather that the SFO, seeking to prosecute the two British citizens? Had the SFO taken a back seat so as to allow the US Government to extradite and prosecute them? (d) Has the UK, by the 2003 Bilateral Extradition Treaty with the USA, made it too easy for the US Government to extradite British citizens, even when the offences alleged were mostly committed in countries other than the USA?

15 In its evidence in support of its claim for judicial review, the Guardian referred to the fact that for reasons of efficiency, and in order to save time and costs, judges increasingly receive and read written material which in previous years would have been given orally in open court. This makes it more difficult for journalists to follow the details unless one of the parties chooses to provide the press with copies of the documents. Rob Evans, the Guardian journalist who principally covered the case, said in his witness statement:

> "17. We were unable to attend for all five days as we had other commitments and other stories to report. Given the financial constraints on national newspapers, it is normal for reporters to attend only parts of trials. I believe that reporters should not be penalised if they are not able to attend every day of a trial. Rather than putting obstacles in front of reporters, the justice system, which is supposed to be open for all to see, should assist the media by providing key documents to them once they have been aired in court . . .
>
> "18. Given that counsel did not refer in detail to the content of documents that were the subject of their submissions, it was simply not possible to understand the full case against Mr Chodan or Mr Tesler from

hearing the submissions without access to the documents. The approach adopted by counsel was, I understand, for the parties' and court's convenience and to make the hearing more efficient. It was possible to do so as copies of the correspondence and documents had been made available to the court and the court was familiar with their contents but without access to these documents my understanding of the proceedings has been hampered."

Decision of the Administrative Court

16 The court gave six reasons for dismissing the Guardian's claim.

17 First, it was settled law as established in *R v Waterfield* [1975] 1 WLR 711 and *In re Crook* [1992] 2 All ER 687 that the principle of open justice in criminal proceedings did not extend to a right for the public or the press to inspect documents or other exhibits placed before the court.

18 Second, no case had been cited which undermined or qualified the reasoning in *R v Waterfield*.

19 Third, those responsible for the Criminal Procedure Rules 2010 (SI 2010/60) must have been aware of *R v Waterfield* and *In re Crook* but took no steps to reverse or qualify them. It was to be inferred that they intended the law to remain as laid down in those cases.

20 Fourth, by contrast with the Civil Procedure Rules, there were no provisions in the Criminal Procedure Rules 2010 giving any right of inspection of written evidence.

21 Fifth, the Freedom of Information Act 2000 could not be used to obtain the documents sought by the Guardian. That Act contained a number of checks and balances, and no good reason had been shown why such checks and balances should be overridden by the common law and/or article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms as scheduled to the Human Rights Act 1998.

22 Sixth, reference to the inherent jurisdiction of the court did not assist, especially since section 32(1) of the 2000 Act expressly exempts a public authority from any obligation to produce a document placed in the custody of a court for the purposes of proceedings in a particular cause or matter.

Criminal Procedure Rules

23 Section 69 of the Courts Act 2003 makes provision for rules of court "governing the practice and procedure to be followed in the criminal courts" to be made by a committee known as the Criminal Procedure Rule Committee.

24 Part 5 of the Criminal Procedure Rules 2011 (SI 2011/1709) includes provisions about the supply of information or documents from records or case materials kept by a court. Rule 5.7 applies where the request comes from a party. Under that rule the appropriate court officer must supply to an applicant party a copy of any document served by or on that party, and, with the court's permission, may also supply copies of other documents retained by the court.

25 Rule 5.8 deals with supply of information about a case to the public. It provides:

"(1) This rule applies where a member of the public, including a reporter, wants information about a case from the court officer.

A "(2) Such person must— (a) apply to the court officer; (b) specify the information requested; and (c) pay any fee prescribed."

26 Rule 5.8(6) sets out information which the court officer is required to supply, but that information is confined to basic details such as the date of any hearing, the alleged offence, the court's decision and the identities of the prosecutor, the defendant, their representatives and whoever made the B decision.

27 Rule 5.8(7) provides:

"If the court so directs, the court officer will— (a) supply to the applicant, by word of mouth, other information about the case; or (b) allow the applicant to inspect or copy a document, or part of a document, containing information about the case."

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28 Where a request is made under rule 5.8(7), it must be made in writing and it must explain for what purpose the information is required.

29 The Criminal Procedure Rules 2010, which were in force at the time of the district judge's decision, had no provisions equivalent to rules 5.7 and 5.8 of the 2011 Rules.

D *The Guardian's appeal*

30 Gavin Millar QC began with the uncontentious statement that a district judge hearing an application for an extradition order under the Extradition Act 2003 is a court of law. Section 77 of the Act provides that at the extradition hearing the judge has the same powers (as nearly as may be) as a magistrates' court would have if the proceedings were the summary trial E of an information against the person whose extradition is requested.

31 Mr Millar submitted next that every court of law has a wide inherent power to control the conduct of its proceedings: see *Attorney General v Leveller Magazine Ltd* [1979] AC 440. In that case magistrates allowed a witness to conceal his identity from the general public on national security grounds and to write his name on a piece of paper shown to the court, the F defendants and the parties' representatives. The House of Lords rejected an argument that this procedure offended against the principle of open justice. As to the general principle, Lord Diplock said, at p 450:

"The application of this principle of open justice has two aspects: as respects proceedings in the court itself it requires that they should be held in open court to which the press and public are admitted and that, in G criminal cases at any rate, all evidence communicated to the court is communicated publicly. As respects the publication to a wider public of fair and accurate reports of proceedings that have taken place in court the principle requires that nothing should be done to discourage this."

32 However, the House of Lords recognised that danger to national security could be a lawful reason for a court to hear evidence in private, and H that it was equally permissible for the court to avoid the need to sit in private by allowing the witness to give evidence in public but conceal his identity. By parallel reasoning, Mr Millar submitted that in the present case the district judge could have required the skeleton arguments, the witness statements and the correspondence to be read in open court, and must

therefore have had inherent power to achieve the same effect by the alternative route of allowing the press to inspect and copy the material.

33 Similar questions have arisen in the civil courts. Lord Scarman, a thinker ahead of his time, said in *Home Office v Harman* [1983] 1 AC 280, 316:

> "Reasonable expedition is, of course, a duty of the judge. But he is also concerned to ensure that justice not only is done but is seen to be done in his court. And this is the fundamental reason for the rule of the common law, recognised by this House in *Scott v Scott* [1913] AC 417, that trials are to be conducted in public. Lord Shaw of Dunfermline referred with approval, at p 477, to the view of Jeremy Bentham that public trial is needed as a spur to judicial virtue. Whether or not judicial virtue needs such a spur, there is also another important public interest involved in justice done openly, namely, that the evidence and argument should be publicly known, so that society may judge for itself the quality of justice administered in its name, and whether the law requires modification. When public policy in the administration of justice is considered, public knowledge of the evidence and arguments of the parties is certainly as important as expedition: and, if the price of expedition is to be the silent reading by the judge before or at trial of relevant documents, it is arguable that expedition will not always be consistent with justice being seen to be done . . . Justice is done in public so that it may be discussed and criticised in public. Moreover, trials will sometimes expose matters of public interest worthy of discussion other than the judicial task of doing justice between the parties in the particular case."

34 Lord Bingham of Cornhill CJ took matters further in *SmithKline Beecham Biologicals SA v Connaught Laboratories Inc* [1999] 4 All ER 498, 511–512:

> "Since the date when Lord Scarman expressed doubt in *Home Office v Harman* as to whether expedition would always be consistent with open justice, the practices of counsel preparing skeleton arguments, chronologies and reading guides, and of judges pre-reading documents (including witness statements) out of court, have become much more common. These means of saving time in court are now not merely permitted, but are positively required, by practice directions. The result is that a case may be heard in such a way that even an intelligent and well-informed member of the public, present throughout every hearing in open court, would be unable to obtain a full understanding of the documentary evidence and the arguments on which the case was to be decided. In such circumstances there may be some degree of unreality in the proposition that the material documents in the case have (in practice as well as in theory) passed into the public domain. That is a matter which gives rise to concern . . . As the court's practice develops it will be necessary to give appropriate weight to both efficiency and openness of justice, with Lord Scarman's warning in mind. Public access to documents referred to in open court (but not in fact read aloud and comprehensibly in open court) may be necessary, with suitable safeguards, to avoid too wide a gap between what has in theory, and what has in practice, passed into the public domain."

A 35 In *GIO Personal Investment Services Ltd v Liverpool and London Steamship Protection and Indemnity Association Ltd (FAI General Insurance Co Ltd intervening)* [1999] 1 WLR 984 a non-party applied to inspect written submissions and documents forming part of the evidence, including witness statements which had been referred to in open court but not read out. The application was refused at first instance. The Court of B Appeal allowed an appeal in respect of the written submissions but not the evidence. As to the evidence, Potter LJ (with whose judgment the other members of the court agreed) said that historically there had been no right, and that there was currently no provision, which enabled a member of the public to see, examine or copy a document on the basis that it had been referred to in court or read by the judge. He added that he did not consider C that any recent development in court procedures justified the court in contemplating such an exercise under its inherent jurisdiction. On the other hand, he considered the arguments for such an exercise in respect of the written submissions of counsel to be a good deal stronger. He said, at p 996:

> "If, as in the instant case, an opening speech is dispensed with in favour of a written opening (or a skeleton argument treated as such) which is not D read out, or even summarised, in open court before the calling of the evidence, it seems to me impossible to avoid the conclusion that an important part of the judicial process, namely the instruction of the judge in the issues of the case, has in fact taken place in the privacy of his room and not in open court. In such a case I have no doubt that, on an application from a member of the press or public in the course of the trial, E it is within the inherent jurisdiction of the court to require that there be made available to such applicant a copy of the written opening or skeleton argument submitted to the judge."

36 The criminal courts have also recognised that they have a power at common law, founded on the principle of open justice, to allow a request by a non-party for disclosure of skeleton arguments read by the court in order F to understand the case and to save time: *R v Howell* [2003] EWCA Crim 486. In that case Judge LJ said, at para 197:

> "Subject to questions arising in connection with written submissions on [public interest immunity] applications, or any other express justification for non-disclosure on the basis that the written submissions would not properly have been deployed in open court, we have concluded G that the principle of open justice leads inexorably to the conclusion that written skeleton arguments, or those parts of the skeleton arguments adopted by counsel and treated by the court as forming part of his oral submissions, should be disclosed if and when a request to do so is received."

37 Turning to the authorities on which the Administrative Court placed H particular reliance, Mr Millar submitted that the Guardian's appeal was not foreclosed by the decisions in *R v Waterfield* [1975] 1 WLR 711 and *In re Crook* [1992] 2 All ER 687. In *R v Waterfield* the defendant was convicted of importing pornographic films and magazines. One of his grounds of appeal was that the proceedings were a nullity because the press and public

had been excluded from the court room during the showing of the films. Dismissing the appeal, Lawton LJ said, at p 714:

> "When evidence is given orally, all in court hear what is said. When written evidence is produced it may or may not be read out . . . The members of the public in court have no right to claim to be allowed to look at the exhibits."

38 He added, at p 715:

> "As judges have differed as to how judicial discretion should be exercised in this class of case it may be helpful if we give some guidance . . . It follows, so it seems to us, that normally when a film is being shown to a jury and the judge, in the exercise of his discretion, decides that it should be done in a closed court room or in a cinema, he should allow representatives of the press to be present. No harm can be done by doing so: some good may result."

39 Mr Millar submitted that the circumstances and the issue in that case were quite different from the present and that it does not answer the question whether the court has a common law power to permit journalists to see evidence considered at an extradition hearing and referred to in open court. He also observed that the court appeared to treat the question what the press should be allowed to see as a discretionary matter.

40 In *In re Crook* [1992] 2 All ER 687 the court dismissed two appeals by a journalist against orders made by a trial judge to exclude the press and public from the court while he considered, in one case, an issue concerning the conduct of a juror and, in the other case, an issue about where the jury should be seated. In the course of its judgment the court observed that although there might be some cases where it was appropriate to allow the press to remain in court while other members of the general public were excluded, as had been suggested in *R v Waterfield* [1975] 1 WLR 711, it would not be generally right to make such a distinction. There was no further discussion of questions of principle.

Article 10

41 Mr Millar relied strongly on article 10 of the Convention and recent Strasbourg decisions. Article 10.1 provides:

> "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers . . ."

42 Article 10.2 permits restrictions to protect other legitimate interests. The Strasbourg court's approach has developed through a line of cases. In *Leander v Sweden* (1987) 9 EHRR 433 the applicant was refused employment at a naval museum after a negative security vetting. He demanded to know the information on which the decision was taken. On his request being refused, he complained that the refusal of his request was a violation of his rights under article 10. The court rejected his complaint. It said, at para 74:

> "The court observes that the right to freedom to receive information basically prohibits a government from restricting a person from receiving

A information that others wish or may be willing to impart to him. Article 10 does not, in circumstances such as those of the present case, confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the government to impart such information to the individual."

43 That principle has been followed in other cases, for example, *Gaskin*
B *v United Kingdom* (1989) 12 EHRR 36, where the applicant complained of ill-treatment while he was in the care of a local authority and living with foster parents. He sought access to his case records held by the local authority but his request was denied. Applying the *Leander* principle, the court held that the refusal did not involve a violation of article 10.

44 In *Atkinson v United Kingdom* (1990) 67 DR 244 two freelance
C journalists working at the Central Criminal Court complained of a decision by the court to hold a private sentencing hearing on a drug dealer who had been convicted after a trial in open court. Relying on the *Leander* 9 EHRR 433 and *Gaskin* 12 EHRR 36 cases, the UK argued that article 10 had no application. The European Commission of Human Rights ruled that the application was inadmissible but on a different basis. After referring to the *Leander* and *Gaskin* cases it said, at p 250:

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> "The Commission considers, however, that the general principle stated by the court may not apply with the same force in the context of court proceedings . . . In order that the media may perform their function of imparting information there is a need that they should be accurately informed. Assuming that the decision of the court to hold part of the proceedings in camera constituted an interference with the applicants'
E right to receive and impart information as guaranteed by article 10.1 of the Convention, the Commission must consider whether this interference was prescribed by law and whether it was necessary in a democratic society for one or more of the purposes set out in article 10.2 of the Convention."

45 The commission found that, having regard to the margin of
F appreciation, the interest of the media in reporting the proceedings was outweighed by other considerations.

46 In *Grupo Interpres SA v Spain* (1997) 89B DR 150, the applicant sold information about people's assets to third parties. He complained that the refusal of the Spanish courts to allow him access to the courts' archives in order to obtain such information violated his rights under article 10. His
G application was ruled inadmissible. The Commission reiterated at pp 153–154 that article 10 "is intended basically to prohibit a government from restricting a person from receiving information that others may wish or may be willing to impart to him". It also observed at p 154 that "the sale of commercial information, which was the applicant company's object, was not concerned with informing public opinion, which is the purpose of the provision in question".

H **47** *Matky v Czech Republic* (Application No 19101/03) (unreported) 10 July 2006, concerned attempts by members of an environmental group to obtain original project documents lodged with a government department. They wanted to compare the plans with revised plans which were currently the subject of an environmental assessment. The ministry refused access to

the documents. The group applied to the court, relying on article 10, but the court declared its application inadmissible. In its reasons the court stated:

> "It notes that the circumstances in the present case are to be clearly distinguished from those in cases relating to restrictions upon the freedom of the press, in which it has on many occasions recognised the existence of a right for the public to receive information . . . The court considers that article 10 of the Convention should not be interpreted as guaranteeing the absolute right to have access to all the technical details relating to the construction of a power station as, unlike information concerning its environmental impact, such data should not be of general public interest."

48 In *Társaság a Szabadságjogokért v Hungary* 53 EHRR 130 a Hungarian MP lodged a complaint with the Hungarian Constitutional Court for a review of parts of the Hungarian Criminal Code. The Hungarian Civil Liberties Union asked the court for access to the complaint. The court refused to disclose it. The court subsequently dismissed the MP's complaint, which it summarised in its published decision. The applicant complained that the decision of the court refusing access to the full complaint was an interference with its rights under article 10.

49 It appears from the Strasbourg court's judgment, at para 18, that the Hungarian Government did not contest that there had been an inference with the applicants' rights under article 10, but relied for its defence on article 10.2. The court found that there had been a violation of article 10. It said, at paras 26–28:

> "26. The court has consistently recognised that the public has a right to receive information of general interest. Its case law in this field has been developed in relation to press freedom which serves to impart information and ideas on such matters. In this connection, the most careful scrutiny on the part of the court is called for when the measures taken by the national authority are capable of discouraging the participation of the press, one of society's 'watchdogs', in the public debate on matters of legitimate public concern, even measures which merely make access to information more cumbersome.
>
> "27. In view of the interest protected by article 10, the law cannot allow arbitrary restrictions which may become a form of indirect censorship should the authorities create obstacles to the gathering of information. For example, the latter activity is an essential preparatory step in journalism and is an inherent, protected part of press freedom. The function of the press includes the creation of forums for public debate. However, the realisation of this function is not limited to the media or professional journalists. In the present case, the preparation of the forum of public debate was conducted by a non-governmental organisation. The purpose of the applicant's activities can therefore be said to have been an essential element of informed public debate . . .
>
> "28. . . . . the court finds that the applicant was involved in the legitimate gathering of information on a matter of public importance. It observes that the authorities interfered in the preparatory stage of this process by creating an administrative obstacle. The Constitutional Court's monopoly of information thus amounted to a form of censorship.

A Furthermore, given that the applicant's intention was to impart to the public the information gathered from the constitutional complaint in question, and thereby to contribute to the public debate concerning legislation on drug-related offences, its right to impart information was clearly impaired."

50 At para 35 the court referred to the principle in *Leander* 9 EHRR
B 433, para 74, but added: "Nevertheless, the court has recently advanced towards a broader interpretation of the notion of 'freedom to receive information' and thereby towards the recognition of a right of access to information."

51 A footnote to that paragraph referred to the *Matky* case (Application No 19101/03) (unreported) 10 July 2006. The court continued, at para 36:

C "Moreover, the state's obligations in matters of freedom of the press include the elimination of barriers to the exercise of press functions where, in issues of public interest, such barriers exist solely because of an information monopoly held by the authorities. The court notes at this juncture that the information sought by the applicant in the present case was ready and available and did not require the collection of any data by
D the Government. Therefore, the court considers that the state had an obligation not to impede the flow of information sought by the applicant."

52 In *Kenedi v Hungary* (2009) 27 BHRC 335, the applicant was a historian specialising in study of the functioning of secret services under totalitarian regimes. He sought access to documents held by the Hungarian
E Ministry of the Interior. After refusal of his request he brought an action against the ministry in the Budapest Regional Court, which found in his favour, but the ministry continued to prevaricate. Eventually he made an application to the Strasbourg court complaining of a violation of article 10. The court noted at para 43 that the Hungarian Government had accepted that there had been an interference with his right to freedom of expression.
F It added:

"The court emphasises that access to original documentary sources for legitimate historical research was an essential element of the exercise of the applicant's right to freedom of expression (see *Társaság a Szabadságjogokért v Hungary* 53 EHRR 130, paras 35–39)."

53 In *Independent News and Media Ltd v A* [2010] 1 WLR 2262,
G paras 39–44, this court observed that the Strasbourg jurisprudence had developed since the *Leander* case 9 EHRR 433, so that article 10 seems to have acquired a wider scope; and that, where the media are involved and genuine public interest is raised, at least in some circumstances the general principle laid down in *Leander* may not apply.

H *Other countries*

54 Heather Rogers QC and Ben Silverstone in their written submissions on behalf of Article 19 provided the court with a helpful and interesting survey of the approach which has been taken by courts in other common law countries. Many of them have constitutional texts which are relevant, but

the judgments also reflect the courts' views about the requirements of open justice.

55 In Canada there is now relevant provision in the Charter of Rights and Freedoms but in *R v Canadian Broadcasting Corpn* 2010 ONCA 726 Sharpe JA, giving the judgment of the Court of Appeal for Ontario, said at para 28: "Even before the Charter, access to exhibits that were used to make a judicial determination, even ones introduced in the course of pre-trial proceedings and not at trial, was a well-recognised aspect of the open court principle." She cited the judgment of Dickson J for the majority of the Supreme Court in *Attorney General of Nova Scotia v MacIntyre* [1982] 1 SCR 175.

56 In that case an investigative journalist was denied access to search warrants and supporting material filed in a criminal court. The ground of refusal was that the material was not available for inspection by the general public. The Supreme Court held that the public should be entitled to inspect such documents. After referring to the decisions of the House of Lords in *Scott v Scott* [1913] AC 417 and *McPherson v McPherson* [1936] AC 177, Dickson J said [1982] 1 SCR 175, 185–187:

> "It is, of course, true that *Scott v Scott* and *McPherson v McPherson* were cases in which proceedings had reached the stage of trial whereas the issuance of a search warrant takes place at the pre-trial investigative stage. The cases mentioned, however, and many others which could be cited, establish the broad principle of 'openness' in judicial proceedings, whatever their nature, and in the exercise of judicial powers. The same policy considerations upon which is predicated our reluctance to inhibit accessibility at the trial stage are still present and should be addressed at the pre-trial stage . . . At every stage the rule should be one of public accessibility and concomitant judicial accountability . . . In my view, curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance. One of these is the protection of the innocent."

57 In *Television New Zealand Ltd v Rogers* [2008] 2 NZLR 277 the Supreme Court of New Zealand considered the application of the open justice principle in a case about a police videotape of an interview with a suspect who was subsequently acquitted of murder. In the interview Mr Rogers admitted killing the victim and re-enacted the way in which he had done so, but the interview was ruled inadmissible at his trial because of the circumstances in which it had been conducted. The television company was given a copy of the videotape by the police officer in charge of the case and proposed to broadcast it. Mr Rogers obtained an injunction against the television company to prevent its broadcast, but the injunction was set aside by the Court of Appeal. The Supreme Court, by a majority of three to two, upheld the decision of the Court of Appeal.

58 Because there were serious questions over the propriety of the way in which the television company had received the videotape, the majority approached the matter as if the television company was seeking access to the videotape from the court as a document which formed part of the court records.

59 Mr Rogers's case was that his rights had been breached by the way in which the police had obtained his confession and that the material, which had for that reason been excluded from consideration by the jury, should not be shown to the public at large. The majority considered that the appellant's rights had been sufficiently protected by the exclusion of the evidence from the trial, but that open justice militated in favour of the television company now being able to broadcast it. Tipping J said, at paras 71–74:

"71. . . . The public have a legitimate interest in being informed about the whole course of the investigation and the trials in relation to the death of Ms Sheffield. Two people have been charged and ultimately neither has been found guilty. The Court of Appeal differed from the High Court over whether the videotape should be admitted in evidence. The conduct of the police in setting up the reconstruction in circumstances which led to its being declared inadmissible is also a justified subject of public scrutiny, as is whether the Court of Appeal was correct in reversing the High Court.

"72. It was said in argument that the public did not need to see the videotape when they already have the judgments of Cooper J and the Court of Appeal explaining their differing conclusions as to whether the videotape should be admitted. I do not consider that argument carries much weight. In the first place the showing of the videotape is what is important for a visual medium like television. In the second I do not consider that legitimate public debate about the admissibility ruling and the circumstances of the case generally can take place effectively without the public being fully informed by access to the video itself. I say that because the public are entitled to be satisfied that the courts have, in their judgments, fairly portrayed the substance of what Mr Rogers said and did during the videotaped reconstruction. The public are also entitled to assess for themselves whether the law generally and its application to this case strike the right balance between vindicating breaches of the Bill of Rights Act and the effective prosecution of crime. I am not expressing any view about that issue myself. I am simply pointing out that this is a matter of legitimate public interest and unless the videotape is released the public will be less than fully informed. Only if the case for withholding the material in question is of sufficient strength should the public have to consider the matter on a less than fully informed basis . . ."

"74. One final point should be mentioned. The courts must be careful in cases such as the present lest, by denying access to their records, they give the impression they are seeking to prevent public scrutiny of their processes and what has happened in a particular case. Any public perception that the courts were adopting a defensive attitude by limiting or preventing access to court records would tend to undermine confidence in the judicial system. There will of course be cases when a sufficient reason for withholding information is made out. If that is so, the public will or should understand why access has been denied. But unless the case for denial is clear, individual interests must give way to the public interest in maintaining confidence in the administration of justice through the principle of openness."

60 McGrath J said, at paras 122 and 136:

> "122. The media was, of course, able to fully report everything that happened at Mr Rogers's trial. The unusual feature of the present case, however, is that the video tape of the reconstruction of events at Mangonui, part of which TVNZ wishes to broadcast, did not form part of the evidence at the trial. This is because the Court of Appeal decided that there was a breach of Mr Rogers's protected rights and that the interests of justice required that the tape not be shown to the jury. This raises the question of whether the requirements of open justice, in relation to scrutiny of judicial processes and also police actions in this case, will not be satisfied unless the videotape is made available, in effect, for public broadcasting."
>
> "136. In the end, in the circumstances of this difficult case, I have reached the conclusion, when balancing the conflicting interests, that the side of open justice carries the greatest weight. Preservation of public confidence in the legal system is directly relevant, because of the circumstances and outcome of the trials of the two accused persons. There is a real risk of damage to public faith in the criminal justice system if the circumstances that led the Court of Appeal to refuse to admit the evidence are not fully transparent. It is a less than satisfactory response to reason that the end is achieved because the courts' own descriptions of the events that are depicted in the videotape are full and complete. Open justice strongly supports allowing the media access to primary sources of relevant information rather than having to receive it filtered according to what courts see as relevant. On the other side of the scales, Mr Rogers's rights have been breached but also vindicated during the criminal justice process. At this stage they have much less weight."

61 In his judgment to the same effect, Blanchard J at para 55 expressly concurred with the words of William Young P in the Court of Appeal ([2007] 1 NZLR 156, para 128):

> "I agree that the underlying issues can be debated without the videotape being shown on national television. But experience shows that arguments are usually more easily understood where they are contextualised. An esoteric argument about the way the New Zealand Bill of Rights Act is applied by the courts becomes far more accessible to the public if the implications can be assessed by reference to the concrete facts of a particular case. In that context, to prohibit the proposed broadcast of the videotape of the confession and reconstruction would necessarily have the tendency to limit legitimate public discussion on questions of genuine public interest."

62 In *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services* 2008 (5) SA 31, the Constitutional Court of South Africa considered an application by the press to compel disclosure of parts of the record of court proceedings in a claim brought unsuccessfully by the former head of the national intelligence agency arising from his suspension and dismissal. The minister objected to disclosure on national security grounds. The judgment of the majority was delivered by Moseneke DCJ. He referred to

A open justice as a fundamental principle of the Constitution, and said, at para 41:

> "From the right to open justice flows the media's right to gain access to, observe and report on, the administration of justice and the right to have access to papers and written arguments which are an integral part of court proceedings subject to such limitations as may be warranted on a case-by-
B case basis in order to ensure a fair trial."

63 At para 43, he described "the default position" as "one of openness", but he considered it an over-narrow formulation to say that "the default position may only be disturbed in exceptional circumstances". Whether there was sufficient reason to depart from the default position required a balancing exercise.

C **64** Sachs J in a judgment concurring with the general approach of the majority, but partially disagreeing with the decision, agreed at para 161 with Moseneke DCJ that technical concepts such as onus of proof should not loom large in the balancing enquiry. He continued:

> "On the contrary, in fact-specific matters such as these, undue technicism, whether on questions of procedure or evidence, would be
D more likely to distort the achievement of constitutional justice than to enhance it. Similarly, it seems clear that, whereas in most cases involving proportionality, the courts will act as an outside eye in assessing the constitutionality of the way in which power has been exercised, in cases such as the present the courts have to do the balancing themselves. Check-lists will not be helpful. As in all proportionality exercises, the
E factual matrix will be all-important, and the court concerned will itself have to make an order based on its enquiry into the specific way in which constitutionally-protected interests interact with each other, and particularly with the intensity of their engagement."

65 In the USA the federal courts have recognised a presumption favouring access to "judicial documents" at common law. In *United States v*
F *Amodeo* (1995) 71 F 3d 1044, the Court of Appeals, 2nd Circuit, considered an application for disclosure of a sealed report filed with the district court in connection with a corruption investigation into a union. The court (Winter, Calabresi and Cabranes CJJ) noted that the courts had given various descriptions of the weight to be given to the presumption of access. It observed, at p 1048:

G > "The difficulty in defining the weight to be given the presumption of access flows from the purpose underlining the presumption and the broad variety of documents deemed to be judicial. The presumption of access is based on the need for federal courts, although independent—indeed, particularly because they are independent—to have a measure of accountability and for the public to have confidence in the administration of justice. Federal courts exercise powers under article III [of the
H Constitution] that impact upon virtually all citizens . . . Monitoring both provides judges with critical views of their work and deters arbitrary judicial behaviour . . . Such monitoring is not possible without access to testimony and documents that are used in the performance of article III functions."

66 The court commented that many statements and documents generated in federal litigation actually have little or no bearing on the exercise of judicial power because "the temptation to leave no stone unturned in the search for evidence material to a judicial proceeding turns up a vast amount of not only irrelevant but also unreliable material". Unlimited access to every item turned up in the course of litigation could cause serious harm to innocent people. The court concluded that the weight to be given the presumption of access must be governed by the role of the material at issue in the exercise of judicial power and the resultant value of such information to those monitoring the federal courts.

67 The decision of the US District Court for the District of Massachusetts *In re Extradition of Romeo* (No 87-0808RC) 1 May 1987 shows how the present case would be resolved by a US court. The Canadian Government applied for the extradition of Mr Romeo, who was a US citizen. It also asked the court to withhold the affidavits detailing the evidence against Mr Romeo, which were admitted into evidence at the extradition hearing, from disclosure to the public, on the ground that disclosure would prejudice his right to a fair trial because of potential jury exposure to the details of the case against him. The US Department of Justice opposed the request for non-disclosure. The court referred in its ruling to the particular public interest in proceedings for the extradition of American citizens to foreign countries to face trial there. The extradition hearing and the documentary evidence admitted at the hearing were the most important part of the process. The court held that the presumption of openness should apply unless the Canadian Government presented evidence to satisfy it that non-disclosure was essential to preserve Mr Romeo's right to a fair trial.

Counter-arguments

68 On behalf of the US Government, Mr Perry submitted that the courts below were right in their reasoning and conclusions. His arguments were these:

1. The open justice principle is ordinarily satisfied if: (a) proceedings are held in public; and (b) fair, accurate and contemporaneous media reporting of the proceedings is not prevented by any action of the court.

2. The Tesler and Chodan extradition hearings satisfied those requirements.

3. The court had no inherent jurisdiction empowering it to allow the Guardian's request.

4. The true position at common law was as stated in *R v Waterfield* [1975] 1 WLR 711.

5. The observations of Judge LJ in *R v Howell* [2003] EWCA Crim 486 were limited to the provision of skeleton arguments in the Court of Appeal in circumstances where the words written were treated as if they had been deployed in open court. The case had no wider significance.

6. In written submissions on behalf of the US Government it was argued that a power to allow the Guardian's application was now conferred by rule 5.8 of the Criminal Procedure Rules 2011. Those rules had not been in force at the relevant time but they made the Guardian's appeal academic. In his oral submissions Mr Perry took a different position. He submitted that

A rule 5.8 was to be narrowly construed and would not include the Guardian's request.

7. The Administrative Court was right to take into account the existence of the exemption in section 32 of the Freedom of Information Act 2000. It was significant that Parliament had expressly exempted public authorities, which would include a court, from any obligation under the Act to produce a B document placed in the custody of the court for the purposes of proceedings in a particular cause or matter.

8. Article 10 was not engaged in this case. The *Leander* principle applied, and the later cases relied on by the Guardian did not support its case. In the *Társaság* case 53 EHRR 130 all that was sought was access to the complaint which had been made to the court. In the present case the nature of the extradition application was plain and the Guardian's request was for access C to a much wider range of documents than in the *Társaság* case. Further, in the *Társaság* case the applicability of article 10 had not been a contested issue. The question in that case was whether the Government had a defence under article 10.2. In *Independent News and Media Ltd v A* [2010] 1 WLR 2262 the issue was whether the press should be allowed to be present at a court hearing. In the present case the extradition hearings had been held in D open court.

9. The district judge's comments about the problems which would arise if her view of the law was wrong were important practical considerations.

10. In any event, the appeal ought to be dismissed on the facts. The extradition hearings had been full and lengthy. The issue had not been whether the US Government had produced sufficient evidence to justify putting the defendants on trial. The scheme under the Extradition Act 2003 E prohibits an inquiry by the court considering extradition into the sufficiency of the evidence to be relied upon at trial. The issues in the extradition hearings were confined to whether the US Government had satisfied the formal requirements of Part 2 of the Act. The judge had delivered clear and full judgments explaining why the requirements were satisfied. Since it appeared from the Guardian's evidence that its correspondents had not F attended the full hearings it was unsurprising if they found themselves unable fully to follow the arguments, but that was not through any want of open justice. If the Guardian regarded the cases as raising matters of great importance, it would be reasonable to expect it to have committed more resources to following it.

G *Conclusions*

69 The open justice principle is a constitutional principle to be found not in a written text but in the common law. It is for the courts to determine its requirements, subject to any statutory provision. It follows that the courts have an inherent jurisdiction to determine how the principle should be applied.

H **70** Broadly speaking, the requirements of open justice apply to all tribunals exercising the judicial power of the state. The fact that magistrates' courts were created by an Act of Parliament is neither here nor there. So for that matter was the Supreme Court, but the Supreme Court does not require statutory authority to determine how the principle of open justice should apply to its procedures.

71 The decisions of the courts in *Scott v Scott* [1913] AC 417, *GIO Personal Investments Services Ltd v Liverpool and London Steamship Protection and Indemnity Association Ltd (FAI General Insurance Co Ltd intervening)* [1999] 1 WLR 984 and *R v Howell* [2003] EWCA Crim 486 are illustrations of the jurisdiction of the courts to determine what open justice requires. For this purpose it is irrelevant how broadly or narrowly the last two cases should be interpreted. The significant point is that the decisions of the court in those cases, about disclosure of skeleton arguments to non-parties, were an exercise of the courts' power to determine whether such disclosure was required by the open justice principle.

72 The exclusion of court documents from the provisions of the Freedom of Information Act 2000 is in my view both unsurprising and irrelevant. Under the Act the Information Commissioner is made responsible for taking decisions about whether a public body should be ordered to produce a document to a party requesting it. The Information Commissioner's decision is subject to appeal to a tribunal, whose decision is then subject to judicial review by the courts. It would be odd indeed if the question whether a court should allow access to a document lodged with the court should be determined in such a roundabout way.

73 More fundamentally, although the sovereignty of Parliament means that the responsibility of the courts for determining the scope of the open justice principle may be affected by an Act of Parliament, Parliament should not be taken to have legislated so as to limit or control the way in which the court decides such a question unless the language of the statute makes it plain beyond possible doubt that this was Parliament's intention.

74 It would be quite wrong in my judgment to infer from the exclusion of court documents from the Freedom of Information Act 2000 that Parliament thereby intended to preclude the court from permitting a non-party to have access to such documents if the court considered such access to be proper under the open justice principle. The Administrative Court's observation that no good reason had been shown why the checks and balances contained in the Act should be overridden by the common law was in my respectful view to approach the matter from the wrong direction. The question, rather, was whether the Act demonstrated unequivocally an intention to preclude the courts from determining in a particular case how the open justice principle should be applied.

75 Similarly, I do not consider that the provisions of the Criminal Procedure Rules are relevant to the central issue. The fact that the rules now lay down a procedure by which a person wanting access to documents of the kind sought by the Guardian should make his application is entirely consistent with the court having an underlying power to allow such an application. The power exists at common law; the rules set out a process.

76 I turn to the critical question of the merits of the Guardian's application. The application is for access to documents which were placed before the district judge and referred to in the course of the extradition hearings. The practice of introducing documents for the judge's consideration in that way, without reading them fully in open court, has become commonplace in civil and, to a lesser extent, in criminal

A proceedings. The Guardian has a serious journalistic purpose in seeking access to the documents. It wants to be able to refer to them for the purpose of stimulating informed debate about the way in which the justice system deals with suspected international corruption and the system for extradition of British subjects to the USA.

77 Unless some strong contrary argument can be made out, the courts B should assist rather than impede such an exercise. The reasons are not difficult to state. The way in which the justice system addresses international corruption and the operation of the Extradition Act 2003 are matters of public interest about which it is right that the public should be informed. The public is more likely to be engaged by an article which focuses on the facts of a particular case than by a more general or abstract discussion.

C 78 Are there strong countervailing arguments? The four main counter-arguments are that the open justice principle is satisfied if the proceedings are held in public and reporting of the proceedings is permitted; that to allow the Guardian's application would be to go further than the courts have considered necessary in the past; that in the present case the issues raised in the extradition proceedings were ventilated very fully in open court, and D there is no need for the press to have access to the documents which they seek for the purpose of reporting the proceedings; and that to allow the application would create a precedent which would give rise to serious practical problems.

79 The first objection is based on too narrow a view of the purpose of the open justice principle. The purpose is not simply to deter impropriety or sloppiness by the judge hearing the case. It is wider. It is to enable the public E to understand and scrutinise the justice system of which the courts are the administrators.

80 The second objection is correct but not of itself decisive. The practice of the courts is not frozen. In *R v Waterfield* [1975] 1 WLR 711, on which the courts below placed considerable weight, the issue was quite different. It was whether the exclusion of the press from the viewing of a F pornographic film rendered the criminal proceedings a nullity. I do not regard the observations of the court in that case, 35 years ago, as determining how the present case should be resolved.

81 In *GIO Personal Investment Services Ltd v Liverpool and London Steamship Protection and Indemnity Association Ltd (FAI General Insurance Co Ltd intervening)* [1999] 1 WLR 984 an insurance company G sought access to documents in a case which did not directly concern it, because it was facing a claim giving rise to similar issues. Both claims were brought under reinsurance contracts placed at about the same time through the same chain of brokers. In both cases the reinsurers purported to avoid for non-disclosure. The applicants wanted sight of the evidence filed in the first action in the hope that it would strengthen their position in the second action. Issues about informing the public regarding matters of general H public interest did not arise.

82 I do not regard the third objection as a strong objection on the facts of this case. The Guardian put forward credible evidence that it was hampered in its ability to report as fully as it would have wished by not having access to the documents which it was seeking. That being so, the

court should be cautious about making what would really be an editorial judgment about the adequacy of the material already available to the paper for its journalistic purpose.

83 The courts have recognised that the practice of receiving evidence without it being read in open court potentially has the side effect of making the proceedings less intelligible to the press and the public. This calls for counter measures. In *SmithKline Beecham Biologicals SA v Connaught Laboratories Inc* [1999] 4 All ER 498 Lord Bingham referred to the need to give appropriate weight both to efficiency and to openness of justice as the court's practice develops. He observed that public access to documents referred to in open court might be necessary. In my view the time has come for the courts to acknowledge that in some cases it is indeed necessary. It is true that there are possible alternative measures. A court may require a document to be read in open court, but it is not desirable that a court should have to take this course simply to achieve the purpose of open justice. A court may also declare that a document is to be treated as if read in open court, but that is merely a formal device for the exercise of a power to allow access to the document. I do not see why the use of such a formula should be required. It may have the advantage of ensuring that other parties have an opportunity to comment, but that can equally be achieved if, in a case such as the present, the applicant is required to notify the parties to the litigation of the application.

84 I am not impressed by the fourth objection, based on the practical problems which it is said would arise if the Guardian's application were to succeed. Rule 5.8 of the Criminal Procedure Rules 2011 provides a sensible and practical procedure where a member of the public, including a reporter, wants to obtain information about a case or to inspect or copy a document. The applicant may be required to pay an appropriate fee; it must specify what it wants; and it must explain for what purpose the information is required.

85 In a case where documents have been placed before a judge and referred to in the course of proceedings, in my judgment the default position should be that access should be permitted on the open justice principle; and where access is sought for a proper journalistic purpose, the case for allowing it will be particularly strong. However, there may be countervailing reasons. In company with the US Court of Appeals, 2nd Circuit, and the Constitutional Court of South Africa, I do not think that it is sensible or practical to look for a standard formula for determining how strong the grounds of opposition need to be in order to outweigh the merits of the application. The court has to carry out a proportionality exercise which will be fact-specific. Central to the court's evaluation will be the purpose of the open justice principle, the potential value of the material in advancing that purpose and, conversely, any risk of harm which access to the documents may cause to the legitimate interests of others.

86 The Law Commission of New Zealand listed in its report on *Access to Court Records*, at paras 2.62 and 2.63, a number of countervailing risks which it suggested should or might lead to access being refused. While it is often helpful for a report by a law commission to consider a range of examples, what matters for present purposes are the general principle and its

application to this case. It is, however, right to observe that we are not presently concerned with a case involving a child or vulnerable adult. The Law Commission of New Zealand gave particular consideration to such cases and said, at para 2.37:

> "There seem to be good reasons for non-disclosure to the public of sensitive, personal information in family law and mental health and disability cases. In both instances, the need to protect personal information from painful and humiliating disclosure may found an exception to the open justice principle. The rationale for protecting such information, especially relating to vulnerable people like children, battered spouses, the mentally disabled, or the elderly and infirm, where there seems no obvious public interest reason in publicity, still holds."

87 In this case the Guardian has put forward good reasons for having access to the documents which it seeks. There has been no suggestion that this would give rise to any risk of harm to any other party, nor would it place any great burden on the court. Accordingly, its application should be allowed.

88 I base my decision on the common law principle of open justice. In reaching it I am fortified by the common theme of the judgments in other common law countries to which I have referred. Collectively they are strong persuasive authority. The courts are used to citation of Strasbourg decisions in abundance, but citation of decisions of senior courts in other common law jurisdictions is now less common. I regret the imbalance. The development of the common law did not come to an end on the passing of the Human Rights Act 1998. It is in vigorous health and flourishing in many parts of the world which share a common legal tradition. This case provides a good example of the benefit which can be gained from knowledge of the development of the common law elsewhere.

89 The Strasbourg jurisprudence may be seen as leading in the same direction, but it is not entirely clear cut because this is not a case in which the court can be said to have had a monopoly of information (as it did in the *Társaság* case 53 EHRR 130 and the *Kenedi* case 27 BHRC 335), so as to justify regarding the court's refusal of access as tantamount to censorship. There is significance in the question whether the refusal of access to the Guardian amounted to covert censorship, because there is force in the argument that article 10 is essentially a protection of freedom of speech and not freedom of information (see the *Leander* case 9 EHRR 433), although in exceptional cases infringement of the latter may be regarded as a covert form of infringement of the former. Some of the observations by the Strasbourg court may be said to support the reasoning behind my decision, but I base the decision on the common law and not on article 10.

90 Although I disagree with the reasoning of the courts below, I recognise that this decision breaks new ground in the application of the principle of open justice, although not, as I believe, in relation to the nature of the principle itself.

91 For those reasons I would allow this appeal and direct that the Guardian should be allowed access to the documents which it seeks.

HOOPER LJ

92 I agree with the judgment of Toulson LJ and only wish to add a few points.

93 Whilst accepting entirely Toulson LJ's arguments that the Guardian succeeds on the basis of the common law, I would be minded, if I needed to do so, to decide that the Criminal Procedure Rules as now drafted give a court the necessary power to make an order of the kind sought by the claimant.

94 The Criminal Procedure Rules have, since the hearing before the district judge, been amended to include a new Part 5, which makes provision in rule 5.8 for the "Supply to the public, including reporters, of information about a case".

95 Rule 5.8(7) of the Criminal Procedure Rules 2011 provides:

> "If the court so directs, the court officer will— (a) supply to the applicant, by word of mouth, other information about the case; or (b) allow the applicant to inspect or copy a document, or part of a document, containing information about the case."

96 Following the rule there is an italicised note which reads:

> "The supply of information about a case is affected by— (a) articles 6, 8 and 10 of the European Convention on Human Rights, and the court's duty to have regard to the importance of— (i) dealing with criminal cases in public, and (ii) allowing a public hearing to be reported to the public; (b) the Rehabilitation of Offenders Act 1974; (c) section 18 of the Criminal Procedure and Investigations Act 1996; (d) the Sexual Offences (Protected Material) Act 1997; (e) the Data Protection Act 1998; (f) section 20 of the Access to Justice Act 1999; and (g) reporting restrictions, rules about which are contained in Part 16 (Reporting, etc restrictions)."

97 Any power to release material to third parties would be subject to restrictions such as public interest immunity and the article 8 rights of witnesses, victims and defendants. In this case, as the last sentence of para 12 of the judgment of the Divisional Court makes clear, it was not claimed by the USA that release of any document would breach any right of confidence or be damaging.

98 It seems to me that rule 5.8(7) of the Criminal Procedure Rules 2011 is a necessary corollary of Part 3 of the Rules which, with other rules, gives very wide powers and duties to manage cases from start to finish. I take some examples: the power to dispense with a public hearing when making decisions at the pre-trial stage, the power to entertain submissions by e-mail and telephone and the duty to run cases efficiently so that the huge costs associated with public hearings are reduced. The corollary must be that the Rules should ensure that the exercise of these powers and duties does not imperil the principle of open justice. Rule 5.8(7) of the Criminal Procedure Rules 2011 does that. I note in passing that, notwithstanding what was said for example in *GIO Personal Investment Services Ltd v Liverpool and London Steamship Protection and Indemnity Association Ltd* [1999] 1 WLR 984, 995 by Potter LJ, there has been no suggestion that the rules in the CPR which deal with disclosure to third parties are ultra vires. As Lord

Woolf MR said in *Barings plc v Coopers & Lybrand* [2000] 1 WLR 2353, para 43:

> "As a matter of basic principle the starting point should be that practices adopted by the courts and parties to ensure the efficient resolution of litigation should not be allowed to adversely affect the ability of the public to know what is happening in the course of the proceedings."

99 I note also that there is often post-trial third party inspection of much of the material relied upon by the prosecution in criminal trials. The modern policy is to be found in *Publicity and the Criminal Justice System, Protocol for working together: Chief Police Officers, Chief Crown Prosecutors and the Media* which provides:

> "2. *Media Access to Prosecution Materials*
>
> "1. The aim of the [Crown Prosecution Service] is to ensure that the principle of open justice is maintained—that justice is done and seen to be done—while at the same time balancing the rights of defendants to a fair trial with any likely consequences for victims or their families and witnesses occasioned by the release of prosecution material to the media.
>
> "2. Prosecution material which has been relied upon by the Crown in court and which *should* normally be released to the media, includes:
>
> "—maps/photographs (including custody photos of defendants)/ diagrams and other documents produced in court;
>
> "—videos showing scenes of crime as recorded by police after the event;
>
> "—videos of property seized (e g weapons, clothing as shown to jury in court, drug hauls or stolen goods);
>
> "—sections of transcripts of interviews/statements as read out (and therefore reportable, subject to any orders) in court;
>
> "—videos or photographs showing reconstructions of the crime;
>
> "—CCTV footage of the defendant, subject to any copyright issues.
>
> "3. Prosecution material which may be released after consideration by the Crown Prosecution Service in consultation with the police and relevant victims, witnesses and family members includes:
>
> "—CCTV footage or photographs showing the defendant and victim, or the victim alone, that has been viewed by jury and public in court, subject to any copyright issues;
>
> "—video and audio tapes of police interviews with defendants, victims and witnesses;
>
> "—victim and witness statements.
>
> "4. Where a guilty plea is accepted and the case does not proceed to trial, then all the foregoing principles apply. *But to ensure that only material informing the decision of the court is published, material released to the media must reflect the prosecution case and must have been read out, or shown in open court, or placed before the sentencing judge*." (Emphasis added.)

100 Whether the defence has an unfettered right to release documents served on it by the prosecution during the proceedings and vice versa is a

more difficult topic. The Criminal Procedure and Investigations Act 1996 in sections 17 and 18 makes special provision for the confidentiality of unused material served on the defendant by the prosecution. Section 17(3) allows the defence to use or disclose unused material only to the extent that it has been displayed to the public in court or to the extent that it has been communicated to the public in court. As far as material relied upon by the prosecution as part of its case and not covered by the Sexual Offences (Protected Material) Act 1997 is concerned, the defence do not in practice give any undertaking about its use and nor do the prosecution give any undertaking in relation to material received from the defence. As to whether there are any implied restrictions on the use of such material, see *Mahon v Rahn* [1998] QB 424 and *Taylor v Director of the Serious Fraud Office* [1999] 2 AC 177 both in the Court of Appeal and in the House of Lords, where Lord Hoffmann (with whose speech the other members of the Appellate Committee agreed) said, at p 212:

> "I do not propose to express a view on the further points which arose in *Mahon v Rahn* [1998] QB 424, namely whether the [implied] undertaking applies also to used materials and whether it survives the publication of the statement in open court."

101 I turn to another topic.

102 During the course of the hearing we asked whether the decision of the Court of Appeal [2011] 1 WLR 3253, holding that it had jurisdiction to entertain an appeal from the decision of the Divisional Court in this case, has any impact on the powers of the Criminal Procedure Rule Committee.

103 Sections 68 and 69 of the Courts Act 2003 provide:

> "68. In this Part 'criminal court' means— (a) the criminal division of the Court of Appeal; (b) when dealing with any criminal cause or matter— (i) the Crown Court; (ii) a magistrates' court.
>
> "69(1) There are to be rules of court (to be called 'Criminal Procedure Rules') governing the practice and procedure to be followed in the criminal courts.
>
> "(2) Criminal Procedure Rules are to be made by a committee known as the Criminal Procedure Rule Committee.
>
> "(3) The power to make Criminal Procedure Rules includes power to make different provision for different cases or different areas, including different provision— (a) for a specified court or description of courts, or (b) for specified descriptions of proceedings or a specified jurisdiction.
>
> "(4) Any power to make . . . Criminal Procedure Rules is to be exercised with a view to securing that— (a) the criminal justice system is accessible, fair and efficient, and (b) the rules are both simple and simply expressed."

104 As sections 68 and 69 make clear, the rule making power of the committee is limited to making rules in relation to the Crown Court and the magistrates' court when they are dealing with "any criminal cause or matter".

105 The Court of Appeal held that it had jurisdiction to entertain an appeal notwithstanding section 18(1) of the Senior Courts Act 1981 which provides that no appeal shall lie to the Court of Appeal in relation to the

types of case therein specified, which include "(a) except as provided by the Administration of Justice Act 1960, from any judgment of the High Court *in any criminal cause or matter*" (emphasis added). The court held that the Guardian's application was "wholly collateral to the extradition proceedings".

106 Mr Perry, rightly in my view, said that the words "any criminal cause or matter" must have a different meaning in section 68 of the Courts Act 2003 than they do in section 18(1) of the Senior Courts Act 1981. To give the words "any criminal cause or matter" in section 68 a narrow meaning would lead to the undesirable result that issues such as those dealt with in Part 5 of the Criminal Procedure Rules (and in other parts of the Rules) would have to be the subject of rule-making by some other body. That cannot have been the intention of Parliament: see also section 66 of the Courts Act 2003, subsection (1A) of section 8 of the Senior Courts Act 1981 (as inserted by paragraph 1(4) of Schedule 2 to the Armed Forces Act 2011) (both of which make provision for the powers of certain judges) and section 16(5) of the Prosecution of Offences Act 1985.

107 I turn to one final topic.

108 Mr Perry submitted that the words "a document . . . containing information about the case" in rule 5.8 (7)(b) should be interpreted narrowly so as not to include written statements made by witnesses or exhibits. I do not agree.

LORD NEUBERGER OF ABBOTSBURY MR

109 I agree that this appeal should be allowed for the reasons given by Toulson LJ, to which there is nothing I can add.

110 As to the three points made by Hooper LJ: (1) I would leave open the question whether, if the court would not otherwise have power to make the order sought by the claimant, it would have such power by virtue of rule 5.8 of the Criminal Procedure Rules 2011. Not only is it unnecessary to decide the point, but it was not argued before us, unsurprisingly as the rule was not in existence at the time the district judge made her order. (2) I agree with what is said in para 106 that "criminal cause or matter" in section 68(b) of the Courts Act 2003 does not necessarily have the same meaning as the identical expression in section 18(1) of the Senior Courts Act 1981, and that, if the expression in the 1981 Act has the meaning ascribed to it in the earlier decision in this case [2011] 1 WLR 3253, then it has a different meaning in the 2003 Act. In particular, it would be inappropriate for the expression to be accorded a narrow meaning in the 2003 Act. (3) I also agree that "a document . . . containing information about the case" in rule 5.8(7)(b) includes written statements made by witnesses, and any exhibits: to exclude them would involve giving the words an artificially and inappropriately narrow meaning.

Appeal allowed with costs.

SUSAN DENNY, Barrister

A Supreme Court

Dring (on behalf of the Asbestos Victims Support Groups Forum UK) *v* Cape Intermediate Holdings Ltd (Media Lawyers Association intervening)

B [2019] UKSC 38

2019 Feb 18, 19; July 29

Baroness Hale of Richmond PSC, Lord Briggs, Lady Arden, Lord Kitchin, Lord Sales JJSC

Practice — Documents — Inspection and copying — Extent of court's jurisdiction under Civil Procedure Rules to permit non-party to obtain copies of documents contained in "records of the court" — Extent of court's inherent jurisdiction in respect of documents not forming part of records of the court — Principles upon which jurisdiction to be exercised — CPR r 5.4C(2)

C

The insurers of certain employers who had settled personal injury claims brought by employees who had been exposed to asbestos brought a claim in negligence against a company involved in the manufacture and supply of asbestos products. The company denied liability and a six-week trial took place in the High Court. After the D trial had ended but before judgment had been delivered the parties settled the claim by a consent order. The applicant, who had not been a party to those proceedings, applied on behalf of a group which supported victims of asbestos-related diseases for access to all documents used or disclosed at or for the trial, including the trial bundles and trial transcripts, on the basis that they were "records of the court" within CPR r 5.4C(2)[1]. The master granted the application. The Court of Appeal allowed the company's appeal in part, holding that "records of the court" did not include trial E bundles or trial transcripts but that the court had an inherent jurisdiction to permit a non-party to obtain some of the documents that a trial bundle usually contained, including witness statements and skeleton arguments. Accordingly, the court granted the applicant access to a number of documents under its inherent jurisdiction.

On appeal by the company and cross-appeal by the applicant—

Held, (1) dismissing the cross-appeal, that "records of the court" in CPR r 5.4C(2) did not refer to every single document generated in connection with a case F and filed, lodged or kept for the time being at court, but referred to those documents and records which the court itself kept for its own purposes, although it could not depend upon how much of the material lodged at court happened still to be there when the request was made; and that, therefore, the Court of Appeal had not erred in failing to make a wider order under rule 5.4C(2) (post, paras 21–24, 49).

(2) Dismissing the appeal, that, unless inconsistent with statute or rules of court, all courts and tribunals had an inherent jurisdiction to determine what the G constitutional principle of open justice required in terms of access to documents or other information placed before the court or tribunal in question; that the default position was that the public should be allowed access, not only to the parties' written submissions and arguments, but also to the documents which had been placed before the court and referred to during the hearing; that, however, a non-party did not have a right to be granted access under the inherent jurisdiction but would have to explain why he sought access and how granting him access would advance the open justice H principle; that the court would then have to carry out a fact-specific balancing exercise by weighing the potential value of the information sought in advancing the purpose of the open justice principle against any risk of harm which its disclosure might cause to the maintenance of an effective judicial process or to the legitimate

[1] CPR r 5.4C: see post, para 16.

interests of others; that, therefore, the Court of Appeal had had power under the inherent jurisdiction to make a wider order than it had; and that, accordingly, those parts of the Court of Appeal's order granting the applicant access to documents would stand and the matter would be listed before the High Court to decide in accordance with the principles of open justice whether the applicant should have access to any other document placed before the judge and referred to in the course of the trial (post, paras 41–50).

R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court (Article 19 intervening) [2013] QB 618, CA approved.

Kennedy v Information Comr (Secretary of State for Justice intervening) [2015] AC 455, SC(E) and *A v British Broadcasting Corpn (Secretary of State for the Home Department intervening)* [2015] AC 588, SC(Sc) applied.

Per curiam. The bodies responsible for framing the court rules in each part of the United Kingdom are urged to give consideration to the questions of principle and practice raised in this case (post, para 51).

Decision of the Court of Appeal [2018] EWCA Civ 1795; [2019] 1 WLR 479; [2019] 1 All ER 804 affirmed on partly different grounds.

The following cases are referred to in the judgment of the court:

A v British Broadcasting Corpn (Secretary of State for the Home Department intervening) [2014] UKSC 25; [2015] AC 588; [2014] 2 WLR 1243; [2014] 2 All ER 1037, SC(Sc)

Barings plc v Coopers & Lybrand [2000] 1 WLR 2353; [2000] 3 All ER 910, CA

GIO Personal Investment Services Ltd v Liverpool and London Steamship Protection and Indemnity Association Ltd (FAI General Insurance Co Ltd intervening) [1999] 1 WLR 984, CA

Home Office v Harman [1983] 1 AC 280; [1982] 2 WLR 338; [1982] 1 All ER 532, HL(E)

Kennedy v Information Comr (Secretary of State for Justice intervening) [2014] UKSC 20; [2015] AC 455; [2014] 2 WLR 808; [2014] 2 All ER 847, SC(E)

Law Debenture Trust Corpn (Channel Islands) Ltd v Lexington Insurance Co [2003] EWHC 2297 (Comm); 153 NLJ 1551

Practice Direction (Audio Recordings of Proceedings: Access) [2014] 1 WLR 632; [2014] 2 All ER 330, Sen Cts

R v Howell [2003] EWCA Crim 486, CA

R v Sussex Justices, Ex p McCarthy [1924] 1 KB 256, DC

R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court (Article 19 intervening) [2012] EWCA Civ 420; [2013] QB 618; [2012] 3 WLR 1343; [2012] 3 All ER 551, CA

Scott v Scott [1913] AC 417, HL(E)

SmithKline Beecham Biologicals SA v Connaught Laboratories Inc [1999] 4 All ER 498, CA

The following additional cases were cited in argument:

Al Rawi v Security Service (JUSTICE intervening) [2011] UKSC 34; [2012] 1 AC 531; [2011] 3 WLR 388; [2012] 1 All ER 1, SC(E)

Attorney General of Nova Scotia v MacIntyre [1982] 1 SCR 175

Blue v Ashley [2017] EWHC 1553 (Comm); [2017] 1 WLR 3630; [2018] 2 All ER 284

Cadam v Beaverbrook Newspapers Ltd [1959] 1 QB 413; [1959] 2 WLR 324; [1959] 1 All ER 453, CA

Chan U Seek v Alvis Vehicles Ltd (Guardian Newspapers Ltd intervening) [2004] EWHC 3092 (Ch); [2005] 1 WLR 2965; [2005] 3 All ER 155

A *Khuja v Times Newspapers Ltd* [2017] UKSC 49; [2019] AC 161; [2017] 3 WLR 351; [2018] 1 Cr App R 1, SC(E)
Mafart v Television New Zealand [2006] NZSC 33; [2006] 3 NZLR 18
Plant v Plant [1998] 1 BCLC 38
R (C) v Secretary of State for Justice (Media Lawyers Association intervening) [2016] UKSC 2; [2016] 1 WLR 444; [2017] 1 All ER 513, SC(E)
R (UNISON) v Lord Chancellor (Equality and Human Rights Commission
B *intervening) (Nos 1 and 2)* [2017] UKSC 51; [2017] 3 WLR 409; [2017] ICR 1037; [2017] 4 All ER 903, SC(E)
Secretary for Justice v FTCW [2014] HKCA 9; [2014] 2 HKC 132
Taylor v Lawrence [2002] EWCA Civ 90; [2003] QB 528; [2002] 3 WLR 640; [2002] 2 All ER 353, CA

APPEAL from the Court of Appeal

C The insurers of certain employers who had paid out damages to employees in settlement of personal injury claims for mesothelioma caused by exposure to asbestos, brought two actions against a company, Cape Intermediate Holdings Ltd, the manufacturers of asbestos products, seeking a contribution towards the damages paid. The company denied liability. A six-week trial, involving a large volume of documents, took place before
D Picken J. After the trial had ended but before judgment had been delivered, the parties settled the claims by a consent order dated 14 March 2017.

On 6 April 2017, the applicant, Graham Dring, acting on behalf of the Asbestos Victims Support Groups Forum UK, applied without notice pursuant to CPR r 5.4C seeking to obtain as "records of the court" all documents used or disclosed at the trial in respect of one of the actions
E brought by the insurers against the company. The same day Master McCloud made an order requiring all documents and electronic bundles in the litigation to be stored and held by the court. On 5 December 2017 Master McCloud [2017] EWHC 3154 (QB) granted the applicant's application.

By an appellant's notice and with permission of Martin Spencer J granted
F on 5 March 2018 the company appealed. On 31 July 2018 the Court of Appeal (Sir Brian Leveson P, Hamblen and Newey LJJ) [2018] EWCA Civ 1795; [2019] 1 WLR 479 allowed the company's appeal in part, holding that "records of the court" did not extend to witness statements, expert reports, trial bundles, transcripts or written submissions but that the court had an inherent jurisdiction to allow non-parties to inspect witness
G statements, expert reports and documents which were read out in open court and any specific documents which were necessary for a non-party to inspect in order to comply with the principle of open justice.

Pursuant to permission granted by the Supreme Court (Baroness Hale of Richmond PSC, Lord Carnwath and Lady Arden JJSC) on 31 October 2018 the company appealed and the applicant cross-appealed. The issue on the appeal was: "What are the powers of the court pursuant to the Civil
H Procedure Rules or its inherent jurisdiction to permit access to documents used in litigation to which the applicant for access was not a party?"

The Media Lawyers Association was given permission to intervene on the appeal.

The facts are stated in the judgment of the court, post, paras 3–14.

Michael Fordham QC, *Geraint Webb QC* and *James Williams* (instructed by *Freshfields Bruckhaus Deringer llp*) for the company.

Access to documents from the court file is governed by CPR r 5.4C and is limited to documents held and retained as "records of the court". That denotes formal documents. The design of the rule should be adhered to. There is no "inherent jurisdiction" to disapply its restrictions and no constitutional necessity for one. The correct approach to rule 5.4C is that adopted by the Court of Appeal. The inherent jurisdiction could not support the orders made below. Inherent jurisdiction does not operate unless there is a gap in the Rules or there is a necessity. There is neither.

The Civil Procedure Rule Committee make the rules under a statutory obligation. Where there are rules regulating certain subject matter, that is where to look for the scope of the court's powers in that area. Any reform requires careful consideration. The rules give effect to the open justice principle. The Rule Committee has frequently reviewed the requirements of open justice and made appropriate changes to the Civil Procedure Rules. Whilst the provisions have changed over time, there has never been a general right to inspect or obtain documents in trial bundles. [Reference was made to *GIO Personal Investment Services Ltd v Liverpool and London Steamship Protection and Indemnity Association Ltd (FAI General Insurance Co Ltd intervening)* [1999] 1 WLR 984, RSC Ord 63, r 4 and to historic provisions of court rules.]

The application of the open justice principle, most commonly encountered where the hearings are in private or the reporting of what happened in open court is restricted, frequently involves the balancing of competing imperatives. Frequently the court is balancing human rights, often the right to privacy against the right to freedom of expression. The present case was in open court and is not about whether anything said in open court should be restrained from being communicated.

At the heart of the open justice principle are the dual values of a public hearing which public and press alike can attend and unrestricted communication rights so that public and press can speak freely about what they have seen and heard at the public hearing. The central rationale of the open justice principle is the scrutiny of the judicial process and public confidence which comes from such scrutiny, promoting the values of the rule of law. The open justice principle is most relevant at the time of the hearing and the emphasis in the rules giving effect to it is on contemporaneous reporting. There is an inherent jurisdiction in relation to skeleton arguments because there was a gap there; there is no such gap for witness statements or trial documents. [Reference was made to *Mafart v Television New Zealand* [2006] 3 NZLR 18.]

The open justice principle is premised on an essential interest in the determination of the court. The scrutiny arises in what the judges decide. It is in delivering judgment that the court comes to explain to the public what the key evidence and law were, and how they featured in the judicial process. The fact that some cases settle without any public hearing, or settle after a public hearing but without a judgment, is no reason to create a public register of court documents.

A There is something invidious about a satellite application after a trial has taken place and proceedings have finally been disposed of, that rests upon open justice arguments by a person who had no interest in attending the trial or in inspecting the evidence-in-chief under the CPR rules, or in analysing the transcripts to see what unfolded at the trial, but simply wants to acquire documents through mandatory injunctions.

B [Reference was made to *Taylor v Lawrence* [2003] QB 528, *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court (Article 19 intervening)* [2013] QB 618, *R (UNISON) v Lord Chancellor (Equality and Human Rights Commission intervening) (Nos 1 and 2)* [2017] 3 WLR 409 and *Chan U Seek v Alvis Vehicles Ltd (Guardian Newspapers Ltd intervening)* [2005] 1 WLR 2965.]

C The relevant case management powers and open justice principle responsibilities were those of the trial judge, while seized of the case, to whom requests based on the open justice principles should have been made at the time. This was a case where the judge was functus. Relevant rule-making powers are those of the Civil Procedure Rule Committee which can and should be trusted to make any appropriate amendments to the Rules following consultation.

D There was no abrogation of the open justice principle in this trial nor was the principle abrogated by the applicant being unable to acquire the trial documents.

Robert Weir QC, Jonathan Butters and *Harry Sheehan* (instructed by *Leigh Day*) for the applicant.

E Open justice is a common law principle which is fundamental to the rule of law and the dispensation of justice. Public scrutiny extends beyond judging the judges. Justice has to be seen to be done. It should be open to full view that the justice system provides for equality before the law. The evidence and argument at trial should be publicly known, that being something of great value in its own right. The legitimacy of the judicial process, operated by an organ of the state, depends on such transparency.

F The judiciary is one of the branches of the state and the need for it to be open and accountable is as much a central feature of a democratic society as it is with the executive or the legislature. Judges are not accountable to the public through election or to Parliament. Transparency is the means by which the judicial system can be held to account in a democratic society. Scrutiny is only through open justice and public access to documents, whether or not they are read out in open court. Access must be provided to

G all documents which were referred to in court and also documents which the judge did not read but had access to.

H [Reference was made to *Al Rawi v Security Service (JUSTICE intervening)* [2012] 1 AC 531, *Khuja v Times Newspapers Ltd* [2019] AC 161, *R (C) v Secretary of State for Justice (Media Lawyers Association intervening* [2016] 1 WLR 444, *Kennedy v Information Comr (Secretary of State for Justice intervening)* [2015] AC 455, *Home Office v Harman* [1983] 1 AC 280, *SmithKline Beecham Biologicals SA v Connaught Laboratories Inc* [1999] 4 All ER 498 and *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court (Article 19 intervening)* [2013] QB 618.]

The furthering of the open justice principle so far as concerns a non-party seeking access to court documents is achieved either under the jurisdiction provided by CPR r 5.4C(2) or under the inherent jurisdiction of the court. The Civil Procedure Rules provide the necessary jurisdiction. If, however, CPR r 5.4C(2) does not cover trial documents, then access should be granted under the inherent jurisdiction.

That rule must be read purposively so as to further the open justice principle. On a plain reading the "records of the court" will include any document filed by a party with the court and still retained by the court. Thus the act of filing a document puts it on the court record. But where a filed document is no longer retained by the court, it will cease to be a record of the court.

Rule 5.4C is the principal rule by which the CPR further the open justice principle in respect of documents accessible to a non-party. Public scrutiny of a trial is not achievable unless non-parties have the right to apply to the court for copies of documents deployed at trial. *GIO Personal Investment Services Ltd v Liverpool and London Steamship Protection and Indemnity Association Ltd (FAI General Insurance Co Ltd intervening)* [1999] 1 WLR 984 was wrongly decided, but being a decision of the Court of Appeal, that case is not binding on the Supreme Court.

The exercise of the inherent jurisdiction of the court does not contravene the CPR. There is room for the engagement of the open justice principle through the inherent jurisdiction of the court to provide copies of skeleton arguments which are generally not covered by the CPR. The Court of Appeal was wrong to limit the scope of the inherent jurisdiction. The court has an inherent power to control proceedings in order to be able to carry out its functions properly. The court has a constitutional duty to secure open justice by applying its inherent jurisdiction.

Once documents have been deployed at a trial the court has a jurisdiction to provide a non-party with access to them, whether the case subsequently settles or a judgment is given, and whether the application is made during the course of the hearing or later. The broad rationale for allowing non-party access to court documents pursuant to the open justice principle applies as much after trial as it does during the trial.

[Reference was made to *Blue v Ashley* [2017] 1 WLR 3630 and *Cadam v Beaverbrook Newspapers Ltd* [1959] QB 413.]

The applicant has a legitimate interest in bringing the application as a non-party with a public interest in the subject matter of the trial. The court had jurisdiction to provide the documents sought.

Jude Bunting (instructed by *Reynolds Porter Chamberlain llp*) for the intervener.

There can be no public accountability of a justice system if there is no open justice. The public obtain information through the media. A proper democracy requires that the media be free and have access to information. The company's approach would lead to practical problems and a narrowing of open justice. The media would need to be present in court and that would not be practical due to the number of court sittings. Trial judges would be required to take editorial decisions. The media would be less able to inform

A the public accurately. Different approaches would arise in the different jurisdictions of the United Kingdom. The solution to these problems is the inherent jurisdiction identified in *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court (Article 19 intervening)* [2013] QB 618, which permits a request for access to court material to be assessed on the basis of a proportionality exercise. This approach reflects an international
B consensus: see *Attorney General of Nova Scotia v MacIntyre* [1982] 1 SCR 175 and *Secretary for Justice v FTCW* [2014] 2 HKC 132.

Fordham QC in reply.

There is a need to know what the inherent jurisdiction is and what is actually to be made available: practical considerations are important. Court bundles are returnable to the parties after the trial. Are parties then allowed
C to destroy documents or should they be retained? These are questions not dealt with by the applicant. The documents are contextualised in the judgment. Notes made by the judge in a trial are not disclosed, nor are the judge's marked up documents. They are excluded by the CPR. It is not implicit in the CPR that there is a free-standing power. The Insolvency Rules (rule 12.39) make explicit provision for access to documents; there could be
D such a provision in the CPR but there is not. Even if a document falls within the scope of CPR r 31.22 that does not give a right of public access. [Reference was made to *Barings plc v Coopers & Lybrand* [2000] 1 WLR 2353 and *Plant v Plant* [1998] 1 BCLC 38.]

There must be a proportionality assessment. The test must be whether the ordinary observer needs the documents to understand the case. There was
E no such claim in the present application.

The court took time for consideration.

29 July 2019. **BARONESS HALE OF RICHMOND PSC** handed down the following judgment of the court.

F 1 As Lord Hewart CJ famously declared, in *R v Sussex Justices, Ex p McCarthy* [1924] 1 KB 256, 259, "it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done". That was in the context of an appearance of bias, but the principle is of broader application. With only a few exceptions, our courts sit in public, not only that justice be
G done but that justice may be seen to be done. But whereas in the olden days civil proceedings were dominated by the spoken word—oral evidence and oral argument, followed by an oral judgment, which anyone in the court room could hear, these days civil proceedings generate a great deal of written material—statements of case, witness statements, and the documents exhibited to them, documents disclosed by each party, skeleton arguments and written submissions, leading eventually to a written judgment. It is
H standard practice to collect all the written material which is likely to be relevant in a hearing into a "bundle"—which may range from a single ring binder to many, many volumes of lever arch files. Increasingly, these bundles may be digitised and presented electronically, either instead of or as well as in hard copy.

2 This case is about how much of the written material placed before the court in a civil action should be accessible to people who are not parties to the proceedings and how it should be made accessible to them. It is, in short, about the extent and operation of the principle of open justice. As Toulson LJ said, in *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court (Article 19 intervening)* [2013] QB 618 ("*Guardian News and Media*"), at para 1:

> "Open justice. The words express a principle at the heart of our system of justice and vital to the rule of law. The rule of law is a fine concept but fine words butter no parsnips. How is the rule of law itself to be policed? It is an age old question. Quis custodiet ipsos custodes—who will guard the guards themselves? In a democracy, where power depends on the consent of the people governed, the answer must lie in the transparency of the legal process. Open justice lets in the light and allows the public to scrutinise the workings of the law, for better or for worse."

The history of the case

3 The circumstances in which this important issue comes before the court are unusual, to say the least. Cape Intermediate Holdings Ltd ("Cape") is a company that was involved in the manufacture and supply of asbestos. In January and February 2017, it was the defendant in a six-week trial in the Queen's Bench Division before Picken J. The trial involved two sets of proceedings, known as the "PL claims" and the "CDL claim", but only the PL claims are relevant to this appeal. In essence, these were claims brought against Cape by insurers who had written employers' liability policies for employers. The employers had paid damages to former employees who had contracted mesothelioma in the course of their employment. The employers, through their insurers, then claimed a contribution from Cape on the basis that the employees had been exposed at work to asbestos from products manufactured by Cape. It was alleged that Cape had been negligent in the production of asbestos insulation boards; that it knew of the risks of asbestos and had failed to take steps to make those risks clear; indeed, that it obscured, understated and unfairly qualified the information that it had, thus providing false and misleading reassurance to employers and others. Cape denied all this and alleged that the employers were solely responsible to their employees, that it did publish relevant warnings and advice, and that any knowledge which it had of the risks should also have been known to the employers.

4 Voluminous documentation was produced for the trial. Each set of proceedings had its own hard copy "core bundle", known as Bundle C, which contained the core documents obtained on disclosure and some documents obtained from public sources. The PL core bundle amounted to over 5,000 pages in around 17 lever arch files. In addition, there was a joint Bundle D, only available on an electronic platform, which contained all the disclosed documents in each set of proceedings. If it was needed to refer to a document in Bundle D which was not in Bundle C, it could immediately be viewed on screen, and would then be included in hard copy in Bundle C. The intention was that Bundle C would contain all the documents referred to for the purpose of the trial, whether in the parties' written and oral

A opening and closing submissions, or in submissions or evidence during the trial.

5 After the trial had ended, but before judgment was delivered, the PL claims were settled by a consent order dated 14 March 2017 and sealed on 17 March 2017. The CDL claim was also settled a month later, before judgment.

B 6 The Asbestos Victims Support Groups Forum UK ("the Forum") is an unincorporated association providing help and support to people who suffer from asbestos-related diseases and their families. It is also involved in lobbying and promoting asbestos knowledge and safety. It was not a party to either set of proceedings. On 6 April 2017, after the settlement of the PL claims, it applied without notice, under the Civil Procedure Rules, CPR r 5.4C, which deals with third party access to the "records of C the court", with a view to preserving and obtaining copies of all the documents used at or disclosed for the trial, including the trial bundles, as well as the trial transcripts. This was because the Forum believed that the documents would contain valuable information about such things as the knowledge of the asbestos industry of the dangers of asbestos, the research which the industry and industry-related bodies had carried out, and the D influence which they had had on the Factory Inspectorate and the Health and Safety Executive in setting standards. In the Forum's view, the documents might assist both claimants and defendants and also the court in understanding the issues in asbestos-related disease claims. No particular case was identified but it was said that they would assist in current cases.

E 7 That same day, the master made an ex parte order designed to ensure that all the documents which were still at court stayed at court and that any which had been removed were returned to the court. She later ordered that a hard drive containing an electronic copy of Bundle D be produced and lodged at court. After a three-day hearing of the application in October, she gave judgment in December, holding that she had jurisdiction, either under CPR r 5.4C(2) or at common law, to order that a non-party be given F access to all the material sought. She ordered that Mr Dring (now acting for and on behalf of the Forum) should be provided with the hard copy trial bundle, including the disclosure documents in Bundle C, all witness statements, expert reports, transcripts and written submissions. She did not order that Bundle D be provided but ordered that it be retained at court.

G 8 Cape appealed, inter alia, on the grounds that: (1) the master did not have jurisdiction, either under CPR r 5.4C or at common law, to make an order of such a broad scope; (2) to the extent that the court did have jurisdiction to grant access, she had applied the wrong test to the exercise of her discretion; and (3) in any event, she should have held that the Forum failed to meet the requisite test.

H 9 The appeal was transferred to the Court of Appeal because of the importance of the issues raised. In July 2018, that court allowed Cape's appeal and set aside the master's order [2019] 1 WLR 479. It held that the "records of the court" for the purpose of the discretion to allow access under CPR rule 5.4C(2) were much more limited than she had held. They would not normally include trial bundles, trial witness statements, trial expert

reports, trial skeleton arguments or written submissions; or trial transcripts. Nevertheless, the court had an inherent jurisdiction to permit a non-party to obtain (i) witness statements of witnesses, including experts, whose statements or reports stood as evidence-in-chief at trial and which would have been available for inspection during the trial, under CPR r 32.13; (ii) documents in relation to which confidentiality had been lost under CPR r 31.22 and which were read out in open court, or the judge was invited to read in court or outside court, or which it was clear or stated that the judge had read; (iii) skeleton arguments or written submissions read by the court, provided that there is an effective public hearing at which these were deployed; and (iv) any specific documents which it was necessary for a non-party to inspect in order to meet the principle of open justice. But there was no inherent jurisdiction to permit non-parties to obtain trial bundles or documents referred to in skeleton arguments or written submissions, or in witness statements or experts' reports, or in open court, simply on the basis that they had been referred to in the hearing.

10 When exercising its discretion under CPR r 5.4C(2) or the inherent jurisdiction, the court had to balance the non-party's reasons for seeking disclosure against the party's reasons for wanting to preserve confidentiality. The court would be likely to lean in favour of granting access if the principle of open justice is engaged and the applicant has a legitimate interest in inspecting the documents. If the principle of open justice is not engaged, then the court would be unlikely to grant access unless there were strong grounds for thinking it necessary in the interests of justice to do so (paras 127 and 129).

11 Accordingly, the court ordered, in summary: (i) that the court should provide the Forum with copies of all statements of case, including requests for further information and answers, apart from those listed in Appendix 1 to the order, so far as they were on the court file and for a fee, pursuant to the right of access granted by CPR r 5.4C(1); (ii) that Cape should provide the Forum with copies of the witness statements, expert reports and written submissions listed in Appendix 2 to the order; and (iii) that the application be listed before Picken J (or failing him some other High Court judge) to decide whether any other document sought by the Forum fell within (ii) or (iv) in para 9 above and if so whether Cape should be ordered to provide copies. Copying would be at the Forum's expense. Cape was permitted to retrieve from the court all the documents and bundles which were not on the court file and the hard drive containing a copy of Bundle D. In making this order, the Court of Appeal proceeded on the basis that clean copies of the documents in question were available.

12 Cape now appeals to this court. It argues, first, that the Court of Appeal should have limited itself to order (i) in para 11 above; second, that the Court of Appeal was wrong to equate the court's inherent jurisdiction to allow access to documents with the principle of open justice; the treatment of court documents is largely governed by the Civil Procedure Rules and the scope of any inherent jurisdiction is very limited; in so far as it goes any further than expressly permitted by the Rules, it extends only to ordering provision to a non-party of copies of (a) skeleton arguments relied on in court and (b) written submissions made by the parties in the course of a trial

A (as held by the Court of Appeal in *GIO Personal Investment Services Ltd v Liverpool and London Steamship Protection and Indemnity Association Ltd (FAI General Insurance Co Ltd intervening)* [1999] 1 WLR 984 ("*FAI*")); and third, that the Court of Appeal was wrong to conclude that the Forum did have a relevant legitimate interest in obtaining access to the documents; the public interest in open justice was different from the public interest in the B content of the documents involved.

13 The Forum cross-appeals on the ground that the Court of Appeal was wrong to limit the scope of CPR r 5.4C in the way that it did. Any document filed at court should be treated as part of the court's records for that purpose. The default position should be to grant access to documents placed before a judge and referred to by a party at trial unless there was a good reason not to do so. It should not be limited by what the judge has C chosen to read.

14 The Media Lawyers Association has intervened in the appeal to this court. It stresses that the way in which most members of the public are able to scrutinise court proceedings is through media reporting. The media are the eyes and ears of the public. For this, media access to court documents is essential. The need often arises after the proceedings have ended and D judgment has been given because that is when it is known that scrutiny is required. The media cannot be present at every hearing. It cites, among many other apposite quotations, the famous words of Jeremy Bentham, cited by Lord Shaw of Dunfermline in the House of Lords in *Scott v Scott* [1913] AC 417, the leading case on open justice, at p 477: "Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all E guards against improbity. It keeps the judge himself while trying under trial."

The issues

15 There are three issues in this important case:

(1) What is the scope of CPR r 5.4C(2)? Does it give the court power to F order access to all documents which have been filed, lodged or held at court, as the master ruled? Or is it more limited, as the Court of Appeal ruled?

(2) Is access to court documents governed solely by the Civil Procedure Rules, save in exceptional circumstances, as Cape argues? Or does the court have an inherent power to order access outside the Rules?

(3) If there is such a power, how far does it extend and how should it be G exercised?

CPR r 5.4C

16 Rule 5.4C is headed "Supply of documents to a non-party from court records". For our purposes, the following provisions are relevant:

> "(1) The general rule is that a person who is not a party to proceedings H may obtain from the court records a copy of— (a) a statement of case, but not any documents filed with or attached to the statement of case, or intended by the party whose statement it is to be served with it; (b) a judgment or order given or made in public (whether made at a hearing or without a hearing) . . .

"(2) A non-party may, if the court gives permission, obtain from the records of the court a copy of any other document filed by a party, or communication between the court and a party or another person."

17 By rule 2.3(1), "statement of case":

"(a) means a claim form, particulars of claim where these are not included in a claim form, defence, Part 20 claim, or reply to defence; and (b) includes any further information in relation to them voluntarily or by court order . . ."

18 There are thus certain documents to which a non-party has a right of access (subject to the various caveats set out in the rule which need not concern us) and what looks at first sight like a very broad power to allow a non-party to obtain copies of "any other document filed by a party, or communication between the court and a party or other person". Hence the Forum argues that the test is filing. CPR r 2.3 provides that " 'filing', in relation to a document, means delivering it, by post or otherwise, to the court office". So, it is argued, any document which has been delivered to the court office has been filed and the court may give permission for a non-party to obtain a copy.

19 There are two problems with this argument. First, the fact that filing is to be achieved in a particular way does not mean that every document which reaches court in that same way has been filed: the famous fallacy of the undistributed middle. The second is that the copy is to be obtained "from the records of the court". The Civil Procedure Rules do not define "the records of the court". They do not even provide what the records of the court are to contain. Nor, so far as we are aware, does any other legislation.

20 The Public Records Act 1958 is not much help. It only tells us which records are public records and what is to be done with them. The person responsible for public records must make arrangements to select those which ought to be permanently preserved and for their transfer to the Public Record Office no later than 20 years after their creation (section 3). The Lord Chancellor is the person responsible for many court records, including those of the High Court and Court of Appeal (section 8). Section 10 and Schedule 1 define what is meant by a public record. Paragraph 4 of Schedule 1 includes the records of or held in the Senior Courts (i e the High Court and Court of Appeal) in the list of records of courts and tribunals which are public records. We have been shown a document prepared by Her Majesty's Courts and Tribunals Service and the Ministry of Justice, headed *Record Retention and Disposition Schedule*. This lists how long various categories of files and other records are to be kept. Queen's Bench Division files, for example, are to be destroyed after seven years. Trial bundles are to be destroyed if not collected by the parties at the end of the hearing or on a date agreed with the court. This is of no help in telling us what the court files should contain.

21 We have been shown various historical sources which indicate what the records of certain courts may from time to time have contained, but it is clear that practice has varied. Some indication of what the court

A records may currently contain is given by CPR Practice Direction 5A, paragraph 4.2A of which lists the documents which a *party* may obtain from the records of the court unless the court orders otherwise. These include "a claim form or other statement of case together with any documents filed with or attached to or intended by the claimant to be served with such claim form"; "an acknowledgement of service together
B with any documents filed with or attached to or intended by the party acknowledging service to be served with such acknowledgement of service"; "an application notice", with two exceptions, and "any written evidence filed in relation to an application", with the same two exceptions; "a judgment or order made in public (whether made at a hearing or without a hearing)"; and "a list of documents". It does not include witness statements for trial, experts' reports for trial, transcripts of hearings, or trial
C bundles.

22 The essence of a record is that it is something which is kept. It is a permanent or long-term record of what has happened. The institution or person whose record it is will decide which materials need to be kept for the purposes of that institution or person. Practice may vary over time depending on the needs of the institution. What the court system may have
D found it necessary or desirable to keep in the olden days may be different from what it now finds it necessary or desirable to keep. Thus one would expect that the court record of any civil case would include, at the very least, the claim form and the judgments or orders which resulted from that claim. One would not expect that it would contain all the evidence which had been put before the court. The court itself would have no need for that, although
E the parties might. Such expectations are confirmed by the list in Practice Direction 5A.

23 The "records of the court" must therefore refer to those documents and records which the court itself keeps for its own purposes. It cannot refer to every single document generated in connection with a case and filed, lodged or kept for the time being at court. It cannot depend upon how much
F of the material lodged at court happens still to be there when the request is made.

24 However, current practice in relation to what is kept in the records of the court cannot determine the scope of the court's power to order access to case materials in particular cases. The purposes for which court records are kept are completely different from the purposes for which non-parties may properly be given access to court documents. The principle of open
G justice is completely distinct from the practical requirements of running a justice system. What is required for each may change over time, but the reasons why records are kept and the reasons why access may be granted are completely different from one another.

Other court rules

H **25** There are other court rules which are relevant to the access to documents which may be granted to non-parties. CPR r 39.2 lays down the general rule that court hearings are to be in public. Rule 39.9 provides that in any hearing the proceedings will be recorded. Any party or other person may require a transcript (for which there will be a fee). If the hearing was in

private, a non-party can get a transcript but only if the court so orders. *Practice Direction (Audio Recordings of Proceedings: Access)* [2014] 1 WLR 632 states that there is generally no right for either a party or a non-party to listen to the recording. If they have obtained a copy of the transcript, they can apply for permission to listen, but this will only be granted in exceptional circumstances, save to official law reporters. Nevertheless, the effect of rule 39.9 (which is wider than its predecessor) is that a non-party can (at a fee) obtain a transcript of everything that was said in court.

26 Rule 39.5 requires the claimant to file a trial bundle and Practice Direction 32, paragraph 27.5, deals in detail with how these are to be prepared. Nothing is said about non-parties being granted access to them.

27 CPR Pt 32 deals with evidence. If a witness who has made a witness statement is called to give evidence, the witness statement shall stand as his evidence-in-chief (rule 32.5(2)). A "witness statement which stands as evidence-in-chief is open to inspection during the course of the trial unless the court otherwise directs" (rule 32.13(1)). The considerations which might lead the court otherwise to direct are listed as the interests of justice, the public interest, the nature of expert medical evidence, the nature of confidential information, and the need to protect a child or protected person (rule 32.13(3)). Rule 32.13 recognises that the modern practice of treating a witness statement as evidence-in-chief (which dates back to the *Report of the Review Body on Civil Justice* (1988) (Cm 394)) means that those observing the proceedings in court will not know the content of that evidence unless they can inspect the statement. The rule puts them back into the position they would have been in before that practice was adopted.

28 In *FAI* [1999] 1 WLR 984, FAI applied to inspect and obtain: copies of documents referred to in witness statements which they had obtained under the predecessor to rule 32.13 (RSC Ord 38, r 2A); any written opening, skeleton argument or submissions, to which reference was made by the judge, together with any documents referred to in them; and any document which the judge was specifically requested to read, which was included in any reading list, or which was read or referred to during trial. The Court of Appeal held that RSC Ord 38, r 2A, the predecessor to CPR r 5.4C(2), did not cover documents referred to in witness statements. The purpose of using witness statements was to encourage a "cards on the table" approach, to accelerate the disclosure of the parties' evidence as between themselves; it was not to enable non-parties to obtain access to documentation which would otherwise have been unavailable to them whether or not they had attended court. As to the inherent jurisdiction of the court, based on the principle of open justice, the same reasoning applied to documents referred to in court or read by the judge, unless they had been read out in court and thus entered the public domain.

29 Written submissions or skeleton arguments were a different matter. The confidence of the public in the integrity of the judicial process must depend upon having an opportunity to understand the issues. Until recently this had been done in an opening speech, but if the public were deprived of that opportunity by a written opening or submissions which were not read out, it was within the inherent jurisdiction of the court to require that a copy be made available. Nevertheless, the court did observe (at p 997), having

A referred to Lord Woolf's report, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (July 1996) that "It is of great importance that the beneficial saving in time and money which it is hoped to bring about by such new procedures should not erode the principle of open justice".

30 Indeed, Lord Woolf MR himself took the same view. In *Barings plc v* B *Coopers & Lybrand* [2000] 1 WLR 2353, para 43, he said:

> "As a matter of basic principle the starting point should be that practices adopted by the courts and parties to ensure the efficient resolution of litigation should not be allowed to adversely affect the ability of the public to know what is happening in the course of the proceedings."

C

31 In this case the Court of Appeal [2019] 1 WLR 479 largely adopted the approach in *FAI*, while recognising that in certain respects the law had been developed. First, it was now apparent that the court had inherent jurisdiction to allow access to all parties' skeleton arguments, not just the opening submissions, provided there was an effective public hearing at which they were deployed (see *Law Debenture Trust Corpn (Channel* D *Islands) Ltd v Lexington Insurance Co* [2003] EWHC 2297 (Comm); 153 NLJ 1551), and the same would apply to other advocates' documents provided to the court to assist its understanding of the case, such as chronologies, dramatis personae, reading lists and written closing submissions (para 92). Second, although CPR r 32.13 is limited to access during the trial, there was no reason why access to witness statements E taken as evidence-in-chief should not be allowed under the inherent jurisdiction after the trial (para 95). Third, what applies to witness statements should also apply to experts' reports which are treated as their evidence-in-chief (para 96). This did not extend to documents exhibited to witness statements or experts' reports unless it was not possible to understand the statement or report without sight of a particular document F (para 100).

32 Finally, developments since *FAI* also meant that it was within the inherent jurisdiction to allow access to "documents read or treated as read in open court" (para 107). This should be limited to documents which are read out in open court; documents which the judge is invited to read in open court; documents which the judge is specifically invited to read outside court; and documents which it is clear or stated that the judge has G read (para 108). These were all documents which were likely to have been read out in open court had the trial been conducted orally. Furthermore, the rule that parties may only use documents obtained on disclosure for the purpose of the proceedings in which they are disclosed does not apply to documents which have been "read to or by the court, or referred to, at a hearing which has been held in public" unless the court prohibits or limits H their use (CPR r 31.22). However, the mere fact that a document had been referred to in court did not mean that it would have been read out had the trial been conducted wholly orally or that sight of it is necessary in order to understand or scrutinise the proceedings (para 109). So, as in *FAI*, the court did not consider that the inherent jurisdiction extended to granting

access "simply on the basis that it has been referred to in open court" (para 109).

33 The decisions of the Court of Appeal in *FAI* and in this case are not the only cases in which the courts have accepted that they have an inherent jurisdiction to allow access to materials used in the course of court proceedings and that the rationale for doing so is the constitutional principle of open justice. That this is so is made even plainer by some recent cases of high authority.

The principle of open justice

34 The Court of Appeal had the unenviable task of trying to reconcile the very different approaches taken by that court in *FAI* and *Guardian News and Media*. This court has the great advantage of being able to consider the issues from the vantage point of principle rather than the detailed decisions which have been reached by the courts below. There can be no doubt at all that the court rules are not exhaustive of the circumstances in which non-parties may be given access to court documents. They are a minimum and of course it is for a person seeking to persuade the court to allow access outside the rules to show a good case for doing so. However, case after case has recognised that the guiding principle is the need for justice to be done in the open and that courts at all levels have an inherent jurisdiction to allow access in accordance with that principle. Furthermore, the open justice principle is applicable throughout the United Kingdom, even though the court rules may be different.

35 This was plainly recognised in *Guardian News and Media* [2013] QB 618. A district judge had ordered two British citizens to be extradited to the USA. The Guardian newspaper applied to the district judge to inspect and take copies of affidavits, witness statements, written arguments and correspondence, supplied to the judge for the purpose of the extradition hearings, referred to during the course of the hearings but not read out in open court. The judge held that she had no power to allow this and the Divisional Court agreed. In a comprehensive judgment, Toulson LJ, with whom both Hooper LJ and Lord Neuberger of Abbotsbury MR agreed, held that she did.

36 The requirements of open justice applied to all tribunals exercising the judicial power of the state. The fact that magistrates' courts were created by statute was neither here nor there (para 70). The decisions of the House of Lords in *Scott v Scott* [1913] AC 417, and of the Court of Appeal in *FAI* [1999] 1 WLR 984, and *R v Howell* [2003] EWCA Crim 486—respectively a family, civil and criminal case—were illustrations of the jurisdiction of the court to decide what open justice required (para 71). Hence the principles established in *Guardian News and Media* cannot be confined to criminal cases. They were clearly meant to apply across the board. Nor has anyone suggested why the jurisdiction in criminal cases should be wider than that in civil. More to the point, they have since been approved by this court.

37 So what were those principles? The purpose of open justice "is not simply to deter impropriety or sloppiness by the judge hearing the case. It is wider. It is to enable the public to understand and scrutinise the justice

A system of which the courts are the administrators" (para 79). The practice of the courts was not frozen (para 80). In *FAI*, for example, issues of informing the public about matters of general public interest did not arise (para 81). In earlier cases, it had been recognised, principally by Lord Scarman and Lord Simon of Glaisdale (dissenting) in *Home Office v Harman* [1983] 1 AC 280, 316, and by Lord Bingham of Cornhill CJ in
B *SmithKline Beecham Biologicals SA v Connaught Laboratories Inc* [1999] 4 All ER 498, 512, that the practice of receiving evidence without its being read in open court "has the side effect of making the proceedings less intelligible to the press and the public". Lord Bingham had contemplated that public access to documents referred to in open court might be necessary "to avoid too wide a gap between what has in theory, and what has in practice, passed into the public domain". The time had come to
C acknowledge that public access to documents referred to in open court was necessary (para 83). Requiring them to be read out would be to defeat the purpose of making hearings more efficient. Stating that they should be treated as if read out was merely a formal device for allowing access. It was unnecessary. Toulson LJ was unimpressed by the suggestion that there would be practical problems, given that the Criminal Procedure Rules
D 2011, in rule 5.8, provided, not only that there was certain (limited) information about a criminal case which the court officer was bound to supply, but also that, if the court so directs, the officer could supply "other information" about the case orally and allow the applicant to inspect or copy a document containing information about the case (para 84). But it was the common law, not the rule, which created the court's power; the rule simply provided a practical procedure for implementing it.
E

38 Hence "In a case where documents have been placed before a judge and referred to in the course of proceedings . . . the default position should be that access should be permitted on the open justice principle; and where access is sought for a proper journalistic purpose, the case for allowing it will be particularly strong". In evaluating the grounds for opposing access, the court would have to carry out a fact-specific proportionality exercise.
F "Central to the court's evaluation will be the purpose of the open justice principle, the potential value of the material in advancing that purpose and, conversely, any risk of harm which access to the documents may cause to the legitimate interests of others" (para 85).

39 The principles laid down in *Guardian News and Media* were clearly endorsed by the majority of the Supreme Court in *Kennedy v*
G *Information Comr (Secretary of State for Justice intervening)* [2015] AC 455: see Lord Mance JSC, at para 47, Lord Toulson JSC, with whom Lord Neuberger of Abbotsbury PSC and Lord Clarke of Stone-cum-Ebony JSC agreed, at paras 110–118, Lord Sumption JSC, who agreed with both Lord Mance and Lord Toulson JJSC, at para 152. Nor did the minority cast doubt upon the decision: see Lord Wilson JSC, at para 192; Lord Carnwath JSC, at para 236. The principles were also endorsed by a
H unanimous Supreme Court in *A v British Broadcasting Corpn (Secretary of State for the Home Department intervening)* [2015] AC 588, a case emanating from Scotland: see Lord Reed JSC, with whom Baroness Hale of Richmond DPSC, Lord Wilson, Lord Hughes and Lord Hodge JJSC agreed, at paras 23–27. That case was concerned with the exceptions to the open

justice principle, in particular to the naming of a party to the proceedings, and at para 41 Lord Reed JSC expressly adopted the test laid down in *Kennedy*, which was a direct citation from *Guardian News and Media*, at para 85:

> "Whether a departure from the principle of open justice was justified in any particular case would depend on the facts of that case. As Lord Toulson JSC observed in *Kennedy v Information Comr (Secretary of State for Justice intervening)* [2015] AC 455, 525, para 113, the court has to carry out a balancing exercise which will be fact-specific. Central to the court's evaluation will be the purpose of the open justice principle, the potential value of the information in question in advancing that purpose and, conversely, any risk of harm which its disclosure may cause to the maintenance of an effective judicial process or to the legitimate interests of others."

40 It follows that there should be no doubt about the principles. The question in any particular case should be about how they are to be applied.

Discussion

41 The constitutional principle of open justice applies to all courts and tribunals exercising the judicial power of the state. It follows that, unless inconsistent with statute or the rules of court, all courts and tribunals have an inherent jurisdiction to determine what that principle requires in terms of access to documents or other information placed before the court or tribunal in question. The extent of any access permitted by the court's rules is not determinative (save to the extent that they may contain a valid prohibition). It is not correct to talk in terms of limits to the court's jurisdiction when what is in fact in question is how that jurisdiction should be exercised in the particular case.

42 The principal purposes of the open justice principle are two-fold and there may well be others. The first is to enable public scrutiny of the way in which courts decide cases—to hold the judges to account for the decisions they make and to enable the public to have confidence that they are doing their job properly. In *A v British Broadcasting Corpn* [2015] AC 588, Lord Reed JSC reminded us of the comment of Lord Shaw of Dunfermline, in *Scott v Scott* [1913] AC 417, 475, that the two Acts of the Scottish Parliament passed in 1693 requiring that both civil and criminal cases be heard "with open doors", "bore testimony to a determination to secure civil liberties against the judges as well as against the Crown" (para 24).

43 But the second goes beyond the policing of individual courts and judges. It is to enable the public to understand how the justice system works and why decisions are taken. For this they have to be in a position to understand the issues and the evidence adduced in support of the parties' cases. In the olden days, as has often been said, the general practice was that all the argument and the evidence was placed before the court orally. Documents would be read out. The modern practice is quite different. Much more of the argument and evidence is reduced into writing before the hearing takes place. Often, documents are not read out. It is difficult, if not

A impossible, in many cases, especially complicated civil cases, to know what is going on unless you have access to the written material.

44 It was held in *Guardian News and Media* [2013] QB 618 that the default position is that the public should be allowed access, not only to the parties' written submissions and arguments, but also to the documents which have been placed before the court and referred to during the hearing. B It follows that it should not be limited to those which the judge has been asked to read or has said that he has read. One object of the exercise is to enable the observer to relate what the judge has done or decided to the material which was before him. It is not impossible, though it must be rare, that the judge has forgotten or ignored some important piece of information which was before him. If access is limited to what the judge has actually read, then the less conscientious the judge, the less transparent is his or her C decision.

45 However, although the court has the power to allow access, the applicant has no right to be granted it (save to the extent that the rules grant such a right). It is for the person seeking access to explain why he seeks it and how granting him access will advance the open justice principle. In this respect it may well be that the media are better placed than others to D demonstrate a good reason for seeking access. But there are others who may be able to show a legitimate interest in doing so. As was said in both *Kennedy* [2015] AC 455, at para 113, and *A v British Broadcasting Corpn* [2015] AC 588, at para 41, the court has to carry out a fact-specific balancing exercise. On the one hand will be "the purpose of the open justice principle" and "the potential value of the information in question in E advancing that purpose".

46 On the other hand will be "any risk of harm which its disclosure may cause to the maintenance of an effective judicial process or to the legitimate interests of others". There may be very good reasons for denying access. The most obvious ones are national security, the protection of the interests of children or mentally disabled adults, the protection of privacy interests more generally, and the protection of trade secrets and commercial F confidentiality. In civil cases, a party may be compelled to disclose documents to the other side which remain confidential unless and until they are deployed for the purpose of the proceedings. But even then there may be good reasons for preserving their confidentiality, for example, in a patent case.

47 Also relevant must be the practicalities and the proportionality of G granting the request. It is highly desirable that the application is made during the trial when the material is still readily available, the parties are before the court and the trial judge is in day-to-day control of the court process. The non-party who seeks access will be expected to pay the reasonable costs of granting that access. People who seek access after the proceedings are over may find that it is not practicable to provide the material because the court will probably not have retained it and the parties H may not have done so. Even if they have, the burdens placed on the parties in identifying and retrieving the material may be out of all proportion to benefits to the open justice principle, and the burden placed upon the trial judge in deciding what disclosure should be made may have become much harder, or more time-consuming, to discharge. On the other hand,

increasing digitisation of court materials may eventually make this easier. In short, non-parties should not seek access unless they can show a good reason why this will advance the open justice principle, that there are no countervailing principles of the sort outlined earlier, which may be stronger after the proceedings have come to an end, and that granting the request will not be impracticable or disproportionate.

48 It is, however, appropriate to add a comment about trial bundles. Trial bundles are now generally required. They are compilations of copies of what are likely to be the relevant materials—the pleadings, the parties' submissions, the witness statements and exhibits, and some of the documents disclosed. They are provided for the convenience of the parties and the court. To that end, the court, the advocates and others involved in the case may flag, mark or annotate their copies of the bundle as an aide memoire. But the bundle is not the evidence or the documents in the case. There can be no question of ordering disclosure of a marked up bundle without the consent of the person holding it. A clean copy of the bundle, if still available, may in fact be the most practicable way of affording a non-party access to the material in question, but that is for the court hearing the application to decide.

Application to this case

49 Cape argues that the Court of Appeal did not have jurisdiction to make the order that it did, not that if it did have jurisdiction the order was wrong in principle. The Forum argues that the court should have made a wider order under CPR r 5.4C(2). Both are, in our view, incorrect. The Court of Appeal not only had jurisdiction to make the order that it did, but also had jurisdiction to make a wider order if it were right so to do. On the other hand, the basis of making any wider order is the inherent jurisdiction in support of the open justice principle, not the Civil Procedure Rules, CPR r 5.4C(2). The principles governing the exercise of that jurisdiction are those laid down in *Guardian News and Media* [2013] QB 618, as explained by this court in *Kennedy* [2015] AC 455, *A v British Broadcasting Corpn* [2015] AC 588 and this case.

50 In those circumstances, as the Court of Appeal took a narrower view, both of the jurisdiction and the applicable principles, it would be tempting to send the whole matter back to a High Court judge, preferably Picken J, so that he can decide it on the basis of the principles enunciated by this court. However, Cape has chosen to attack the order made by the Court of Appeal, not on its merits, but on a narrow view of the court's jurisdiction. Nor has it set up any countervailing rights of its own. In those circumstances, there seems no realistic possibility of the judge making a more limited order than did the Court of Appeal. We therefore order that paragraphs 4 and 7 of the Court of Appeal order (corresponding to points (i) and (ii) in para 11 above) stand. But we would replace paragraph 8 (corresponding with point (iii)) with an order that the application be listed before Picken J (or, if that is not possible, another High Court judge) to determine whether the court should require Cape to provide a copy of any other document placed before the judge and referred to in the course of the

A trial to the Forum (at the Forum's expense) in accordance with the principles laid down by this court.

Postscript

51 We would urge the bodies responsible for framing the court rules in each part of the United Kingdom to give consideration to the questions of
B principle and practice raised by this case. About the importance and universality of the principles of open justice there can be no argument. But we are conscious that these issues were raised in unusual circumstances, after the end of the trial, but where clean copies of the documents were still available. We have heard no argument on the extent of any continuing obligation of the parties to co-operate with the court in furthering the open justice principle once the proceedings are over. This and the other practical
C questions touched on above are more suitable for resolution through a consultative process in which all interests are represented than through the prism of an individual case.

Appeal and cross-appeal dismissed.
Case remitted to High Court for further consideration.
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SHIRANIKHA HERBERT, Barrister

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A Supreme Court

*Regina (Haworth) *v* Revenue and Customs Commissioners

[2021] UKSC 25

2021 April 21; July 2

Lord Briggs, Lady Arden, Lord Leggatt, Lord Stephens, Lady Rose JJSC

Revenue — Tax avoidance — Follower notice — Taxpayer entering into tax arrangements to avoid liability to capital gains tax — Revenue giving follower notice to taxpayer following judicial ruling regarding similar tax arrangements — Whether ruling relevant to taxpayer's tax arrangements — Whether application of "principles laid down, or reasoning given" in ruling "would" deny tax advantage asserted by taxpayer — Finance Act 2014 (c 26), ss 204, 205(3)(b), 206

The claimant entered into certain tax arrangements in order to avoid capital gains tax on the disposal of shares by a trust of which he was the settlor. Accordingly he submitted a tax return on the basis that the trust was not liable to capital gains tax on that disposal. Since the Court of Appeal had already ruled in a different case that similar arrangements to avoid capital gains tax had not been effective ("the *Smallwood* ruling"), the revenue issued the claimant with a follower notice under section 204 of the Finance Act 2014[1] requiring him to amend his tax return and an accelerated payment notice under section 219 requiring him to pay the disputed tax. The notices were given on the basis that the revenue was of the opinion that the *Smallwood* ruling was "relevant" to the claimant's tax arrangements (within section 204(4)) since the "principles laid down, or reasoning given" in that ruling "would", if applied to those arrangements, deny the tax advantage that the claimant asserted resulted therefrom (within section 205(3)(b)). The claimant's claim for judicial review of the revenue's decision to issue the follower and accelerated payment notices was dismissed, but the Court of Appeal reversed that decision and quashed both notices, holding that, on a true construction of section 205(3)(b), the *Smallwood* ruling was not relevant to the claimant's tax arrangements.

On the revenue's further appeal—

Held, dismissing the appeal, that, in determining the level of certainty that the revenue would have to arrive at before it could be of the opinion that a judicial ruling was "relevant" to a taxpayer's chosen tax arrangements within section 204(4) of the Finance Act 2014, it was necessary to take into account the severe penalties to which a taxpayer would be liable if he failed to comply with a follower or accelerated payment notice; that, construing section 205(3)(b) accordingly, it could only be said that the principles laid down or reasoning given in a judicial ruling "would", if applied to a taxpayer's chosen tax arrangements, deny the tax advantage that the taxpayer asserted resulted from those arrangements if the revenue was of the opinion that there was no scope for a reasonable person to disagree that the ruling denied the relevant advantage; that it would be insufficient that the revenue had formed the opinion that the ruling was likely to do so; that it could not be said that this construction put a gloss on the statutory wording or imposed a non-statutory threshold, nor that it was inconsistent with the test applied by the First-tier Tribunal pursuant to section 214(3)(b) when determining an appeal against the imposition of a

[1] Finance Act 2014, s 204: see post, para 6.
S 205: see post, para 8.
S 206: see post, para 9.
S 214: see post, para 13.

penalty for non-compliance with a penalty notice; that, further, factual findings in a judicial ruling did form part of the "reasoning given" in that ruling for the purposes of section 205(3)(b); that, in the present case, the revenue accepted that its opinion had been that it was merely likely that the *Smallwood* ruling would deny the tax advantage asserted by the claimant and, in any event, had misdirected itself as to what the *Smallwood* ruling actually decided; and that, accordingly, the Court of Appeal had been right to quash the follower and accelerated payment notices issued to the taxpayer (post, paras 59–63, 69–70, 75–76, 81, 83, 87).

R (UNISON) v Lord Chancellor (Equality and Human Rights Commission intervening) (Nos 1 and 2) [2020] AC 869, SC(E) applied.

Smallwood v Revenue and Customs Comrs [2010] STC 2045, CA considered.

Per curiam. (i) Whether the revenue can reasonably form the opinion that a judicial ruling is relevant to the taxpayer's asserted tax advantage, for the purposes of sections 204(4) and 205(3), will depend on a number of factors, including: (a) how fact-sensitive the application of the relevant ruling is, in other words whether a small difference in the fact pattern of the taxpayer's arrangements or circumstances as compared with the fact pattern described in the earlier ruling would prevent the principles or reasoning applying; (b) whether the untruthfulness of the taxpayer's evidence is so clear that the revenue can reasonably form the opinion that the ruling is relevant, despite that contrary evidence; (c) the legal arguments put forward by the taxpayer, particularly those that were not raised in the earlier ruling; and (d) the nature of the ruling, a ruling being less likely to be capable of forming the basis for the opinion required by section 204(4) if it was arrived at after a hearing where the taxpayer did not appear or was not legally represented or where the reasoning is brief or unclear (post, paras 64–68).

(ii) A follower notice which does not comply with the requirements of section 206 of the 2014 Act as to the content of such a notice is not thereby rendered invalid (post, paras 85–86).

Decision of the Court of Appeal [2019] EWCA Civ 747; [2019] 1 WLR 4708; [2019] 4 All ER 506 affirmed.

The following cases are referred to in the judgment of Lady Rose JSC:

Clark v Perks (No 2) [2001] EWCA Civ 1228; [2002] ICR 302; [2001] STC 1254, CA
Edwards v Bairstow [1956] AC 14; [1955] 3 WLR 410; [1955] 3 All ER 48, HL(E)
R (Begum) v Special Immigration Appeals Commission (UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism intervening) [2021] UKSC 7; [2021] 2 WLR 556; [2021] 2 All ER 1063, SC(E)
R (Broomfield) v Revenue and Customs Comrs [2018] EWHC 1966 (Admin); [2019] 1 WLR 1353; [2018] STC 1790
R (Locke) v Revenue and Customs Comrs [2019] EWCA Civ 1909; [2020] 1 All ER 459; [2019] STC 2543, CA
R (UNISON) v Lord Chancellor (Equality and Human Rights Commission intervening) (Nos 1 and 2) [2017] UKSC 51; [2020] AC 869; [2017] 3 WLR 409; [2017] ICR 1037; [2017] 4 All ER 903, SC(E)
Secretary of State for the Home Department v Rehman [2001] UKHL 47; [2003] 1 AC 153; [2001] 3 WLR 877; [2002] 1 All ER 122, HL(E)
Smallwood v Revenue and Customs Comrs [2009] EWHC 777 (Ch); [2009] STC 1222; [2010] EWCA Civ 778; [2010] STC 2045, CA
UBS AG v Revenue and Customs Comrs [2016] UKSC 13; [2016] 1 WLR 1005; [2016] 3 All ER 1; [2016] STC 934, SC(E)
Uber BV v Aslam [2021] UKSC 5; [2021] ICR 657, SC(E)
Wood v Holden [2006] EWCA Civ 26; [2006] 1 WLR 1393; [2006] STC 443, CA

The following additional cases were cited in argument:

R (N) v Mental Health Review Tribunal (Northern Region) [2005] EWCA Civ 1605; [2006] QB 468; [2006] 2 WLR 850; [2006] 4 All ER 194, CA

R (Spurrier) v Secretary of State for Transport [2020] EWCA Civ 214; [2020] PTSR 1446, CA

APPEAL from the Court of Appeal

By a claim form issued on 29 June 2016 the taxpayer, Geoffrey Richard Haworth, sought judicial review of the decision of the Revenue and Customs Commissioners on 24 June 2016 to issue him with a follower notice and an accelerated payment notice under Part 4 of the Finance Act 2014 requiring him to amend his tax return and make payment (with provision for interest and penalties in the event of non-compliance) in relation to a potential capital gains tax liability. The claimant sought, inter alia, an order quashing the follower notice and the accelerated payment notice.

By a decision dated 23 May 2018 Sir Ross Cranston sitting as a judge of the Queen's Bench Division [2018] EWHC 1271 (Admin); [2018] STC 1326 dismissed the claim. The claimant appealed. On 1 May 2019 the Court of Appeal (Gross, Newey LJJ and Sir Timothy Lloyd) [2019] EWCA Civ 747; [2019] 1 WLR 4708 allowed the claimant's appeal and quashed the notices.

With permission of the Supreme Court (Lord Wilson, Lord Carnwath, Lord Kitchin JJSC) granted on 9 January 2020 the revenue appealed.

The issues in the appeal and the facts are stated in the judgment of Lady Rose JSC.

Christopher Stone (instructed by *Solicitor, Revenue and Customs*) for the revenue.

Giles Goodfellow QC and *Ben Elliott* (instructed by *Levy & Levy*) for the taxpayer.

The court took time for consideration.

2 July 2021. **LADY ROSE JSC** (with whom **LORD BRIGGS**, **LADY ARDEN**, **LORD LEGGATT** and **LORD STEPHENS JJSC** agreed) handed down the following judgment.

Introduction

1 The follower notice regime established by Part 4 of the Finance Act 2014 has been described as raising the stakes on tax avoidance. It has also been described as draconian. The provisions apply where a taxpayer has completed his tax return or brought an appeal against his assessment on the basis that he is entitled to a tax advantage because of arrangements that he has entered into. The advantage might be an entitlement to a particular relief from tax or the avoidance of a tax charge. HMRC may form the opinion that the taxpayer is not entitled to that tax advantage because a previous court or tribunal ruling has already decided that arrangements like his are not effective and do not confer that advantage on taxpayers. If certain conditions are met, HMRC may serve a follower notice, informing the taxpayer that his situation follows that in the earlier case, denying him the tax advantage he asserts.

2 The taxpayer who receives a follower notice must decide whether to respond by taking the "corrective action" specified in Part 4. If he takes corrective action, he concedes that he is not entitled to the tax advantage and he then becomes liable to pay the tax he had initially sought to avoid. If the taxpayer decides not to take corrective action and maintains that he is entitled to the advantage claimed then, if he ultimately loses his case before the tribunal and HMRC are proved right, not only will he have to pay the additional tax, but he will also be subject to a substantial penalty.

3 In his tax return for the year 2000/2001, the respondent, Mr Haworth, disclosed that he had entered into arrangements whereby, he asserted, he avoided any charge to tax on a substantial capital gain arising from the disposal of shares by a trust of which he was the settlor. His avoidance of the charge to tax depended on a combination of the provisions of the Taxation of Chargeable Gains Act 1992 ("the TCGA") and the operation of the UK/Mauritius double taxation convention as appended to the Double Taxation Relief (Taxes on Income) (Mauritius) Order 1981 (SI 1981/1121) ("the Convention").

4 HMRC opened an enquiry into Mr Haworth's tax return and issued a follower notice to Mr Haworth contending that the Court of Appeal has already decided in *Smallwood v Revenue and Customs Comrs* [2010] STC 2045 ("*Smallwood*") that on the true construction of the Convention, the provisions he relies on do not relieve him of liability under the TCGA. In that case, HMRC say, arrangements which were the same in all material respects to those of Mr Haworth were held not to remove the charge to tax in the way that Mr Haworth asserts.

5 Mr Haworth brought judicial review proceedings in the Administrative Court to challenge the issue of the follower notice. Mr Haworth's challenge was dismissed at first instance by Sir Ross Cranston: see [2018] STC 1326 handed down on 23 May 2018. Mr Haworth's appeal was allowed by the Court of Appeal. The court held unanimously that the conditions required for the giving of a follower notice had not been satisfied in Mr Haworth's case [2019] 1 WLR 4708. The main judgment was given by Newey LJ with Gross LJ giving a short concurring judgment. Sir Timothy Lloyd agreed with both judgments.

The legislation

6 The conditions that must be satisfied before HMRC can give a follower notice are set out in section 204 of the Finance Act 2014 ("FA 2014") as follows:

> "*Circumstances in which a follower notice may be given*
>
> "(1) HMRC may give a notice (a 'follower notice') to a person ('P') if Conditions A to D are met.
>
> "(2) Condition A is that— (a) a tax enquiry is in progress into a return or claim made by P in relation to a relevant tax, or (b) P has made a tax appeal (by notifying HMRC or otherwise) in relation to a relevant tax, but that appeal has not yet been— (i) determined by the tribunal or court to which it is addressed, or (ii) abandoned or otherwise disposed of.
>
> "(3) Condition B is that the return or claim or, as the case may be, appeal is made on the basis that a particular tax advantage ('the asserted

A advantage') results from particular tax arrangements ('the chosen arrangements').

"(4) Condition C is that HMRC is of the opinion that there is a judicial ruling which is relevant to the chosen arrangements.

"(5) Condition D is that no previous follower notice has been given to the same person (and not withdrawn) by reference to the same tax advantage, tax arrangements, judicial ruling and tax period.

B "(6) A follower notice may not be given after the end of the period of 12 months beginning with the later of— (a) the day on which the judicial ruling mentioned in Condition C is made, and (b) the day the return or claim to which subsection (2)(a) refers was received by HMRC or (as the case may be) the day the tax appeal to which subsection (2)(b) refers was made."

C 7 Capital gains tax is a relevant tax for the purposes of Condition A: see section 200(b) FA 2014. For our purposes, the time limit in section 204(6) was substituted by a transitional provision in section 217 FA 2014. That provides that in the case of a judicial ruling made before the day on which the FA 2014 was passed, the provisions have effect as if the deadline set in section 204(6) was the end of the period of 24 months beginning with the day on which the Act was passed. The effect of this was that the deadline for D giving follower notices which relied on *Smallwood* as the relevant ruling was 17 July 2016.

8 The key provision for the purposes of this appeal is the provision that sets out when a previous judicial ruling is "relevant" to the taxpayer's chosen arrangements for the purposes of Condition C. Section 205 elaborates on the meaning of that term and other terms used in Condition C—

E "*'Judicial ruling' and circumstances in which a ruling is 'relevant'*

"(1) This section applies for the purposes of this Chapter.

"(2) 'Judicial ruling' means a ruling of a court or tribunal on one or more issues.

"(3) A judicial ruling is 'relevant' to the chosen arrangements if— (a) it relates to tax arrangements, (b) the principles laid down, or reasoning given, in the ruling would, if applied to the chosen arrangements, deny the F asserted advantage or a part of that advantage, and (c) it is a final ruling.

"(4) A judicial ruling is a 'final ruling' if it is— (a) a ruling of the Supreme Court, or (b) a ruling of any other court or tribunal in circumstances where— (i) no appeal may be made against the ruling, (ii) if an appeal may be made against the ruling with permission, the time limit for applications has expired and either no application has been made or permission has been G refused, (iii) if such permission to appeal against the ruling has been granted or is not required, no appeal has been made within the time limit for appeals, or (iv) if an appeal was made, it was abandoned or otherwise disposed of before it was determined by the court or tribunal to which it was addressed.

"(5) Where a judicial ruling is final by virtue of sub-paragraph (ii), (iii) or (iv) of subsection (4)(b), the ruling is treated as made at the time H when the sub-paragraph in question is first satisfied."

9 Section 206 specifies what must be included in a follower notice:

"*Content of a follower notice*

"A follower notice must— (a) identify the judicial ruling in respect of which Condition C in section 204 is met, (b) explain why HMRC

considers that the ruling meets the requirements of section 205(3), and (c) explain the effects of sections 207 to 210."

10 There are provisions in section 207 entitling the taxpayer to make written representations to HMRC objecting to the follower notice on the ground, amongst others, that the judicial ruling specified in the notice is not one which is relevant to the chosen arrangements. HMRC must consider any representations and determine whether to confirm or withdraw the notice.

11 The consequences for the taxpayer of being given a follower notice are set out in section 208. This provides that P is liable to pay a penalty if the necessary corrective action is not taken in respect of the denied advantage before the deadline specified in section 208(8) FA 2014. Where, as in Mr Haworth's case, the follower notice has been given after the opening of an enquiry into his tax return, P takes corrective action if he amends his return to counteract the denied advantage. If the follower notice has been given in the course of a tax appeal, then the corrective action required is for P to take all the action necessary to enter into an agreement with HMRC to relinquish the denied advantage. In either case, P must also notify HMRC both that he has taken the first step and of the amount of tax he is now liable to pay.

12 The penalty which P is liable to pay if he does not take the necessary corrective action is quantified in accordance with section 209 and is, broadly, 50% of the tax advantage. This penalty can be reduced if the taxpayer co-operates with HMRC but cannot be less than 10% of the denied tax advantage: see section 210. If the taxpayer becomes liable for a penalty under section 208, HMRC may assess the penalty and notify him of the amount: see section 211. Section 211(5) sets a deadline by which HMRC must notify the taxpayer of the penalty.

13 There is no right of appeal as such against the issue of a follower notice. However, section 214 provides a right of appeal against a section 208 penalty and that the taxpayer may challenge the notice on the ground that the judicial ruling relied on by HMRC was not relevant:

"*Appeal against a section 208 penalty*

"(1) P may appeal against a decision of HMRC that a penalty is payable by P under section 208.

"(2) P may appeal against a decision of HMRC as to the amount of a penalty payable by P under section 208.

"(3) The grounds on which an appeal under subsection (1) may be made include in particular— (a) that Condition A, B or D in section 204 was not met in relation to the follower notice, (b) that the judicial ruling specified in the notice is not one which is relevant to the chosen arrangements, (c) that the notice was not given within the period specified in subsection (6) of that section, or (d) that it was reasonable in all the circumstances for P not to have taken the necessary corrective action (see section 208(4)) in respect of the denied advantage."

14 The giving of a follower notice does not of itself require the taxpayer to pay any tax earlier than he would have to if he appealed against a closure notice and lost that appeal. But in addition to creating the contingent liability to the penalty, the giving of a follower notice is important because it

A forms one of the bases on which HMRC can also give an accelerated payment notice under the provisions of Chapter 3 of Part 4 of the FA 2014. The effect of the accelerated payment notice is, broadly, that the taxpayer must pay an amount stated in the notice and that amount is then treated as paid on account of the disputed tax. Again, the provisions do not stop the taxpayer from later bringing a challenge before the tribunal to establish B whether the tax advantage applies. But he must pay the disputed tax up front as well as take the risk that he will have to pay the penalty resulting from the follower notice if he is wrong about his tax position.

The ruling in Smallwood

15 The relevant provisions of the TCGA and of the Convention are set C out in the judgment of Mann J who decided *Smallwood* on appeal from the Special Commissioners [2009] STC 1222 and the judgment of Patten LJ in the Court of Appeal in that case. What follows is a summary of how the arrangements in *Smallwood* were supposed to work and what the Court of Appeal decided.

16 Liability for capital gains tax depends upon residence in the United Kingdom and applies to chargeable gains accruing to the taxpayer in a year D of assessment during any part of which he is resident here. Where the trustees of a settlement are non-resident throughout the fiscal year, but the settlor himself retains an interest in the settlement and is himself UK resident in the fiscal year, any gains made by the trust are attributed to the settlor by section 86 TCGA and he is chargeable to tax on them. Where the trustees of the settlement are resident in the UK at any time during the fiscal year, then E any gains which are chargeable to tax in the trustees' hands in the UK are also attributed to the settlor by section 77 TCGA.

17 The arrangements entered into by Mr Smallwood were aimed at avoiding a charge to capital gains tax on the disposal of shares held by a settlement of which he was a trustee at the time he completed his tax returns and in which he retained an interest. He hoped to avoid the application of a charge under either of those sections of the TCGA by relying on the F application of a double taxation treaty between the UK and a state which would not impose a tax on the gain made on the disposal under its own taxing provisions. Mauritius is such a state. Mauritius only imposes capital gains tax on disposals in very limited circumstances which do not apply here. The efficacy of the arrangements depended on the Convention having the effect that the trust was not liable to capital gains tax because the only G Contracting State entitled under the Convention to tax the gain was Mauritius and not the UK.

18 The Smallwoods' arrangements were devised by KPMG. Pursuant to the arrangements, the Jersey trustee was replaced by a trustee company which was tax resident in Mauritius, the shares were then disposed of and the Mauritian trustee was then promptly replaced by the Smallwoods who were domiciled and resident in the UK. The appointment of the Smallwoods H meant that the trust was not non-UK resident for the whole fiscal year so section 86 did not attribute the gain made by the trust to Mr Smallwood. Mr Smallwood claimed that under the terms of the Convention, there was also no capital gains tax payable by the trustees under the TCGA and so nothing to attribute to the Smallwoods under section 77.

19 HMRC did not accept that the Convention had that effect and they amended Mr Smallwood's tax return to include chargeable gains of over £6m. He appealed to the Special Commissioners. The Special Commissioners set out detailed findings of fact in relation to the way the scheme had been devised and implemented. On their view of how the Convention should be interpreted, the identity of the Contracting State which was entitled to tax the capital gain depended on the place of effective management, or POEM, of the trust. That, they decided on the facts that they had found, was the UK not Mauritius. The trustees were therefore liable to tax on the gain in the UK and that tax charge was attributed to Mr Smallwood under section 77 TCGA.

20 The Smallwoods appealed against the decision of the Special Commissioners and Mann J allowed their appeal. He disagreed with the Special Commissioners' construction of the relevant provisions of the Convention and held that the Contracting State entitled to tax the gain was the State in which the trust was resident as at the time of the disposal of the shares. That was clearly Mauritius. Thus, there was no gain chargeable in the UK, no tax liability accruing to the trust, and nothing to be paid by Mr Smallwood. HMRC appealed Mann J's construction of the Convention to the Court of Appeal. The Smallwoods cross-appealed on the ground that the Special Commissioners erred in law on the issue of the POEM (a point which had not been decided by Mann J).

21 The main judgment in the Court of Appeal was given by Patten LJ. The other members of the court, Hughes and Ward LJJ, agreed with his analysis of how the provisions of the Convention should be applied. The court held that both Contracting States would, under their domestic legislation, appear to be entitled to apply their capital gains tax regimes to the disposal by the trust. This triggered a "tie-breaker" provision in article 4(3) of the Convention, designed to prevent double taxation. That tie-breaker provided that where a trust was a resident of both Contracting States, "then it shall be deemed to be a resident of the Contracting State in which its place of effective management is situated". Having decided that the Smallwoods' trust was indeed resident in both the UK and Mauritius within the meaning of article 4(3), the Court of Appeal went on to consider where the trust's place of effective management or POEM was situated.

22 Patten LJ noted that POEM was not defined in the Convention but that both parties accepted that the test was that set out in the relevant Commentary on article 4(3) of the 1977 OECD Model Convention on the double taxation of income and capital. That Commentary describes the POEM in these terms:

> "As a result of these considerations, the 'place of effective management' has been adopted as the preference criterion for persons other than individuals. The place of effective management is the place where key management and commercial decisions that are necessary for the conduct of the entity's business are in substance made. The place of effective management will ordinarily be the place where the most senior person or group of persons (for example a board of directors) makes its decisions, the place where the actions to be taken by the entity as a whole are determined; however, no definitive rule can be given and all relevant facts and circumstances must be examined to determine the place of

A effective management. An entity may have more than one place of management, but it can have only one place of effective management at any one time."

23 Patten LJ then set out in full the findings of the Special Commissioners as to the manner in which the Smallwood arrangements had been devised and implemented. He prefaced this discussion with the
B following comment:

"50. It goes almost without saying that, to succeed on the cross-appeal, the taxpayers must establish that the decision of the Special Commissioners on this point contained an error of law of the kind recognised by the House of Lords in *Edwards v Bairstow* [1956] AC 14. Mr Prosser [counsel for the Smallwoods] therefore contends that it was not open to
C the Special Commissioners to find that the POEM of the trustee (PMIL) was anywhere but in Mauritius at the relevant time and, to have reached the conclusion which they did on the evidence, the Special Commissioners must therefore have applied the wrong test."

24 Patten LJ held that the Special Commissioners' findings did not support a conclusion that effective management of the trust took place in the
D UK. He adopted the test set out in *Wood v Holden* [2006] 1 WLR 1393 so that the POEM of the trust turned on whether the critical decisions of the Mauritian trustee company were taken by its board of directors, albeit on the advice and at the request of KPMG, or whether that board had ceded any discretion in the matter to KPMG by agreeing to act in accordance with their instructions: para 61.

25 Patten LJ did not accept, applying that test, that the Special
E Commissioners could properly have concluded that the POEM of the corporate trustee lay in the UK rather than in Mauritius. The trustee's functions had not been "usurped" in the sense described in *Wood v Holden*. The Special Commissioners' conclusions were not ones which were open to them on the evidence or on the findings of fact which they made. He would have dismissed the appeal.

F **26** Patten LJ was however in the minority on the POEM issue. Hughes LJ also prefaced his conclusions by reiterating that the Special Commissioners' finding on the issue of the POEM was one of fact so that the Smallwoods could only succeed on *Edwards v Bairstow* [1956] AC 14 grounds. He agreed that the Special Commissioners' findings did not go so far as to establish that the functions of the corporate trustee had been wholly usurped in the sense described in *Wood v Holden*. If that were the test, then
G there may well have been an *Edwards v Bairstow* error. But he held that the test was the POEM of the trustees as a single and continuous body of persons as distinct from any particular corporate trustee at any particular time. On that basis, he said:

"70. On the primary facts which the Special Commissioners found at
H paras 136–145, which are set out in the judgment of Patten LJ, I do not think that it is possible to say that they were not entitled to find that the POEM of the trust was in the United Kingdom in the fiscal year in question. The scheme was devised in the United Kingdom by Mr Smallwood on the advice of KPMG Bristol. The steps taken in the scheme were carefully orchestrated throughout from the United Kingdom, both by KPMG and by

Quilter [the nominee shareholder]. And it was integral to the scheme that the trust should be exported to Mauritius for a brief temporary period only and then be returned, within the fiscal year, to the United Kingdom, which occurred. Mr Smallwood remained throughout in the UK. There was a scheme of management of this trust which went above and beyond the day to day management exercised by the trustees for the time being, and the control of it was located in the United Kingdom."

27 Ward LJ agreed with Patten LJ on the construction of the provisions but with Hughes LJ on the issue of the POEM. The Smallwoods' cross-appeal was therefore dismissed because their scheme did not succeed in avoiding the charge to tax.

HMRC's decision to give Mr Haworth a follower notice

28 Mr Haworth's chosen arrangements were also aimed at taking advantage of the combination of sections 86 and 77 of the TCGA and the application of the Convention to avoid any charge to capital gains tax on shares disposed of by a trust in which he held an interest. The arrangements were described by the judge at paras 8–31 of his judgment. Like the arrangements in *Smallwood*, the arrangements included the resignation of Jersey trustees in favour of trustees resident in Mauritius. The trust then disposed of shares realising a substantial gain and those Mauritian trustees were then replaced by UK resident trustees within the same fiscal year.

29 Mr Haworth disclosed the transactions on his tax return for the year ended 5 April 2001. His tax return was completed on the assumption that his chosen arrangements were effective to avoid any liability for capital gains tax on the disposal of the shares. HMRC opened an enquiry into that return on 20 January 2003 The enquiry was still going on when the judgment in *Smallwood* was handed down and when the follower notice regime in the FA 2014 came into effect. HMRC then turned their mind to whether *Smallwood* was a relevant ruling for the purposes of Mr Haworth's chosen arrangements as well as the arrangements of many other taxpayers who had used similar schemes.

30 The internal procedure adopted by HMRC to arrive at the decision whether to issue a follower notice to Mr Haworth was described in the witness statement of Julie Elsey. She had been the Senior Responsible Officer at HMRC for the implementation of the follower notice regime. When the follower notice regime came into operation, HMRC set up a panel of officers called the Workflow Governance Group ("WFGG") to take the decisions as to whether to issue a notice in each case. The panel was made up of officers of senior grades representing technical, operational and policy teams within HMRC including HMRC's Solicitors Office. The WFGG would not take a decision unless someone of senior civil service grade was present. It operated by considering submissions initially prepared by the compliance team responsible for the relevant enquiry working together with officers in counter avoidance, the relevant technical specialists and HMRC's Solicitor's Office, as appropriate.

31 The first group of taxpayers who were possible followers from *Smallwood* were presented in a submission considered by the WFGG at a meeting on 27 August 2014 By this time HMRC had identified what became known as "the *Smallwood* pointers". These were the indicators which

A HMRC considered had been highlighted by Hughes LJ in *Smallwood* and which, if present in the case of a later taxpayer, would be likely to defeat an appeal in his case. The pointers were taken from para 70 of Hughes LJ's judgment in *Smallwood* and provided a template for comparing the circumstances of the taxpayer subject to the enquiry with the circumstances of the taxpayer in *Smallwood*. The seven pointers were: (a) the wording of
B the "place of management" test in the double taxation treaty relied on by the taxpayer was the same as the wording in the Convention; (b) the taxpayer was a UK resident; (c) the scheme or relevant arrangements had been devised in the UK; (d) the steps taken in the scheme were carefully orchestrated throughout from the UK; (e) it was integral to the scheme that the trust should be exported to the overseas territory for a brief temporary period only; (f) it was integral to the scheme that the trust would then be returned
C within the fiscal year to the United Kingdom; and (g) the arrangements were implemented in a way which integrated these features.

32 The submission to the WFGG considered on 27 August 2014 described the aim of the tax arrangements and said:

> "The *Smallwood* reasoning applies to those who have used the same methodology to escape CGT on disposals. Under the [Double Taxation
D Convention] article the 'place of effective management' [POEM] of the trust determined if for the period of the disposal(s) the trust was resident in Mauritius (which has no CGT) or in the UK which has. The Court of Appeal upheld the tribunal's purposive approach in deciding that the POEM remained in the UK because the POEM was the inevitable consequence of the tax scheme."

E

33 The submission then summarised the view of the Solicitor's Office that there was "a high factual content" in the *Smallwood* decision which did not fit as neatly into the follower notice regime as some. The advice was "In another case, a Tribunal on balance is likely to find similarly" if the seven pointers were present. The advice was taken to mean that if those factors were present in the chosen arrangements of a given taxpayer, then the
F Solicitors supported the issue of a follower notice to that taxpayer.

34 Ms Elsey's evidence was that having read the submission with respect to the first tranche of *Smallwood* follower notices in August 2014, and having read *Smallwood* herself, she saw no reason to disagree with the analysis that if the seven features derived from para 70 of Hughes LJ's judgment were present, the ruling "would be likely to defeat an appeal in a
G corresponding case".

35 In fact, no follower notices were issued relying on *Smallwood* until May 2015 At a meeting on 8 May 2015, approval was given by the WFGG to issue follower notices in 11 cases, not including Mr Haworth.

36 Two further cases were considered by the WFGG at a meeting on 6 November 2015. At that meeting a detailed submission was put forward giving a legal and technical analysis of the *Smallwood* case ("the November
H Submission"). The November Submission went through the different conditions in section 204, as they applied to the two taxpayers under consideration at that meeting. It stated that the majority in the Court of Appeal had agreed that the conclusion of the POEM in the UK was a finding of fact:

"6.18 Hughes LJ put the POEM as the inevitable consequence of the tax scheme, the decisions for and direction of which was orchestrated from the UK (CoA decision para 70). [Para 70 of *Smallwood* then set out.]

"6.19 *Smallwood* failed as a scheme as the Court of Appeal were content that the Tribunal was entitled on the facts to reach their conclusion that the 'place of effective management' of the trust in the test in the UK/Mauritius DTA was in the UK as a result of the planned operation of the tax scheme.

"6.20 Advice from Solicitor's Office is that in another case a Tribunal is likely to find similarly, if the following facts were present: . . ."

37 The November Submission then set out the seven pointers and stated that the cases before the WFGG satisfied all those conditions.

38 The WFGG approved the issue of the two follower notices. The WFGG also agreed a simplified process for further submissions concerning the issue of follower notices relying on *Smallwood* whereby the later submissions to the WFGG could incorporate the terms of the November Submission rather than repeating its explanation and analysis.

39 A further tranche of 11 *Smallwood* follower notices, including that of Mr Haworth was considered and approved by the WFGG on 13 May 2016 using the simplified process. The submission made to the WFGG at that meeting referred to and incorporated the analysis in the November Submission and confirmed that all the cases recommended for the issue of follower notices satisfied the terms of that submission. The submission was accompanied by a spreadsheet for each taxpayer under consideration, listing the documents on file as regards his tax arrangements and noting which of them demonstrated that a particular pointer was present. The WFGG accepted the submission that Mr Haworth's case included all the seven *Smallwood* pointers. A number of other taxpayers were also considered at that meeting but it was decided not to issue follower notices in their case.

40 A follower notice was issued to Mr Haworth on 24 June 2016. The notice set out the four conditions from section 204 FA 2014 and stated that the trust of which Mr Haworth was settlor used a similar scheme to that used in *Smallwood*. The notice described the decision in *Smallwood*, setting out the seven pointers and then stated: "Corresponding reasoning applies to the circumstances and implementation of the tax arrangements used by you or on your behalf."

41 An accelerated payment notice was also issued to Mr Haworth on 24 June 2016, stating the amount due to be £8,786,288.40. Mr Haworth made representations pursuant to section 207 FA 2014 in September 2016, but the follower notice was upheld by HMRC on review on 12 December 2016. Mr Haworth did not take the corrective action required by the follower notice and did not make the accelerated payment.

42 A closure notice was issued to Mr Haworth on 31 October 2016 bringing the enquiry into his tax return to an end and amending it to include capital gains of £21,965,721 on which there was an additional charge to capital gains tax of £8,786,288.40. Mr Haworth has appealed to the First-tier Tribunal against that notice, asserting that in his case the POEM of the trust was Mauritius. We were told that the hearing took place over ten days and that the decision of the tribunal is awaited.

A **43** HMRC did not in fact impose a penalty on Mr Haworth within the time limit prescribed by the FA 2014. He did not therefore have the opportunity to challenge the follower notice using the procedure set out in section 214.

The issues in the appeal

B **44** It has been common ground between Mr Haworth and HMRC from the start of the proceedings that Conditions A, B and D in section 204 FA 2014 are satisfied here. It is also agreed, as regards Condition C, that the *Smallwood* ruling relates to tax arrangements within the meaning of section 201(3) and that it is a final ruling for the purposes of section 205(3)(c).

45 The issues raised in HMRC's notice of appeal and Mr Haworth's respondent's form can be summarised as follows.

C **46** The first issue is raised by Ground 1 of HMRC's notice of appeal. It concerns the degree of certainty that HMRC must arrive at before they can show that they have formed the opinion required by Condition C, namely that the principles laid down or reasoning given in the *Smallwood* ruling if applied to Mr Haworth's tax arrangements would deny the tax advantage asserted by Mr Haworth. HMRC accept that the submissions put to the D WFGG and the evidence of Julie Elsey show no more than that HMRC concluded that it was "likely" that the application of the *Smallwood* ruling would deny that advantage to Mr Haworth. The issue is whether that opinion satisfies Condition C.

47 The second issue raised by Grounds 2 and 3 of HMRC's notice of appeal concerns whether HMRC misdirected themselves about what was actually decided in *Smallwood* by overstating the conclusions reached by the E Court of Appeal in that case. HMRC say that the judge found that there had been no misdirections. Even if there were, HMRC say they made no difference because their decision as regards Mr Haworth would have been the same if they had properly directed themselves.

48 Allied to Grounds 2 and 3 of HMRC's appeal is the third issue which is a point raised by Mr Haworth in his respondent's form. He argues that the F finding in *Smallwood* about the POEM of the trust was a finding of fact only. As such, it does not form part of the "principles laid down or reasoning given" in the case and so cannot form the basis of the opinion required by Condition C.

49 The fourth issue is raised by Mr Haworth and concerns whether the follower notice failed to give an adequate explanation as required by G section 206(b) and whether that failure invalidated the notice.

Issue 1: Did HMRC form the opinion required by Condition C?

50 Before the judge, Mr Haworth submitted that the threshold set by Condition C for a ruling to be "relevant" was only satisfied if the earlier ruling clearly determined the issue in the taxpayer's case. The regime was intended to apply only in cases where the taxpayer was spinning out his H dispute with HMRC unreasonably because his claim to the tax advantage had no reasonable prospect of success and was hopeless in light of the earlier ruling. The judge rejected this argument at para 90 of his judgment. He held that if Parliament had wanted to set the threshold as high as Mr Haworth claimed, Parliament could have incorporated phrases such as "no reasonable

prospect of success" or "hopeless" in the provisions. The legislation makes no reference to them.

51 The Court of Appeal disagreed with the judge. Newey LJ rejected HMRC's contention that Condition C required no more than that HMRC consider that the principles or reasoning are more likely than not to result in the advantage being denied. He considered, at para 36, that as a matter of language, the word "would" used in section 205(3)(b) meant that HMRC must be of the opinion that, should the point be tested, the principles or reasoning found in the ruling in question will deny the advantage. That demands more certainty than just a perception that there is a 51% chance of the advantage being denied. The more liberal construction proposed by HMRC would, Newey LJ noted, allow follower notices to be given in a surprisingly wide range of cases, whereas they were meant to be available to HMRC only in relatively exceptional circumstances, having regard to the serious consequences that flow from them. In order for Condition C to be satisfied, HMRC must have "a substantial degree of confidence in the outcome" and that had not been shown here: para 37.

52 Gross LJ agreed that the appeal should be allowed for the reasons given by Newey LJ. He added that, given the draconian nature of these powers, it was right that they should be carefully circumscribed, not least because of their impact on access to the courts and the rule of law. He held that the interpretation of sections 204 and 205 of the FA 2014 that he preferred "serves to confine the exercise of these powers to their proper sphere and in accordance with their true statutory purpose": para 66. Sir Timothy Lloyd agreed with both judgments.

Discussion

53 It is important first of all to clear up some confusion about the question being addressed here. The Court of Appeal phrased the question in terms of how firm HMRC's opinion needs to be. That may not be the most helpful way to look at it. HMRC might form the firm opinion that it is not at all clear whether the earlier ruling determines the point against the taxpayer or leaves the point open. That would be no less an opinion formed by HMRC, though of course it would not be an opinion that satisfies Condition C. What matters is the content of the opinion. What HMRC have to be able to show is first that they formed an opinion and secondly that that opinion was that *Smallwood* was a relevant ruling for the purposes of Mr Haworth's tax arrangements.

54 Condition C makes clear that for a follower notice to be given the opinion must be formed by HMRC. This can be contrasted with other provisions in taxing statutes that require only that an officer of HMRC form a specified opinion: see for example sections 9C and section 29 of the Taxes Management Act 1970. HMRC interpreted Condition C, correctly in my view, as requiring them to set up a procedure whereby the decision whether to issue a follower notice was taken by a senior person within the organisation. The Government's consultation response document *Tackling Marketed Tax Avoidance—Summary of Responses* published in March 2014 noted that HMRC was putting in place "strict internal governance and safeguards so that follower notices can only be issued following approval at senior level within the organisation, and will be scrutinised by staff other than those who have been working on the detail of the case". This was

A reflected in HMRC's published guidance *Follower Notices and Accelerated Payments* (July 2015) which states, at para 1.19.1, that decisions over the giving of follower notices will be taken by a senior HMRC panel independent from the team who investigate the cases.

55 One can envisage a case in which a taxpayer challenges a follower notice on the basis that the notice was not based on an opinion formed by HMRC but only by an officer of HMRC. Such a challenge by Mr Haworth B was rejected by the judge, see paras 95 onwards of his judgment where he held that the establishment of WFGG generally and the decision-making process in respect of Mr Haworth in particular did not involve any improper sub-delegation. Permission to appeal to the Court of Appeal against that finding was refused. Whatever opinion is formed by WFGG, whether the opinion is that the judicial ruling is relevant or that it is not relevant or they C are not sure whether it is relevant or not, is an opinion formed by HMRC.

56 The second point is that this is not a rationality challenge in the usual sense of that term. The opinion formed by HMRC was that it was "likely" that *Smallwood* was a relevant ruling covering Mr Haworth's case. I do not understand Mr Haworth's challenge to be that no reasonable body could rationally have formed the opinion that it was so "likely". Rather his challenge is that that opinion is not good enough. There may be other cases D in which HMRC purport to form an opinion that a relevant ruling will definitely deny a taxpayer an advantage and that taxpayer challenges on the basis that no reasonable body could have formed that opinion. That would be a true rationality challenge. The issue here is whether, HMRC having reasonably formed the opinion that it is likely that the application of *Smallwood* would deny Mr Haworth his asserted tax advantage, that is E enough to establish that Condition C is satisfied.

57 In my judgment this turns on what is meant by "would" in section 205(3)(b)—how certain must it be, in HMRC's opinion, that *Smallwood* provides the answer in Mr Haworth's case before it can be said that HMRC's opinion is that *Smallwood would* deny Mr Haworth the advantage he asserts?

58 Mr Stone, appearing before us on behalf of HMRC, argued that the F Court of Appeal was wrong to place what he described as a non-statutory, additional threshold or gloss on the wording of section 204(4) by holding that HMRC must have a high degree of confidence or certainty before it can form the opinion that the relevant ruling would deny the tax advantage. The court must interpret section 205(3) having regard to its purpose and in a way which best gives effect to that purpose: see *UBS AG v Revenue and Customs* G *Comrs* [2016] 1 WLR 1005, para 61. That purpose has been summarised by Lewis J in *R (Broomfield) v Revenue and Customs Comrs* [2019] 1 WLR 1353, para 80 cited by Gross LJ in the present case. I accept that the purpose of the regime is to deter further litigation on points already decided by a court or tribunal and to reduce the administrative and judicial resources needed to deal with such unmeritorious claims. That does not, however, H provide much assistance in distinguishing more precisely between the circumstances which are intended to be caught by the regime and those which are not.

59 In determining where that line falls it is relevant, in my judgment, to take into account the severe consequences for the taxpayer of the giving of a notice. This court's judgment in *R (UNISON) v Lord Chancellor (Equality*

and Human Rights Commission intervening) (Nos 1 and 2) [2020] AC 869 is important here. In that case, the issue before the court was whether the fees prescribed by the Lord Chancellor for bringing proceedings in the employment tribunal and the Employment Appeal Tribunal were unlawful because, among other reasons, they interfered unjustifiably with the right of access to justice. It was acknowledged by the court in *UNISON* that a secondary objective of the introduction of fees was to deter the bringing of unmeritorious claims and to encourage earlier settlement: paras 57 and 58. Lord Reed JSC, giving the leading judgment, referred to the constitutional principles to which the canons of statutory interpretation give effect. Those principles include the constitutional right of access to justice: para 65. Decisions of the courts and tribunals resolve points of genuine uncertainty as to the interpretation of legislation. That is of general importance because it forms the basis of advice given to others.

60 HMRC argue that the provisions of Part 4 of the FA 2014 are different from the fees order challenged in *UNISON*. A taxpayer who receives a follower notice can still assert his right to the tax advantage in the tribunal but is merely discouraged from doing so by the threat of the penalty. Moreover, HMRC point out, the court in the present case is construing primary legislation which is properly focused on hindering only those cases which HMRC considers are unmeritorious from being pursued, whereas the fees in *UNISON* hindered access to justice for both meritorious and hopeless cases alike.

61 Even taking those differences into account, the principle of statutory interpretation referred to in *UNISON* supports, in my view, the Court of Appeal's conclusion. There can be no doubt that the threat of the substantial penalty is intended firmly to discourage a taxpayer from pursuing his appeal. As Lord Reed JSC said at para 80 of *UNISON*, where a statutory power authorises an intrusion upon the right of access to the courts, it must be interpreted as authorising only such a degree of intrusion as is reasonably necessary to fulfil the objective of the provision in question. Applying that principle, the use of the word "would" in the provision requires that HMRC must form the opinion that there is no scope for a reasonable person to disagree that the earlier ruling denies the taxpayer the advantage. Only then can they be said to have formed the opinion that the relevant ruling "would" deny the advantage. An opinion merely that is likely to do so is not sufficient.

62 I do not accept that this puts a gloss on the wording or imposes a non-statutory threshold as HMRC submitted. It gives full weight to the use of the word "would" as opposed, for example, to "might". I also reject HMRC's submission that construing the word "would" narrowly in this way somehow undermines the role of HMRC in forming the necessary opinion. Mr Stone referred us to the decision of the House of Lords in *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153, considered in the Supreme Court in *R (Begum) v Special Immigration Appeals Commission (UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism intervening)* [2021] 2 WLR 556. I fully accept that the opinion required by the provisions is that of HMRC and not that of a reviewing court. I also recognise that HMRC's opinion should be accorded respect and is an evaluative one in the light of all the evidence, though it does not involve the

same degree of prediction as those two earlier cases. That is no answer to the question of the degree of certainty which must be achieved by HMRC before Condition C is satisfied.

63 HMRC also argued that this construction of section 205(3) is inconsistent with the test that is applied by the First-tier Tribunal when determining an appeal under section 214(3)(b). I do not see that there is any anomaly created here. HMRC say correctly that in an appeal against a penalty under that provision, the FTT does not review the reasonableness or rationality of HMRC's opinion but determines for itself whether the earlier case is a relevant ruling or not. The tribunal must also apply the wording of section 205(3)(b) when arriving at their decision as to whether the judicial ruling is "relevant". Faced with such an appeal, the tribunal must, therefore, decide whether the ruling would deny the advantage, applying the same high threshold of certainty as applies to HMRC. The same test applies in both contexts in which the issue of whether the judicial ruling is relevant within the meaning of section 205(3) arises; both for HMRC's role in forming the opinion required by section 204(4) and for the tribunal in determining whether the taxpayer's ground of appeal in section 214(3)(b) succeeds.

64 Whether HMRC can reasonably form the opinion that an earlier ruling is relevant to the taxpayer's asserted advantage will depend on a number of factors. First, it may depend on how fact-sensitive the application of the relevant ruling is; in other words, whether a small difference in the fact pattern of the taxpayer's arrangements or circumstances as compared with the fact pattern described in the earlier ruling would prevent the principles or reasoning applying. A follower notice may be issued at different stages of the investigation into the taxpayer's affairs. According to Condition A in section 204(2), it may be given as soon as a tax enquiry has been opened into the tax return made by P or it may be given during the course of a tax appeal. If the application of the earlier ruling is very fact dependent, then it may be more difficult for HMRC to form the opinion that the relevant ruling would deny the advantage where HMRC is considering Condition C at the earlier stage. If the follower notice is being considered when the tax appeal is already underway it may be clearer whether the fact patterns are sufficiently similar.

65 Secondly, the relevance of the earlier ruling may turn on HMRC's rejection of the taxpayer's evidence as being untruthful. HMRC will have to consider carefully whether it is satisfied that the untruthfulness of those factual assertions is so clear that it can reasonably form the opinion that the earlier ruling is relevant, despite that contrary evidence.

66 Other cases may be less fact-sensitive, for example where the taxpayer has entered into the same mass marketed tax avoidance scheme as the taxpayer in the earlier ruling so that the provisions applicable in his case are identical to those held to be ineffective by the earlier ruling. If it is clear that there is no material difference between the chosen arrangements and the arrangements considered in the earlier ruling, it will be easier in such a case for HMRC to form the opinion that Condition C is satisfied.

67 Thirdly, HMRC will need to consider the legal arguments put forward by the taxpayer. The taxpayer may rely on an argument that was not raised in the earlier ruling. This is what happened in *R (Locke) v Revenue and Customs Comrs* [2020] 1 All ER 459. In that case, the taxpayer Mr Locke relied on a different statutory provision as entitling him

to the tax advantage he asserted as compared to the statutory provision that had been considered and rejected in the earlier case on which HMRC sought to rely as the relevant ruling. The novel argument he made had not been put forward by the other taxpayers who had entered into the same arrangements as Mr Locke. It had not therefore been determined by the earlier ruling so that earlier ruling did not satisfy Condition C. A similar situation might arise where the earlier ruling was based on a concession by a party to those proceedings as to some aspect of the legal framework, but the taxpayer whose asserted tax advantage is being considered has made clear that he does not make that same concession and wishes to argue the point.

68 Fourthly, HMRC should also consider the nature of the earlier ruling. As Mr Stone pointed out, a ruling by the FTT can be a relevant ruling for the purposes of Condition C even though it has no precedential value. However, a ruling arrived at after a hearing where, for example, the taxpayer did not appear or was not legally represented or where the reasoning in the decision is brief or unclear is less likely to be capable of forming the basis for the necessary opinion required in Condition C.

69 In the present case, Mr Stone fairly accepted that the evidence presented by HMRC does not support the conclusion that HMRC's opinion was anything more than that it was likely that the ruling in *Smallwood* if applied would deny Mr Haworth his tax advantage. That was what was stated in the November Submission and in the evidence of Ms Elsey.

70 I would therefore dismiss the appeal on Ground 1.

Issue 2: Did HMRC misdirect themselves in their analysis of Smallwood?

71 The Court of Appeal held that the November Submission contained a further misdirection by overstating the significance of Hughes LJ's judgment in *Smallwood*. The November submission stated that Hughes LJ had held that the UK POEM of the trust was the inevitable consequence of the tax scheme because the decisions of the trust whilst resident in Mauritius were orchestrated from the UK. The court did not agree that Hughes LJ had gone that far and held that this was a material misdirection.

72 HMRC's second ground of appeal asserts that the Court of Appeal were wrong to make such a finding because the judge had found as a fact at para 88 of his judgment that HMRC had properly understood the legislation and the decision in *Smallwood*. That finding was arrived at as a result of a comprehensive review following a three-day hearing that involved a large volume of documentary evidence only a small proportion of which was before the Court of Appeal. There was no basis, HMRC contend, on which the Court of Appeal could properly interfere with that finding.

73 I cannot accept this criticism of the Court of Appeal's judgment. The judge set out his description of the materials on which HMRC formed its opinion in paras 36 onwards. He states that at some point following the handing down of *Smallwood*, HMRC's Solicitor's Office gave advice that in another case the tribunal would reach a similar result having regard to the *Smallwood* pointers. He focused on the November Submission and the emphasis on whether arrangements in the cases under consideration contained all seven pointers. That was also the evidence of Ms Elsey. He then described the subsequent submissions and the fact that HMRC had been unable to provide direct evidence about the completion of the factual

review in Mr Haworth's case: paras 47–48. HMRC were able only to say that a satisfactory review must have been conducted otherwise the notice would not have been issued.

74 There is nothing in that careful account by the judge that suggests that he made a finding of fact that the opinion that HMRC formed in Mr Haworth's case was based on evidence that he had seen other than the submissions he described. The tenor of those submissions is that Hughes LJ found in *Smallwood* [2010] STC 2045 that the presence of the seven pointers inevitably led to the conclusion that the POEM of a trust was the UK. Further, the submissions stated and the WFGG proceeded on the basis that if those seven pointers were present in any subsequent case, that justified the issue of a follower notice.

75 That does overstate the conclusion of the court in *Smallwood*. Hughes LJ did not decide that it was an inevitable consequence of a scheme which shared the *Smallwood* pointers that its POEM would be the UK and not Mauritius. All the members of the Court of Appeal accepted that the test was that set out in the Commentary on article 4(3) of the Model Convention. That Commentary states that "no definitive rule can be given and all relevant facts and circumstances must be examined to determine the place of effective management". Although Hughes LJ summarised the findings of the Special Commissioners in para 70 of his judgment, he was not, in my view, listing those pointers as being necessary and sufficient to establish in any other case that the POEM of the trust is the UK. On the contrary, he referred to the full description of the primary facts found by the Special Commissioners as set out in the judgement of Patten LJ as supporting their finding that in Mr Smallwood's case, the POEM of their trust had been the UK.

76 I also consider the Court of Appeal were right to reject HMRC's contention that section 31(2A) of the Senior Courts Act 1981 applied to prevent the follower notice from being quashed. Section 31(2A) provides that the High Court must refuse relief on an application for judicial review if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred. It is, as Newey LJ said, by no means self-evident that HMRC would have arrived at the same conclusion if the November Submission had not overstated the conclusions arrived at by Hughes LJ. In my view the proper course was to quash the follower notice. Grounds 2 and 3 of HMRC's appeal must therefore be dismissed.

Issue 3: Whether the "reasoning given" in the ruling covers factual findings

77 It is convenient to deal at this point with Mr Haworth's submission that factual findings in a judgment do not form part of the principles laid down or reasoning given in a ruling for the purposes of Condition C. The judge and the Court of Appeal both rejected this contention, see paras 82–88 of the judgment at first instance and paras 31–34 of Newey LJ's judgment.

78 In my judgement they were right to do so. This submission misunderstands the nature of factual findings of this kind and their role in the precedential value of judicial decisions. There are many instances in the taxing statutes, and in other statutes too, where a provision applies to a particular thing and there is an issue about whether the thing in dispute falls within that provision or not. A classic example arose in *Clark v Perks (No 2)*

[2002] ICR 302. In that case the taxpayers were workers on a mobile oil-drilling rig and claimed an exemption for income tax for work performed abroad. This entitlement depended on whether they were employed as "seafarers" and that in turn depended on whether the oil rig was a "ship". Having analysed what the oil rig comprised and how it operated, the General Commissioners concluded that the oil rigs were "ships" so that the workers were "seafarers". On appeal by HMRC, Ferris J accepted that he was bound by the findings of primary fact made by the Commissioners about how the rigs were built and how they operated, but he held that the question whether they were "ships" was a question of law on which he was entitled to form his own view. He held that they were not ships.

79 The Court of Appeal disagreed, holding that the question whether the oil rigs were ships was a question of fact which the judge could only have interfered with on appeal on *Edwards v Bairstow* grounds. Once it had been decided that the word "ship" bore its ordinary meaning rather than some more bespoke meaning, "the application of that meaning to the facts of the particular case is a question of fact, not law." The decision was therefore for the Commissioners and not for the court, whether one was speaking of the findings of primary fact or of the inferences to be drawn from those facts: see para 33 of Carnwath LJ's judgment.

80 The principles laid down in and the reasoning given in *Clark v Perks (No 2)* would mean that Mr Perks' colleagues working on the same oil rig were also seafarers entitled to the same exemption as Mr Perks and, further, that workers on other oil rigs that were not distinguishable (in the legal sense of that word) from the rigs as described in the judgment were also seafarers. Conversely, if it had been held that the oil rig was not a ship and Mr Perks was not a seafarer, his colleagues could not have sought to relitigate the same matter the next week, dismissing the precedential value of *Clark v Perks (No 2)* as merely deciding that the General Commissioners had been entitled to conclude as a matter of fact that the rig was a ship. A later case might arise involving some other kind of seaborne structure or turning on the meaning of the word "ship" in a different statutory provision. No doubt the party seeking to avoid the consequences of *Clark v Perks (No 2)* would argue that the structure was materially different from the rigs in *Clark v Perks (No 2)* or that the word "ship" must be construed differently to give effect to the intention of Parliament in that different context. The later court would then undertake the orthodox process of judicial reasoning to decide how relevant, if at all, the reasoning given in *Clark v Perks (No 2)* was to the case before it.

81 I reject therefore Mr Goodfellow's submission that factual findings of this kind are not part of the reasoning given in the relevant ruling for the purposes of section 205(3)(b). That contention, if correct, would also create an anomalous position where the decision of the FTT might be a relevant ruling if it becomes a final ruling for the purposes of section 205(3)(c) but the reasoning in the decision could not be applied if the decision were upheld on appeal either because there was no *Edwards v Bairstow* challenge or where such a challenge failed. If an appellate judgment upholds the decision of the FTT, the FTT's reasoning to that extent becomes the reasoning given in the appellate judgment.

82 I also cannot accept Mr Goodfellow's submission that it makes any difference whether the appellate court, when rejecting an *Edwards v*

Bairstow challenge, expresses its agreement with the conclusion of the fact-finding tribunal or states only that the fact-finding tribunal was entitled to reach that conclusion on the material before it. An example cited to us by the parties is the recent decision of this court in *Uber BV v Aslam* [2021] ICR 657. The issue there was summarised by Lord Leggatt JSC (with whom the other members of the court agreed) as whether an employment tribunal was entitled to find that Uber drivers worked under "workers' contracts". Lord Leggatt JSC stressed at para 118 that it is firmly established that the question of whether work is performed by an individual as a worker is to be regarded as a question of fact to be determined by the first level tribunal. Absent a misdirection of law, that finding can only be impugned by an appellate court if it is shown that the tribunal could not reasonably have reached the conclusion under appeal. He held, at para 119, that on the basis of the facts found, the employment tribunal was entitled to find that the drivers were workers working for Uber under workers' contracts within the meaning of the statutory definition. He added that that was in his opinion, the only conclusion which the tribunal could reasonably have reached.

83 Mr Goodfellow submitted that that final sentence of Lord Leggatt JSC's conclusion, endorsing the finding of the employment tribunal, would, in the present context make all the difference, effectively converting mere factual findings by the first instance tribunal into part of the reasoning given by the Supreme Court. I disagree. If *Uber BV v Aslam* had involved tax arrangements, the principles laid down or reasoning given in the Supreme Court's ruling would include the reasoning as to why the Uber drivers fell within the definition. That would be the case whether or not the appellate court expressed its own agreement with the factual finding as Lord Leggatt JSC did or stated only that the fact-finding tribunal had been entitled to make its findings, as Hughes LJ stated in *Smallwood*. I therefore consider that there is no merit in this first point made in the respondent's form.

Issue 4: The validity of the follower notice

84 Mr Haworth contends that HMRC did not give the explanation required by section 206 as to why *Smallwood* determined its case. The follower notice should at the very least have identified the key facts on which HMRC relied in forming their opinion in his individual case, in particular in determining the fact-sensitive issue of the POEM.

85 I can deal with this issue briefly since it cannot affect the outcome of the appeal. I agree with Newey LJ's conclusion that the follower notice was deficient. Having described the ruling in *Smallwood* in some detail including setting out the seven pointers, the notice then stated baldly that "Corresponding reasoning applies to the circumstances and implementation of the tax arrangements used by you or on your behalf." I would not want to encourage HMRC to send voluminous notices to taxpayers. But some more explanation as to why the corresponding reasoning applied to his arrangements should have been set out. This is required even though there may have been discussions between HMRC and Mr Haworth's advisers prior to the giving of the notice. The notice need not be lengthy, but it should have contained a description of the features of Mr Haworth's arrangements that in HMRC's opinion meant that *Smallwood* would deny him the tax advantage asserted.

86 Although the notice was defective, I agree with the Court of Appeal that on its true construction, section 206 does not provide that any defect in the notice will render it invalid and that the defects in the present case did not invalidate this notice.

Conclusion

87 I would therefore dismiss HMRC's appeal.

Appeal dismissed.

Ms B L Scully, Barrister

Supreme Court

*Regina (A and others) *v* Secretary of State for the Home Department and another

2021 May 14 Lord Reed PSC, Lord Kitchin, Lady Rose JJSC

APPLICATION by the claimants for permission to appeal from the decision of the Court of Appeal [2020] EWCA Civ 130; [2020] 1 WLR 2062

Permission to appeal was refused.

A (appellant) v Burke and Hare (respondent)

EA-2020-SCO-000067-DT

1700 *Human rights*
1732.1 *Rights and freedoms – respect for family and private life – private life*
4100 *Employment Appeal Tribunal*
4123 *Anonymity order*
4300 *Tribunals*
4323 *Anonymity order*

Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (SI 2013/1237): r 50
European Convention on Human Rights ('ECHR'): arts 6, 8
For anonymity orders see *Harvey* Z [944]–[952]

The facts:
The respondent operated a strip club where the claimant had performed as a stripper. In employment tribunal proceedings between the two, the claimant made a preliminary application for an anonymity order pursuant to r 50 of the Employment Tribunal Rules. Her application was refused and she appealed. In essence, she argued, first, that the tribunal had omitted to consider whether publication of judgment would have been damaging to her honour and reputation: privacy entailed the preservation of personal interests such as honour and reputation, and strippers along with others who worked in the sex industry were stigmatised by society. She contended that, if a judgment were issued bearing her name, which she said was 'distinctive', people would identify her and she would be stigmatised as a result. Secondly, she argued that the tribunal had erred in taking into account irrelevant factors, such as the fact that it was her choice to work as a stripper; the right to privacy under art 8 ECHR remained even though she had chosen to work as a stripper. Thirdly, she contended the tribunal's decision was perverse; in particular, it was perverse to conclude that there was a public interest in publishing a judgment bearing her name, particularly given that a judgment relating to her would be easily tracked down by anyone who used her name as a search term; and that the revelation that she had worked as a stripper would damage her employment prospects and adversely affect her mental health. She indicated that if the EAT was not willing to anonymise any judgments given in her claim she would discontinue proceedings. At sift, she was granted an anonymity order pro tem to protect her identity until the resolution of the appeal.

The EAT (Lord Summers) by a reserved judgment given on 13 October 2021 dismissed the stripper's appeal.

The EAT held:
1732.1, 4123, 4323
(1) The stripper was not entitled to the r 50 anonymity order she sought:

The principle of open justice has three common manifestations. It requires cases to be heard in public, judgment to be given in public, and the names of those who contest cases or who give evidence in them to be given to the public. The terms of art 6(2) ECHR in relation to the right to a fair trial make it clear that derogations from the principle of open justice must be shown to be necessary. It is not sufficient that derogation is desirable. Article 6 indicates that open justice is characteristic of a fair trial. Article 8(2) acknowledges that the right to privacy may have to give way if it is necessary. The Employment Tribunal Rules give statutory expression to the principle of open justice contained in art 6. Rule 50(2) enjoins tribunals to give the principle of open justice 'full weight'. Articles 6 and 8 sit close together in the hierarchy of convention rights. Both are qualified rights. Prima facie both are rights of similar weight. As a rule, the litigant claims the protection of art 6 but the need for open justice is a matter for the tribunal. It is for the tribunal to apply the terms of r 50(2) and do so with an eye on the benefits the principle offers to the legal system as a whole rather than individual cases.

The concept of 'honour and reputation' relied on by the claimant was not one to be found in the case law. By choosing to work as a stripper, the claimant did not forfeit her right to rely on art 8. However, social opprobrium was not regarded as sufficient to justify an anonymity order. Stigmatisation was a form of reputational damage and was not sufficient to outweigh the principle of open justice. Stigmatisation could lead to other risks, such as the risk of verbal abuse and sexual assault, which if a material risk, would give rise to different considerations. However, the evidence of such other harm had been found by the tribunal to be thin. Further, there was no evidence that an internet search on the claimant's name would return any judgment in which she was named that appeared on the employment tribunal or EAT's webpages. Although the claimant's name was said to be distinctive, it was in no way unique, and there was no reason why anyone who encountered a judgment bearing her name would automatically assume that the case was about her. Further, there had not been sufficient evidence before the tribunal to decide whether publication might harm her career prospects, or that her mental health would suffer. The fact that the claimant felt unable to continue with her claim in the absence of an anonymity order was not to prevent her from obtaining access to justice. The law did not exist to provide access to justice whatever the cost. The principle of open justice represented a commitment to transparency that was designed for the greater good. It may not always serve the interests of the individual.

(b) The anonymity order already granted would be continued in relation to the instant judgment and that of the tribunal below:

The public interest in open justice is at its strongest in relation to reporting or publishing the merits of the case. That will usually be at the point when evidence is led, though it may be when submissions are made on legal issues that are in dispute. At that stage the identities will usually be disclosed and may be published. However, the principle of open justice does not have the same weight at the stage of a preliminary application designed to establish whether an order under r 50 should be made. Where the claimant had, in effect, asked whether she would be entitled to anonymity if she pressed on with her case, it did not seem proper to publish a judgment in her name merely because she had asked for anonymity. Accordingly, on the understanding that the claimant intended to drop her claim, the anonymity order granted at sift would be continued in respect of the present judgment and that of the tribunal.

Cases referred to:
AAA v Rakoff [2019] EWHC 2525 (QB), [2019] All ER (D) 01 (Oct)
Ameyaw v PriceWaterhouseCoopers Services Ltd (2019) UKEAT/0244/18, [2019] IRLR 611, [2019] ICR 976
British Broadcasting Corporation v Roden (2015) UKEAT/0385/14, [2015] IRLR 627, [2015] ICR 985
EF v AB (2015) UKEAT/0525/13, [2015] IRLR 619
Fallows v News Group Newspapers Ltd (2016) UKEAT/0075/16, [2016] IRLR 827, [2016] ICR 801

Guardian News and Media Ltd, Re [2010] UKSC 1, [2010] 2 All ER 799, [2010] 2 AC 697, [2010] 4 LRC 476, [2010] 2 WLR 325
Khuja v Times Newspapers Ltd [2017] UKSC 49, [2019] AC 161, [2017] 3 WLR 351
Lion Laboratories Ltd v Evans [1985] QB 526, [1984] 2 All ER 417, [1984] 3 WLR 539 CA
R (*on the application of Guardian News and Media Ltd*) *v City of Westminster Magistrates' Court* [2012] EWCA Civ 420, [2012] 3 All ER 551, [2013] QB 618, [2012] 3 WLR 1343
R v Legal Aid Board ex p Kaim Todner [1998] 3 All ER 541, [1999] QB 966, [1998] 3 WLR 925 CA
S (*a child*) (*identification: restrictions on publication*), *Re* [2004] UKHL 47, [2004] 4 All ER 683, [2005] 1 AC 593, [2005] 1 FLR 591, [2004] 3 WLR 1129
Scott (*orse Morgan*) *v Scott* [1913] AC 417 HL
X v Y (2019) UKEAT/0302/18, [2020] IRLR 762, [2021] ICR 147

Appearances:
For the claimant:
C LORD, instructed by United Voices of the World
The respondent made written representations.

1 **LORD SUMMERS:**
INTRODUCTION
This case comes before me on appeal from the Employment Tribunal (hereafter the 'ET') in Edinburgh. The legal issue raised by the appeal is whether in the circumstances of this case an anonymity order should have been pronounced so as to protect the identity of the Claimant. The Employment Judge (hereafter the 'EJ') refused to pronounce an anonymity order. His judgment refusing the application is dated 26 May 2020. The EJ was asked to reconsider and fresh representations were made to him. On 3 August 2020 he declined to reconsider his decision. No appeal is taken against that decision.

2 The Claimant invited me to allow the appeal and grant an anonymity order. At sift Griffiths J granted an anonymity order *pro tem* so that the Claimant's identity was protected until the resolution of this appeal. The order designated the Claimant as 'A'. The Claimant submits that I should allow her appeal and make the order pronounced by Griffiths J's permanent. The Claimant submitted that if I was against her I should grant an anonymity order but restrict it to the judgments issued in the determination of her application for anonymity.

3 The Claimant was represented by Ms Lord. She was instructed by the Claimant's Trade Union, United Voices of the World. Ms Lord represented the Claimant at the Preliminary Hearing where the application for an anonymity order was disposed of. She appeared in person at the Employment Appeal Tribunal (hereafter the EAT). Ms Lord acted pro bono. I am grateful to her for her assistance. The Respondents did not appear at the EAT. They did however oppose the application. They lodged two Skeleton Arguments setting out their grounds of opposition.

4 **THE LAW**
In deciding the application the EJ had regard to the terms of r 50(1) of the Employment Tribunals Rules of Procedure 2013 (Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Sch 1, SI 2013/1237). It enables an anonymisation order to be pronounced if it is –

> '… necessary in the interests of justice or in order to protect the Convention rights of any person or in the circumstances identified in section 10A of the Employment Tribunals Act'.

5 The Claimant submits that an anonymisation order is necessary to protect her Convention right to privacy under art 8 of the European Convention on Human Rights (hereafter ECHR). Article 8 reads as follows –

> '1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

Reference was also made to art 6 which provides –

> '1. In the determination of his civil rights and obligations … everyone is entitled to a fair and public hearing … Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.'

Article 10 provides –

> '1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority …
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'

6 Although art 10 figures prominently in many of the cases to which I was referred, it does not arise in this case. Neither party relied on the right to freedom of expression in art 10. The press have not intervened to argue that art 10 is engaged. In the absence of press or media interest or any indication from the public that the issues raised by the claim ought to be reported the only aspect of the matter that may involve art 10 is the publication of the ET or EAT judgment on the Government's online register of judgments. As I understand it the ET judgment has not been placed on the online register. Hence art 10 has a potential application to the publication of the EAT judgment. In the absence of a submission that art 10 has any application to the publication of judgments on the online register I have decided I should proceed on the basis that resolution of this appeal depends on the balance to be struck between the Claimant's art 8 right to privacy and the principle of open justice.

7 The Employment Tribunal Rules of Procedure 2013 at r 50(2) provides as follows –

> 'In considering whether to make an order under this rule, the Tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression.'

8 **THE PROCEDURAL BACKGROUND**
The Claimant's application came before the Employment Tribunal at a preliminary hearing. It was held by telephone. No oral evidence was led. The only information before the ET was a witness statement from the Claimant, the information supplied in the claim form and the Respondent's response thereto. An excerpt from the Claimant's GP records was also supplied. A statement by Dr Ahearne of the University of Liverpool, was supplied to the ET at the stage of reconsideration.

9 I should note that by the time the appeal came before the EAT the claim form had been redacted as had the GP records to remove the Claimant's personal details. The Claimant's name, address, date of birth and contact details had been covered over. Ms Lord indicated that this had been done so as to preserve the Claimant's identity. This created a difficulty. It was submitted to me that the Claimant had a distinctive name and that if a judgment was pronounced bearing that name it would be picked up easily if an internet search was performed using the Claimant's name. The redaction of the Claimant's name made that submission difficult to evaluate. With that in mind I asked to be told her name during the hearing. Ms Lord then gave me the Claimant's name. The EAT staff have been in contact with the Claimant's representative since the hearing. They have confirmed that the Claimant is willing to permit the EAT to consider her name in determining the appeal. I should say that in my opinion the redactions were unnecessary. The judge in a case of this nature should see all the evidence. If there was a concern that the press or a member of the public might seek access to the Core Bundle at the ET or EAT this should have been drawn to the attention of the administrative staff and arrangements could have been put in place to protect the Claimant's privacy. No request for access by the press or public has been made.

10 **THE UNDERLYING LEGAL ISSUE**

Leaving aside the question of anonymisation, the legal issue raised by the case is whether the Claimant was a 'worker' when she performed as a stripper at Burke and Hare, the Respondent's establishment. The parties are agreed that she was not an employee of the Respondents. The Claimant submits that as a worker she had a variety of statutory rights and in particular was entitled to holiday pay under reg 13 of the Working Time Regulations 1998, SI 1998/1833. The Claimant seeks payment of £1,846.56 representing arrears of holiday pay.

11 The Respondent's response indicates that they consider that the Claimant was self-employed. In their ET3 they set out a variety of factors that they allege support of this position. They also aver that the Claimant was not a regular performer at Burke and Hare in the years 2017–2019 and was away travelling overseas during much of this three year period. The Respondents submit that they were not responsible for her tax and did not submit tax returns for her. They submit that she should have submitted tax returns. The Respondents have it would appear tried to recover the Claimant's tax returns. To date no tax returns have been lodged.

12 **THE FACTUAL BACKGROUND**

The Claimant came to Edinburgh to study for a qualification in IT. I was not told which of Edinburgh's educational institutions she attended. She was in the city for about three years between 2016 and 2019. In this time the Claimant worked intermittently at Burke and Hare. Burke and Hare is a strip and lap dancing bar located near the centre of Edinburgh and close to the campuses of Edinburgh's universities and colleges. She had worked as a stripper before she came to Edinburgh. She had performed at Stringfellows in London.

13 After completing her course the Claimant returned to London in 2019. I am advised she has taken up employment as a waitress. She no longer works as a stripper. The Claimant does not intend to perform as a stripper again. The Claimant hopes to make a career in IT or finance.

14 Ms Lord submitted on behalf of the Claimant that stripping is a form of sex work and that for the period of time she worked as a stripper she worked in what is sometimes loosely called the sex industry. Although it is notorious that sex work is often accompanied by exploitative behaviour, economic hardship and coercion the Claimant did not allege that she had been coerced or exploited. The Claimant did however make it clear that her work involved the risk of physical assault. The Claimant stated that customers had threatened to follow her home. She advised that when leaving Burke and Hare's premises she wore baggy clothing and took steps to conceal her identity. She stated that when working at Burke and Hare she had on occasions been called a 'slut' and a 'whore'. The Respondents dispute the Claimant's assertion that she was verbally abused or threatened. They submit that Burke and Hare is a safe environment for the women who perform there.

15 The Claimant performed under the stage name 'Asia'. Her name was not disclosed to the audience or to customers. She did not reveal her true name to the Respondents or the staff at Burke and Hare. She called herself 'Nicole'. The Claimant indicates that she did not wish her true name to be known. I am unclear whether this means that her true name was not known to the management of Burke and Hare, as opposed to the other strippers with whom she worked. In order to work at Burke and Hare certain financial arrangements had to be made that involved payments of money. I presume her true name was given to those with whom she liaised when dealing with the financial and administrative aspects of her work.

16 Ms Lord drew my attention to the nature of the Claimant's work. It is described in the witness statement as follows:

> 'The job is to engage in heavy flirtation with customers, including intimate discussion about one's private life (almost entirely fabricated by most dancers). This is with a view to paying for a private dance which involved my stripping entirely naked and showing the customer my naked body. The physical contact was limited to being touched by customers briefly without their consent and in breach of the club rules, and my sitting on client's lap, but the fully nude private dance involved the mimicking of sexual acts such as masturbation and sexual intercourse.'

17 The Claimant refers to 'club rules'. I take it that the Council regulate Burke and Hare by means of a licence and that the rules are designed to secure compliance with licence conditions. The Claimant says clients could touch her 'without their consent'. She does not specify whose consent is in view. But it must refer to a prohibition on touching (see *AAA v Rakoff* [2019] EWHC 2525 (QB), [2019] All ER (D) 01 (Oct), para [3]). It would not appear however that this aspect of the case is relevant to the Claimant's application for anonymity.

18 The Claimant had to pay the Respondents if she wished to perform at Burke and Hare. They did not pay her. Her income came from customers who were willing to pay for a private dance. Payment was made directly to her.

19 The Claimant states that her family and partner were aware that she was working as a stripper at Burke and Hare. The Claimant indicates that her sister was not aware that she was a stripper. The Claimant indicates that her friends did not know she worked as a stripper. I was given very little information about the Claimant's peer group or friendship circle. I presume that they are largely young adults and that the Claimant is also a young adult. Obviously the other strippers and the staff at Burke and Hare knew she worked as a stripper although they did not know her first name. I presume she did not disclose her surname. Likewise

any member of the public who attended Burke and Hare might recognise her if they saw her but they would not recognise her by name.

20 I was supplied with parts of the Claimant's GP records. They begin on 15 August 2019. They are redacted so as to conceal her personal details. The Claimant states in her witness statement that if her name was disclosed in a judgment her mental health would suffer. Although the GP notes refer to an episode of depression and indicate that she suffered from stress and anxiety during her exams, there is nothing to indicate that the Claimant suffers from significant mental health issues and nothing to enable me to understand why the Claimant considers disclosure would have an adverse effect on her mental health.

21 **STATEMENT BY DR GEMMA AHEARNE**
An unsigned and undated 'Statement on the stigma of sex work' was supplied by Dr Gemma Ahearne of the Department of Sociology, Criminology and Social Policy, School of Law and Social Justice, University of Liverpool. Dr Ahearne's statement was given to the EJ for the purposes of reconsideration.

22 The document is not a witness statement. The statement is not an expert report. It is a commentary on the EJ's decision. In particular Dr Ahearne opines on whether women who choose to be strippers should be entitled to privacy. Dr Ahearne offers an opinion on whether disclosure of the Claimant's identity would pose a risk to the Claimant's mental health. But these are not matters within her province. Legal questions are for the tribunal. Medical questions are for suitably qualified medical practitioners. It may be that Ms Lord appreciated that the statement posed certain difficulties since although I was referred to the statement Ms Lord did not rely on it in submissions.

23 **OTHER MATTERS**
I should add that two claims were brought against the Respondents. They were conjoined. The stripper in the other claim did not object to her name being disclosed. She too had a distinctive name. The co-claimant settled her claim with the Respondents.

24 **THE ET JUDGMENT**
The ET's decision begins at para 24 of the judgment. The EJ took the view that the Claimant should have foreseen that working as a stripper might harm her career prospects. That being so any adverse consequences resulting from the publication of a judgment bearing her name should be regarded as the consequences of her choice of work. He noted that other work options that would not have had these consequences were open to her. More generally he took the view that she should have known that if she raised proceedings in a public tribunal a public judgment would be issued in her name. Although the Claimant had indicated that she did not know that tribunal judgments were published on the internet the EJ took the view that this sort of thing should have been drawn to her attention by her representatives. She could not be relieved of the consequences of her decision to litigate in a public forum if she had not been informed of the consequences of doing so by those that advised her.

25 The claimant also submitted that if a judgment was to be published disclosing that she had worked as a stripper she would be at risk of sexual violence and stigmatisation. The EJ noted that there was no evidence that the Claimant had ever suffered sexual violence although he accepted that there was evidence that customers had threatened to follow her home from Burke and Hare. He noted that the Respondents disputed the Claimant's evidence in this connection. He observed that she had willingly undertaken the risk of abuse and violence when she worked as a stripper. It would seem by implication that the EJ thought that she should continue to be held to have assumed the risk that this might occur. He took the view that since she had left the sex industry and no longer worked as a stripper the risks she faced had receded. This proceeds on the assumption that she was no longer in an environment where there was a risk of violence stemming from her sex work.

26 The EJ examined the evidence of risk to the Claimant's health. He noted that the Claimant was of the view that her health would deteriorate if it became widely known that she had worked as a stripper when a student. The EJ was unable to uphold this submission in the absence of supportive medical opinion. He noted that the GP records submitted by the Claimant did not appear to support the Claimant's fear. He accepted she had suffered from mental health issues but concluded that they did not suggest that disclosure of a judgment on the Government website would cause her mental health difficulties.

27 **THE CLAIMANT'S SUBMISSIONS**
In relation to her first Ground of Appeal, Ms Lord submitted that the ET had omitted to consider whether publication of judgment in the case would be damaging to the Claimant's honour and reputation. She argued that privacy entailed the preservation of personal interests such as honour and reputation. She submitted that strippers along with others who work in the sex industry are stigmatised by society and that if a judgment was issued bearing her name people would identify her and she would be stigmatised as a result.

28 Secondly she submitted that the ET had erred in law by taking into account irrelevant factors. It should not have taken account of the fact that it was the Claimant's choice to work as a stripper. The right to privacy remained even though she had chosen to work as a stripper. She had endeavoured to keep her name out of the limelight throughout her time at Burke and Hare. She also submitted that the ET was wrong to take account of the fact that others who worked at Burke and Hare would be named in any future judgment. It was irrelevant to the Claimant's rights that others who worked at Burke and Hare were willing to be named.

29 The last ground of appeal was that the ET's decision was perverse. She submitted that there it was perverse to conclude that there was a public interest in publishing a judgment bearing her name. This was especially so since a judgment relating to her would be easily tracked down by anyone who used her name as a search term. She had a distinctive name and a search engine would be bound to generate the judgment among its search results. She submitted that she wished to leave her life as a stripper behind her. If an internet search would reveal that she had worked as a stripper her employment prospects would suffer. She submitted that publication would be damaging to her mental health. She submitted that the ET had failed to take account of the fact that she had not had an opportunity to give evidence in support of this concern.

30 The Claimant indicated that if the EAT was not willing to anonymise any judgments given in her claim she would drop proceedings. The Claimant submitted that a decision that elevated the principle of open justice over her right to privacy would in that circumstance impede access to justice.

31 **THE LEGAL PRINCIPLES**
The courts over the years have made some powerful statements about the principle of open justice.

32 In *Scott* (*orse Morgan*) *v Scott* [1913] AC 417 at 463 Lord Atkinson stated –

> 'The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses, and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trial is to found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect.'

33 In *R* (*on the application of Guardian News and Media Ltd*) *v City of Westminster Magistrates' Court* [2012] EWCA Civ 420, [2012] 3 All ER 551, [2013] QB 618, Toulson LJ stated (para [1]) –

> 'Open justice. The words express a principle at the heart of our system of justice and vital to the rule of law. The rule of law is a fine concept but fine words butter no parsnips. How is the rule of law itself to be policed? … In a democracy, where power depends on the consent of the people governed, the answer must lie in the transparency of the legal process. Open justice lets in the light and allows the public to scrutinise the workings of the law, for better or for worse. Jeremy Bentham said … "Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial".'

34 In an employment law context *British Broadcasting Corporation v Roden* (2015) UKEAT/0385/14, [2015] IRLR 627, [2015] ICR 985 (para 22) Simler J has recently stressed that the principle of open justice is of paramount importance and derogations from it are only be justified when necessary in the interests of justice. *R v Legal Aid Board ex p Kaim Todner* [1998] 3 All ER 541 (at 550j–551b), [1999] QB 966 (at p 978E–G) is authority for the proposition that parties and in particular claimants should expect their names to be made public, while witnesses have a greater claim to anonymity.

35 **1732.1, 4123, 4323**
The principle of open justice has three common manifestations. It requires cases to be heard in public, judgment to be given in public and the names of those who contest cases or who give evidence in them given to the public. The terms of art 6(2) make it clear that derogations from the principle of open justice must be shown to be necessary. It is not sufficient that derogation is desirable. Article 6 indicates that open justice is characteristic of a fair trial. Article 8(2) acknowledges that the right to privacy may have to give way if it is necessary.

36 **1732.1, 4123, 4323**
Although the principle of open justice may be found in art 6 the 2013 Rules give it statutory expression. Rule 50(2) enjoins tribunals to give the principle of open justice 'full weight'. The exact weight to be attributed to the principle is difficult to judge. But the cases quoted above suggest that it has considerable weight. Articles 6 and 8 sit close together in the hierarchy of ECHR rights. Both are qualified rights. Prima facie both are rights of similar weight. As a rule the litigant claims the protection of art 6 but in this case the need for open justice is a matter for the tribunal. Although the respondents have lodged Skeleton Arguments and sought to support the principle of open justice, they did not appear at the appeal and it is clear their interest in naming the Claimant is because she has stated that she will abandon her claim if she is not granted anonymity. In these circumstances it is for the tribunal to apply the terms of r 50(2) and do so with an eye on the benefits the principle offers to the legal system as a whole rather than individual cases.

37 It is a question of judgment in each case whether the 'full weight' of open justice tips the scales against the weight of right to privacy. Neither enjoys a priori superiority over the other. In *Re S* (*a child*) (*identification: restrictions on publication*) [2004] UKHL 47, [2004] 4 All ER 683, [2005] 1 AC 593, para [17] Lord Steyn dealt with the situation where rights are in conflict. He stated –

> '… neither article has as such precedence over the other … where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary … the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each:'

38 **THE CASE LAW**
In her oral submissions Ms Lord referred me to a number of cases. I will deal with them first of all. I was referred to paras [29] and [30] in *Khuja v Times Newspapers Ltd* [2017] UKSC 49, [2019] AC 161, [2017] 3 WLR 351. In para [30] Lord Sumption stated –

> 'None of this means that if there is a sufficient public interest in reporting the proceedings there must necessarily be a sufficient public interest in identifying the individual involved. The identity of those involved may be wholly marginal to the public interest engaged.'

Ms Lord submitted that this dictum supported the application for anonymity. She submitted that the Claimant's identity was 'wholly marginal' to the question of whether strippers should be regarded as workers under employment legislation. I consider however that the 'public interest' Lord Sumption had in mind is that covered by art 10. Article 10 does not arise in this case. I also doubt if Lord Sumption would have regarded the Claimant's name as 'wholly marginal' for the purpose of an art 10 argument. She is the person who has brought the claim and around whom the claim revolves. That said I do not see any reason why anonymity could not be granted where a claimant's identity was 'wholly marginal' in a case based on art 8 and r 50(2) of the 2013 Rules. Where the only form of publication in contemplation is on the Government database or an appearance in the law reports, it might be argued that disclosing the Claimant's name is 'wholly marginal'. Although judges may at times choke on a diet of 'alphabet soup' (*Re Guardian News and Media Ltd* [2010] UKSC 1, [2010] 2 All ER 799 (at p 803), [2010] 2 AC 697 (at p 708) per Lord Rodger), the legal profession has in general no interest in knowing the names of the parties.

39 The principle of open justice however rests on broader concerns (see above). In *R v Legal Aid Board ex p Kaim Todner* [1998] 3 All ER 541 (at p 499h–j), [1999] QB 966 (at p 977 D–E) Lord Woolf MR dealt with an application from a firm of solicitors to have their name anonymised. Their licence to provide legal aid services had been suspended because of allegations of irregularity. The firm began judicial review proceedings. The firm applied for anonymity in light of the fact that the facts of the case were likely to prove very damaging to their business. The Court of Appeal refused the application. Lord Woolf sets out a variety of considerations that justify the principle of open justice. He noted that –

> 'It can result in evidence becoming available which would not become available if the proceedings were conducted behind closed doors or with one or more of the parties' or witnesses' identity concealed.'

Public awareness of who is litigating can therefore contribute to the evidence that is available to the court. In the libel action between the Sun and Gillian Taylforth in 1994 important evidence was supplied by the public during the course of the trial. Were it not for the fact that the trial was being reported the evidence would not have come to hand. No doubt this was an exceptional case but it is a prominent example of the point made by Lord Woolf in *Kaim Todner*. Open

justice also encourages candour on the part of those who give evidence. If a witness is tempted to mislead the court the knowledge that what he or she says may be reported to those who know the true position is capable of deterring false evidence.

40 I was referred to *X v Y* (2019) UKEAT/0302/18, [2020] IRLR 762, [2021] ICR 147. It demonstrates that art 8 may in appropriate circumstances trump the principle of open justice. In *X v Y* the claimant brought a claim for arrears of wages. At the time the claimant was undergoing gender reassignment and had sensitive mental health issues arising from his transition. When he discovered that the judgment disposing of his claim rehearsed evidence about the gender reassignment, he applied for an anonymity order. The EAT granted the order. Cavanagh J concluded that there was no need to name the claimant given the sensitivity surrounding his gender reassignment and his mental health issues. Cavanagh J emphasised that he was not to be taken as saying that every case involving gender reassignment must be anonymised (para 43). This case shows that art 8 rights to privacy may outweigh the principle of open justice. It also emphasises that each case depends on its facts.

41 I was referred to *EF v AB* (2015) UKEAT/0525/13, [2015] IRLR 619. In this case the claimant had a managerial role in a company. He was the subject of various allegations. In order to protect his position he disclosed various texts and photographs of the CEO and his wife engaged in sexual activity. An order restraining publication was put in place by the High Court. At a tribunal held to consider the claimant's challenge to his dismissal, the tribunal concluded that the claimant's allegations about the CEO were meritless and his disclosures were motivated by a desire for revenge. A question arose as to whether the Restricted Reporting Ord (RRO) pronounced by the tribunal should be continued after proceedings had ended. The tribunal declined to continue the RRO in respect of the claimant, the CEO and the CEO's wife. The CEO and his wife appealed. They relied on art 8. The EAT allowed the appeal and granted the order. Ms Lord directed me to paras 50 and 68 which state as follows –

> 'The first element of public interest identified by the ET was "general human interest in sex and money involving relatively rich people". This was more or less prurient. This clearly falls within the well-known dictum in *Lion Laboratories Ltd v Evans* [1985] QB 526 that there is a world of a difference between what is in the public interest and what is of interest to the public.'

The ET considered that two elements of the public interest were engaged. The first was described by them at para 31 as 'the general human interest in sex and money involving relatively rich people'. The EAT allowed the appeal and restored the RRO. The EAT referred to Ward LJ in *K* at para 23, 'publication may satisfy public prurience but that is not a sufficient justification for interfering with the private rights of those involved.' Ms Lord submitted that to identify the Claimant in this case would similarly involve the gratification of public prurience and that the Claimant's sexual conduct was entitled to a high level of protection. While I can accept these submissions in general terms, *EF v AB* is not analogous to the present case. It involved a variety of allegations of sexual misconduct. This is not a strong feature of the present case. Stripping is a lawful activity albeit strip clubs are subject to licensing provisions and are regulated by local authorities. The case does however illustrate an important general point which is that sexual activity conducted in private between consenting adults should be regarded as attracting a high degree of privacy (*EF v AB* at [2015] IRLR 619, p 624, para 59). I accept that if the Claimant sought to keep her activity as a stripper private, she would be entitled to rely on art 8.

42 I was referred to *AAA v Rakoff* [2019] EWHC 2525 (QB), [2019] All ER (D) 01 (Oct). In this case a group of strippers who performed at a lap dancing or strip club known as Spearmint Rhino brought a case alleging that the Respondents had breached their art 8 rights by filming without their permission inside Spearmint Rhino premises. Spearmint Rhino joined their application. The Respondents represented a campaigning body who sought to expose and highlight damaging aspects of sexual entertainment venues. In particular they sought to expose breaches of licence conditions so that they could challenge applications for renewal. The Claimants sought to restrain circulation of footage obtained of performers at a Spearmint Rhino venue. The case report indicates concerns similar to those expressed by the Claimant in this case (see *AAA*, *para* 40). In the event the claimants in that case did not seek anonymity order preventing their names being published in the proceedings (para 41). Nicklin J concluded that it was inappropriate to anonymise their names on the claim forms if they had no objection to being identified in the proceedings. He also concluded that if they sought anonymity for the purpose of preventing footage being published that he could not determine that matter until the Respondents had lodged their defence. On that basis he also considered the application premature. Nothing in *AAA* assists in the determination of the present application.

43 In *Ameyaw v PriceWaterhouseCoopers Services Ltd* (2019) UKEAT/0244/18, [2019] IRLR 611, [2019] ICR 976 Eady QC as she then was, considered whether an anonymity order should be made where it was said that publication of a judgment online had caused breach of art 8 rights to privacy. The EAT refused to pronounce an order. The facts of that case are very different from the present case. It arose long after the judgment had been published on the register. The EAT was largely occupied with the question of whether it had power to take a judgment off the Government website. In this case the application is taken at an early stage and is focussed on the need for an anonymity order.

44 **DISCUSSION**

The Claimant's Grounds of Appeal are in three parts. On the face of it there are three grounds of appeal. In reality more than three grounds are stated. I shall deal with them in the order they arise.

45 **GROUND 1**

The first ground of appeal is that the EJ erred in law because he did not 'acknowledge that the protection of an individual's honour and reputation is well-recognised as an aspect of the rights protected by art 8'. The only paragraph in the first Ground of Appeal that takes up that argument is para 6 of the Notice of Appeal. The other paragraphs deal with other issues.

46 **1732.1, 4123, 4323**

I am a little wary of criticising the ET for failing to refer to 'honour and reputation'. I was not referred to any cases that discuss this concept. I am reluctant to assume that the EJ was favoured with a more extensive citation of authority. His decision was taken at a preliminary hearing conducted by telephone. I was advised that he did not have the full papers. It is plain that he did not have the benefit of the extensive argument that was deployed at the EAT. His judgment sets out r 50 at length and refers to the Claimant's 'convention rights' and *British Broadcasting Corporation v Roden* (2015) UKEAT/0385/14, [2015] IRLR 627, [2015] ICR 985, a case that focusses on the right to privacy. It would have been preferable if he had referred to art 8. That after all was the basis of the

application. It seems to me however that this is not a fatal defect. He addressed the argument that the Claimant was stigmatised. It would appear to me that in doing so the EJ applied himself to the question of 'honour and reputation' and the issue that lies at the heart of this ground of appeal. Stigmatisation involves loss or damage to 'honour and reputation'. The EJ referred to the risk of stigmatisation on a number of occasions (paras 7, 9, 24 and 28). The question the EJ addressed was whether the behaviours that flow from stigmatisation justified the use of an anonymity order. He noted the Claimant's submission that strippers are not taken seriously (para 7) and that she feared that she would not be taken seriously if it became known she had once been a stripper. He acknowledged that strippers are exposed to various forms of injurious behaviour. I do not consider therefore the EJ's failure to refer to art 8 or the Claimant's 'honour and dignity' is an error of law that undermines his disposal.

47 Ground of Appeal 1 (para 5) raises a separate issue. The Claimant submits that the ET was wrong to take account of the fact that she had chosen to be a stripper. This issue is also raised in Ground 2 where the fact that the Claimant chose to work as a stripper is said to be an irrelevant consideration.

48 The EJ dealt with this issue in paras 24–27. He considered that if a potential employer found out that she had worked as a stripper and was dissuaded from employing her on that account, any harm she suffered on the labour market should be attributed to her decision to work as a stripper and not the ET's decision to name the Claimant in its judgment.

49 **1732.1, 4123, 4323**
The EJ's conclusions however do not take account of the Claimant's evidence in her witness statement. Although the Claimant had chosen to work as a stripper her witness statement indicates that she tried to conceal her name when she worked at Burke and Hare. She took various steps to preserve her identity (see above). The EJ does not interact with this evidence. I can see that a stripper who had made no attempt to conceal her name but who advertised her services by name might not be able to rely on art 8. In that situation her work as a stripper would already be in the public arena. But the Claimant had sought to protect her identity. She had not impliedly waived her right to keep the fact that she worked as a stripper a private matter. Although it might be thought difficult for someone who performs in public as a stripper to assert that she has a right to keep her work private, I accept that the Claimant's evidence to the tribunal in this case demonstrates that she took steps to protect her identity. I also consider that there is a difference between the risk that someone would recognise the Claimant for example on the street as the stripper who appeared at Burke and Hare and the recognition that might follow from the publication of a judgment on the web. I accept therefore that by choosing to work as a stripper she did not forfeit her right to rely on art 8.

50 At para 24 the EJ states that the Claimant 'may be stigmatised and suffer potential risks to her own safety or person'. It held however that this was –

> '… a serious issue which goes well beyond the scope of this Tribunal' (para 28 line 10).

51 I am not clear what the EJ meant by the 'scope' of the tribunal. I suspect he thought that the breach of privacy was insufficient to justify protection under r 50(2) and thus lay beyond the 'scope' of the tribunal. I was not invited to remit back to seek clarification of the position and given that the materials the EJ examined are before me, I consider I should examine the EJ's conclusion.

52 **1732.1, 4123, 4323**
INJURY TO HONOUR AND REPUTATION
I consider that stigmatisation without more would be beyond the 'scope' of the tribunal. In *R v Legal Aid Board ex p Kaim Todner* (above) the Court of Appeal held that 'embarrassment and reputational damage' are ordinary concomitants of litigation ([1998] 3 All ER 541 (at 550j), [1999] QB 966 (at p 978F)). Although *Kaim Todner* involved the risk of harmful publicity to the commercial interests of a firm of solicitors, the Court of Appeal's judgment sets out the broad circumstances in which a derogation from open justice would be permissible. If derogation is not appropriate where publicity would be damaging to a person's reputation it is difficult to see why an anonymity order would be appropriate in the present case. In *Roden* Simler J refused to grant the order even although the case contained unproven allegations of sexual misconduct of an egregious sort; see Simler J's reference at para 50 to in *Re S*. I consider therefore that the case law shows that social opprobrium is not regarded as sufficient to justify an anonymity order. It would appear to me that stigmatisation is a form of reputational damage and is not sufficient to outweigh the principle of open justice.

53 **1732.1, 4123, 4323**
VERBAL ABUSE AND THE RISK OF ASSAULT
But stigmatisation may of course lead to other harms. The Claimant submitted that stigmatisation was the cause of a continuing risk of verbal abuse and sexual assault of the sort she encountered while she worked at Burke and Hare. I would accept that if such harms were a material risk, different considerations would arise.

54 **1732.1, 4123, 4323**
EVIDENCE OF INJURY
The EJ expressed a broad conclusion that the evidence was 'extremely thin' (para 28). The Notice of Appeal does not attack the EJ's assessment of the evidence. There is no complaint that he failed to reach proper conclusions based on the factual material presented to him. I acknowledge that this is an appeal against a preliminary application and that no findings in fact have been made but I would have expected the Claimant to challenge the EJ's factual conclusions if she thought they were wrong. In the absence of an appeal to the EJ's conclusion that there was insufficient evidence that the Claimant had suffered any harm through the alleged breach of art 8 the appeal must fail.

55 If I am wrong about that I would have held that the EJ's characterisation of the evidence as 'thin' was justified. In *Fallows v News Group Newspapers Ltd* (2016) UKEAT/0075/16, [2016] IRLR 827, [2016] ICR 801 Simler J held that there must be 'clear and cogent evidence' of harm. In *Roden* Simler J held that the 'default position' (para 50) was that open justice should prevail. Where the evidence is deficient it would appear to me that the 'default position' should prevail.

56 **1732.1, 4123, 4323**
Although the EJ does not explain his conclusion I would have upheld his rejection of the Claimant's evidence for the following reasons. In the internet age a massive amount of information is posted on the web every day. Hundreds of judgments are issued every year on the ET and EAT register of judgments. A tiny fraction generate publicity. In the absence of press interest it is difficult to see how this judgment or any judgment on the merits would come to the attention of those who know the Claimant. The users of the Government website are I suspect largely those involved in the employment law or who work in recruitment. No evidence was offered to indicate that searching the Claimant's name would produce a 'hit'. Given the variables that control the operations of internet search engines, I am unwilling to assume that a search

against the Claimant's name would necessarily take a user to a judgment on the ET or EAT database. The capabilities and parameters of search engines are not matters on which I am well informed and such experience as I have suggests that such a search would not necessarily reveal a judgment bearing the Claimant's name.

57 **1732.1, 4123, 4323**
I was told that she would be easily identified on the internet because of her distinctive name. But I have no reason however to think her name is unique. I would not expect anyone who encountered a judgment bearing her name to automatically assume that the case was about the Claimant. In order to make a definite identification there would have to be more than a 'name match'. I am not persuaded that the Claimant is in a position to say that she would be recognised or that her work as a stripper would become known if a judgment bearing her name was published.

58 **1732.1, 4123, 4323**
If someone who knew the Claimant and who was unaware that she had worked as a stripper found the judgment in this case I accept that there is a risk that she might suffer harm to her honour and reputation. But I am not persuaded that her activities would affect everyone in the same way. I have little evidence about the Claimant's age. Precise information was withheld from the EAT. If she is young and has a friendship circle that is also young, it is possible that the knowledge that she had been a stripper would have no or little impact on her dignity and reputation. My impression is that social attitudes are heavily dependent on age and that the young are less likely to be influenced by such considerations. Likewise there are those who, quite apart from age considerations, might (quite sensibly) take the view that they should not allow the past to affect their treatment of her in the present. It is now over two years since she left Edinburgh and performed as a stripper. It would appear to me that the risk of harm is limited by these considerations.

59 **1732.1, 4123, 4323**
If as I have held social opprobrium is not sufficient to overturn the principle of open justice, the chances of her past emerging make no difference to her application. The risk of verbal abuse or violence is a different matter. But in this connection however the evidence before the EJ was 'extremely thin'. It would appear that she was exposed to these sorts of behaviours when she worked as a stripper. No explanation was given as to how these risks would arise now she has left the sex industry and is working as a waitress. It would not appear to me that there is much chance of her past becoming known to those who know her or how those who discovered she had been a stripper might cause her harm of this nature.

60 **HANDICAP ON THE LABOUR MARKET**
The Claimant submitted that she was at risk of handicap on the labour market if a judgment was published. If, as I have held, she did not forfeit her right to privacy by choosing to work as a stripper might this risk be sufficient to overturn the principle of open justice? The EJ does not address this issue at all. Given his conclusions, he did not assess the evidence for handicap on the labour market.

61 **1732.1, 4123, 4323**
I am advised that employers or recruitment agencies use the Government online register when scrutinising job applications. But I do not know how widespread the practise is or whether it would be likely to affect the Claimant. Thus although I accept that the Claimant has a right to assert privacy, I do not consider that the EJ had sufficient evidence to decide whether publication might harm her career prospects. If there was such evidence I accept that it might be possible to argue that the risk of harm outweighed the principle of open justice. I cannot predict the outcome of such an application.

62 **MENTAL HEALTH**
No challenge is taken to the EJ's findings in relation to the risk to the Claimant's mental health. For that reason the Claimant's appeal in this connection must fail. The only attack on the EJ's approach is that the EJ rejected her evidence without hearing her oral evidence. But the Claimant could if she wished have given oral evidence at the Preliminary Hearing. If she chose not to that was a matter for her. Even if she had given evidence the EJ was not bound to accept her assertions. She had no medical qualifications. No evidence from a suitably qualified person was provided. No attempt was made to explore the nature of the condition to which she might succumb or the potential causes. It was not clear whether she was suggesting that her mental health would breakdown if she was identified as a stripper in the judgment or whether the breakdown would occur if she was identified as a former stripper by her friends or whether other circumstances were anticipated as likely causes. The only source of medical evidence were the GP notes. They do not address the question of whether publication of her name would affect the Claimant. There are too many variables and a lack of solid evidence.

63 **GROUND 2**
In Ground 2 the Claimant returns to an issue raised in Ground 1. She submits that the EJ ought not to have taken into account the Claimant's choice of work. As I have indicated I agree that her decision to work as a stripper does not remove art 8 rights of privacy. Although much of what she did was in public and although no doubt in a busy city centre venue she could easily have been recognised by those that knew her, she did take steps to conceal her identity. I am not confident that the use of a stage name was necessarily designed to conceal her identity. Even if it had other purposes I accept however that one side effect of a stage name is anonymity. She did not use her first name in her interactions with the staff at Burke and Hare. Whether she gave her full name to the management for payment purposes or legal purposes is not stated. She does not say that she concealed her surname from the staff and management of Burke and Hare. Her surname is the distinctive part of her name so the name 'Nicole' would not have concealed her identity if her surname was known. When coming and going from the premises she dressed in a non-descript way. She stated that this was to avoid recognition. In these circumstances it seems to me that in choosing to work as a stripper she made attempts to protect her name and identity. Given the nature of her work, the location of the premises and the type of work she did, she must have recognised that her strategy might not always succeed. That however does not in my opinion mean she has no right to rely on art 8 for the reasons I give above.

64 I accept that other members of staff might lose their anonymity by being named in the proceedings. But if they are concerned about that possibility they too may apply for anonymity. The Claimant has tried to protect her private life. I do not see why she should lose her right to privacy because the Respondents may wish to lead evidence from staff who do not wish to be named. As this application demonstrates not everyone is concerned about privacy and the fact that one person wishes to remain private does not mean the next person will feel the same way. In addition the right to privacy is in part determined by the nature of the disclosure. Whether a member of staff may also have a right to privacy will depend on the nature of their

evidence. I do not accept therefore that the Claimant's right to privacy is circumscribed by the possibility that others may be named in the judgment.

65 **1732.1, 4123, 4323**
The Claimant submits that if an anonymity order is not pronounced she will abandon her claim. She submits that if the EAT forces her into this position it will have prevented her from obtaining access to justice. As I have sought to explain however the law does not exist to provide access to justice whatever the cost. The principle of open justice represents a commitment to transparency that is designed for the greater good. It may not always serve the interests of the individual.

66 **1732.1, 4123, 4323**
GROUND 3
The last ground of appeal is that it was perverse to conclude that the principle of open justice outweighed the Claimant's art 8 right to privacy. The basis for this attack is the proposition that there is no public interest in exposing the Claimant as someone who once worked a stripper. I have sought to explain however that the EJ was bound to approach matters the other way around. He did not have to identify a reason why people should know that the Claimant was a stripper. The reverse was true. He needed to identify a reason why the Claimant should not be identified as a stripper. The law assumes that all the details of a case should be made public unless some injury can be identified to the Claimant's Convention rights. In this case that injury must be more than embarrassment or reputational loss. If there was not a strong countervailing reason for granting anonymity the EJ was bound to assume that it was in the public interest to publish the Claimant's name. In the absence of sufficient evidence the EJ was entitled to conclude that the Claimant was not at a continuing risk of verbal insult or injury, handicap on the labour market or injury to her mental health. There is no perversity in his decision.

67 **1732.1, 4123, 4323**
DECISION
In these circumstances I uphold the decision of the ET. I do not consider that the Claimant is entitled to an anonymity order as sought.

68 **POSTSCRIPT**
The Claimant indicated that if the price of obtaining payment of her alleged right to arrears of holiday pay was the publication of her name in the merits judgment, she would prefer to drop her claim. In this situation I was asked not to publish her name on this judgment. Ms Lord pointed out that if her name was published on the judgment the Claimant would suffer a loss of privacy merely because she had sought to obtain anonymity as opposed to seeking a remedy for her alleged right to holiday pay. I was advised that the hearing before the EJ took place in private. Ms Lord submitted that it would be unfortunate if the Claimant was forced into the open merely because she wished to challenge the EJ's decision.

69 **1732.1, 4123, 4323**
The public interest in open justice is at its strongest when it restricts or interferes with reporting or publishing the merits of the case. That will usually be at the point when evidence is led, though it may be when submissions are made on legal issues that are in dispute. At that stage the identities will usually be disclosed and may be published. I am not persuaded that the principle of open justice has the same weight at the stage of a preliminary application designed to establish whether an order under r 50 should be made. In effect the Claimant has asked whether she would be entitled to anonymity if she pressed on with her case. It does not seem proper to publish a judgment in the Claimant's name merely because she has asked for anonymity. As I have indicated I am satisfied that art 8 is engaged. In that situation I consider I should grant an order in relation to the present application.

70 In her Grounds of Appeal (para 21) Ms Lord addressed this situation. In the Notice of Appeal she submits that I should grant an RRO. I assume however that this is an error and that the Claimant seeks an anonymity order in respect of her appeal against the EJ's decision at the Preliminary Hearing as opposed to an anonymity covering the ongoing proceedings.

71 **1732.1, 4123, 4323**
For the reasons given, and on the understanding that the Claimant intends to drop her claim against the Respondents, I will continue the anonymity order pronounced by Griffiths J in respect of this judgment and that of the EJ.

Lu (appellant) v Solicitors Regulation Authority (respondent)

[2022] EWHC 1729 (Admin)

1700 *Human rights*
1732.1 *Rights and freedoms – respect for family and private life – private life*
4100 *Employment Appeal Tribunal*
4123 *Anonymity order*
4300 *Tribunals*
4321 *Rules of procedure – private hearing/restricted reporting order*
4323 *Anonymity order*

Solicitors (Disciplinary Proceedings) Rules 2019 (SI 2019/1185): r 35
European Convention on Human Rights ('ECHR'): arts 6, 8, 10
For anonymity orders see *Harvey* PI [944] and *Harvey* R [2807]

The facts:
Ms Lu became an associate solicitor at a law firm ('Y LLP'), where she came into close physical proximity to a senior colleague ('Person B'). In August 2017, the firm terminated her employment, stating that the reasons were performance related. She maintained that the real reason was that she had resisted harassment by a partner. She then became an associate at another law firm ('X LLP'). Around three months later, in January 2018, she raised a grievance against a partner ('Person C'). Another partner ('Person A') provided statements to X LLP saying that Ms Lu had refused to carry out work. Ms Lu was suspended and asked to attend a disciplinary hearing. She raised a grievance against colleagues including Person A and other partners who had provided statements criticising her, alleging that the statements constituted harassment. The company concluded that Person C had not harassed her and she appealed. A few weeks later, she posted on her Instagram account the 'corgi post'. It featured an image of the rear end of a corgi dog and contained the message: 'Ever want to kick someone's c*** in so bad?! # diebitchdie f****** fat [first name of Person A] Corgi can suck my d***" '. Person A and X LLP believed the corgi post referred to Person A. An HR officer reported that post and other matters to the Solicitors Regulation Authority ('SRA'). In the following three months, two further posts allegedly appeared on Ms Lu's Instagram account (the 'abuse and threat posts'). Those posts clearly related to Person B, Ms Lu's senior work colleague during her time at Y LLP. They were deeply offensive to Person B and included what appeared to be a threat: '… it's only a matter of time before I take you down. I will do it when you least expect it to keep it fun'. Subsequently, X LLP rejected Ms Lu's grievances and she left the company.

The SRA brought disciplinary proceedings against Ms Lu. The allegations against her were that she had posted the corgi post and the abuse and threat posts. She argued that the corgi post had concerned an acquaintance's dog who had bitten her and then been put down. She denied authorship of the abuse and threat posts, asserting that the apparent presence of the posts on her Instagram account had been faked and that someone must have hacked into her account and sought to create a semblance of the posts appearing there in an attempt to taint her character. She applied at a case management hearing of the Solicitors Disciplinary Tribunal (the 'tribunal') for the cause list for the substantive hearing to be anonymised. Her arguments centred on protecting her identity as a complainant alleging sexual harassment. The tribunal decided that the cause list would not be anonymised and that the hearing would be conducted in private. At the conclusion of the hearing, the tribunal reserved its judgment and announced to the parties that Ms Lu was acquitted on both charges. Ms Lu tried unsuccessfully to persuade the tribunal to keep her name out of the public domain. Subsequently, the tribunal published its main judgment. It found it unproved that Ms Lu had intended the corgi post to refer to Person A or that Ms Lu was the author of the abuse and threat posts. It preserved the anonymity of the X and Y LLPs, Persons A, B and C, and that of various individuals, including the HR officer and a barrister instructed by X LLP to investigate one of Ms Lu's grievances. By contrast, Ms Lu named.

Ms Lu appealed. She argued that the tribunal: wrongly refused to anonymise her identity; wrongly refused to redact out the content of her social media account; wrongly refused to redact out her 'employment history' (ie the details of complaints made by and against her); and wrongly anonymised the LLPs and other individuals. The SRA submitted that anonymity decisions were case management decisions not appealable under s 49 of the Solicitors Act 1974. Further, it pointed to the tribunal's Judgment Publication Policy which stated that, in the light of the decision in *Solicitors Regulation Authority v Spector*, it was 'unlikely' that an application for anonymity from an acquitted defendant would be granted: the principle of open justice was likely to prevail.

The High Court (Mr Justice Kerr) by a reserved judgment given on 6 July 2022 allowed Ms Lu's appeal in part.

The High Court held:
1732.1, 4123, 4323
(1) The submission that anonymity decisions were case management decisions not appealable under s 49 would be rejected. The reasoning in the tribunal's decision showed that these were not mere case management decisions, but matters of open justice and human rights.

(2) The tribunal was right not to protect the solicitor's identity after she was acquitted:

Where a balancing exercise has been done weighing the rival demands of art 8 rights to respect for a person's private life and art 10 rights to report proceedings freely and fully, the appellate court itself has a duty (being a body falling within s 6 of the Human Rights Act 1998) to uphold those rights and get the balance right. That does not prevent the appellate court from according all the respect that is due to the assessment made by the tribunal from which the appeal is brought. The appellate court should do so. On the other hand, the appellate court must be free to decide that the lower tribunal's decision on the balancing exercise was wrong because the balance is clearly the other way. The threshold for interference by an appellate court is not a high one that verges on a *Wednesbury* threshold of unreasonableness.

In the present case, the reasoning in *Spector* weighed heavily against protecting Ms Lu's identity. The tribunal was right not to accept the proposition that the *Spector* reasoning should have been ignored because of the likely impact of the publicity on Ms Lu's future career, or because she was a female relatively junior lawyer who had made allegations including some of sexual harassment. The making of allegations by and against Ms Lu were relevant to the charges of misconduct. They provided the context and a possible motive, both for posting the offending posts (on the SRA's case) and, on the other hand, for fabricating the abuse and threat posts (on Ms Lu's case). The evidence that those allegations were made, by Ms Lu and against her, was admissible in support of both the SRA's case and Ms Lu's defence to it. It was commonplace for domestic and other tribunals to hear evidence about and write judgments about unadjudicated allegations and counter-allegations. They were not exceptional and should not readily have led to derogations from open justice.

(3) The tribunal's decision not to anonymise the solicitor's Instagram account details was correct:

The reasoning was, essentially, the same as stated above: if Ms Lu's name and identity were correctly allowed to enter the public domain, the details of her Instagram account added little. Further, the tribunal was entitled to give weight to the voluntary nature of social media posts. She decided to place swathes of personal information in a semi-public domain of followers. Private text messages and emails were regularly admitted in evidence; social media posts were no different. A person making an electronic communication should generally be expected to take the risk that its contents might become public by becoming relevant in litigation and thus disclosed publicly. Hence, the adage that you should not put in an email something you would not want to see on the front page of next day's tabloid newspaper. There were exceptions as formulated in the case law, but this case was not one of them.

(4) The tribunal had not erred in refusing to redact out details of the complaints made by and against the solicitor:

The tribunal was entitled to let readers of its judgment know what had been alleged by Ms Lu and what had been alleged against her by her accusers. It was relevant to the case against her and relevant to her defence against the charges. It would have been possible to draft the judgment in language that omitted those matters, without rendering the judgment incomprehensible. But there was no obligation on the tribunal to do so. The default position was that hearings were held in public and judgments published. Although the hearing did not take place in public, the judgment should not have excluded relevant material without adequate cause. Here, there was no adequate cause.

(5) The tribunal should not have anonymised the law firms:

The tribunal's decision to anonymise them was not adequately reasoned. The two firms were shielded from being accountable publicly for reporting alleged misconduct and bringing accusations to the SRA which went before the tribunal and were then found not proved. The tribunal did not make any clear findings that they would suffer exceptional hardship or prejudice if identified. Nor did it analyse why the reasoning in the *Spector* case should not have been applied to accusers as well as accused, at any rate where the accused was acquitted. The LLPs would be named in the present judgment.

(6) The anonymity of Persons A, B and C would be continued:

They were likely, as against their employer, to have had a contractual right to anonymity in respect of allegations made by or against them internally within the context of their employment.

(7) The other individuals, such as the HR officer and the barrister, should not have been anonymised:

Courts and tribunals should not be squeamish about naming innocent people caught up in alleged wrongdoing of others. It is part of the price of open justice and there is no presumption that their privacy is more important than open justice. In the present case, these were individuals properly doing their jobs. Their role was not remarkable or particularly controversial. There was no reason not to apply the default position of open justice. They had no particular private or family life issues to protect. There was no justification for continuing their anonymity.

Observed:

(1) 'I have found this appeal difficult. It shows the problems we are experiencing in our justice system with the notion of open justice. We repeatedly stress its importance, yet increasingly undermine it by the creeping march of anonymity and redaction. Parties, witnesses and ordinary workers – for example, a case worker at the SRA in this case – are routinely anonymised without asking the court or giving the matter much thought. … the inexorable trend seems to be towards less open justice and more anonymity. I doubt that this is a good direction of travel for the law.'

4321

(2) The hearing should have been held mainly, if not wholly, in public. It appeared from the judgment that sitting in private was convenient rather than necessary.

(3) 'I am … concerned that the test for sitting in private in r 35 of the SDRP, exceptional prejudice or hardship, including in cases where no application is made by the person affected, is out of tune with the common law principle of open justice and with the case law on balancing art 8 and art 10 rights. I hope the issue and the rule will be looked at again to avoid further difficulties of the kind that have arisen in this appeal'.

Cases referred to:

A v British Broadcasting Corporation [2014] UKSC 25, [2014] 2 All ER 1037, [2015] AC 588, [2014] 5 LRC 131, [2014] 2 WLR 1243

A-G v Leveller Magazine Ltd [1979] 1 All ER 745, [1979] AC 440, [1979] 2 WLR 247 HL

Ali v Solicitors Regulation Authority [2021] EWHC 2709 (Admin)

Bank Mellat v HM Treasury [2013] UKSC 38, [2013] 4 All ER 495, [2014] AC 700, [2013] 3 WLR 179

Dring (on behalf of the Asbestos Victims Support Groups Forum UK) v Cape Intermediate Holdings Ltd [2019] UKSC 38, [2019] 4 All ER 1071, [2020] AC 629, [2020] 1 All ER (Comm) 95, [2019] 3 WLR 429

Guardian News and Media Ltd, Re [2010] UKSC 1, [2010] 2 All ER 799, [2010] 2 AC 697, [2010] 4 LRC 476, [2010] 2 WLR 325

Hudson v Solicitors Regulation Authority [2017] EWHC 3478 (Admin)

Khuja v Times Newspapers Ltd [2017] UKSC 49, [2019] AC 161, [2017] 3 WLR 351

Newman v Southampton CC [2021] EWCA Civ 437, [2022] 1 FLR 97, [2021] 1 WLR 2900

Obi v Solicitors Regulation Authority [2013] EWHC 3578 (Admin), [2013] All ER (D) 271 (Nov)

Officer L, Re [2007] UKHL 36, [2007] NI 277, [2007] 1 WLR 2135, [2007] 4 All ER 965

Pink Floyd Music Ltd v EMI Records Ltd; Practice Note [2010] EWCA Civ 1429, [2011] 1 WLR 770

S (a child) (identification: restriction on publication), Re [2004] UKHL 47, [2004] 4 All ER 683, [2005] 1 AC 593, [2005] 1 FLR 591, [2004] 3 WLR 1129

Scott (orse Morgan) v Scott [1913] AC 417, [1911–13] All ER Rep 1 HL

Singh v Dass [2019] EWCA Civ 360

Solicitor (No 6119/92), Re a (1994) Times, May 4 (transcript pp 14–15), (1994) 144 NLJ 707, (1994) 138 SJLB 100

Solicitors Regulation Authority v Spector [2016] EWHC 37 (Admin), [2016] 4 WLR 16, [2016] 1 Costs LR 35

XXX v Camden LBC [2020] EWCA Civ 1468, [2021] 3 All ER 1034, [2020] 4 WLR 165

Yassin v General Medical Council [2015] EWHC 2955 (Admin), [2015] All ER (D) 210 (Oct)

Appearances:
For the SRA:
RORY MULCHRONE and MICHAEL COLLIS, instructed by Capsticks LLP
(*Ms Lu appeared in person*)

1 **KERR J:**
INTRODUCTION
This appeal by the appellant (**Ms Lu**) is from a decision of the Solicitors Disciplinary Tribunal (**the tribunal**) published on 26 February 2021, in disciplinary proceedings brought by the respondent (**the SRA**) against Ms Lu. Ms Lu was *acquitted* of any misconduct. The appeal concerns the tribunal's approach to open justice and to the anonymity of persons mentioned in the tribunal's decision and relevant to the allegations it had to determine.

2 The tribunal agreed to sit in private and decided to anonymise two complainant firms of solicitors, relevant individuals employed by them and, for some reason, a barrister and an expert witness whose roles were not particularly controversial. The tribunal so decided of its own accord, without any application from those concerned. However, the tribunal refused to agree to Ms Lu's request that her identity be withheld from the public domain.

3 At the hearing before me, held in public, with some misgivings I gave a *temporary* direction preserving the status quo and prohibiting publication of Ms Lu's name and that of the two firms, their relevant employees and the barrister. Before the draft of this judgment was made final, the two firms and four individuals were able to (and most did) make representations as to whether their anonymity should be preserved in this judgment. Ms Lu's should not be.

4 **1732.1, 4123, 4323**
I am prepared, not without hesitation, to continue the anonymity of three relevant individuals within the two complainant firms. This is because they are likely, as against their employer, to have a contractual right to anonymity in respect of allegations made by or against them internally within the context of their employment; albeit that contractual right is far from conclusive, does not bind the court and might well have to yield to open justice.

5 **1732.1, 4123, 4323**
I have found this appeal difficult. It shows the problems we are experiencing in our justice system with the notion of open justice. We repeatedly stress its importance, yet increasingly undermine it by the creeping march of anonymity and redaction. Parties, witnesses and ordinary workers – for example, a case worker at the SRA in this case – are routinely anonymised without asking the court or giving the matter much thought.

6 **1732.1, 4123, 4323**
A common misconception is that if the identity of a person in legal proceedings is not directly relevant, there is no public interest in that person's name being known. The justice system thrives on fearless naming of people, whether bit part players or a protagonist. Open reporting is discouraged by what George Orwell once called a 'plague of initials'[1]. Clarity and a sense of purpose are lost. Reading or writing reports about nameless people is tedious.

7 **1732.1, 4123, 4323**
The applicable principles are clear at the highest level. The common law principle of open justice is well known. The jurisprudence on arts 8 and 10 of the European Convention is quite well known. Procedural rules such as CPR 39.2 which reflect the law correctly, work reasonably well if properly applied. Yet, the inexorable trend seems to be towards less open justice and more anonymity. I doubt that this is a good direction of travel for the law.

8 **FACTS**
I can take some of the facts from the decision of the tribunal. I will omit as much detail as possible. Ms Lu qualified as a solicitor in Scotland in 2015. The tribunal eventually rejected her contention that it lacked jurisdiction to discipline her, determining that she was an 'RFL' (registered foreign lawyer) at the relevant times and, as such, subject to the disciplinary rules policed by the SRA and enforced by decisions of the tribunal.

9 Ms Lu became an associate in the London office of Cadwalader Wickersham & Taft LLP (**Cadwalader**), a US law firm. Cadwalader was referred to by the tribunal as 'Y LLP'. There, Ms Lu came into contact with, and in close physical proximity to, a senior work colleague, referred to by the tribunal and in this judgment as Person B.

10 Ms Lu's relations with Cadwalader, to put it neutrally, did not thrive. The reasons for that were and remain disputed. Ms Lu says the real reason was that she resisted harassment by a partner. She maintains that she passed her probation but was dismissed when she indicated a willingness to report the harassment to human resources ('HR').

11 It is agreed that Cadwalader terminated Ms Lu's employment by a letter of 17 August 2017 and that the reasons given in the letter, not accepted by Ms Lu as genuine, were performance related: refusal to accept work allocated, refusing to discuss work with her supervising partner, taking unauthorised leave and displaying an aggressive attitude in conversation with supervising attorneys.

12 In or about October 2017, Ms Lu became an associate at the London office of Pillsbury Winthrop Shaw Pittman LLP (**Pillsbury**), also a US law firm. Pillsbury was referred to by the tribunal as 'X LLP'. Ms Lu's employment did not go smoothly. On 17 January 2018, she raised a grievance against 'Person C', a partner. On 15 and 26 February 2018, 'Person A', a partner, provided statements to Pillsbury saying that Ms Lu had refused to carry out work.

13 On 27 February 2018, Ms Lu was suspended by Pillsbury pending an investigation. On 2 March 2018, she was asked to attend a disciplinary hearing on 7 March. Also on 7 March, she raised a grievance against 13 individuals at Pillsbury including Person A and the other partners who had provided statements criticising her. She alleged that the statements were false and misleading and constituted harassment.

14 On 29 March 2018, Pillsbury concluded, after enquiring into the matter, that Person C had not harassed Ms Lu. Pillsbury also looked into whether Ms Lu had been bullied and concluded that she had not been. On 29 March 2018, Pillsbury appointed Ms Judy Stone ('J' in the tribunal proceedings), a barrister in private practice, to investigate Ms Lu's grievance raised earlier that month. Ms Stone spoke to various people including Ms Lu. On 25 May 2018, Ms Lu appealed against the decision not to uphold her grievance against Person C.

15 On 15 June 2018, Ms Lu posted on her Instagram account the first post for which she was subsequently charged with misconduct by the SRA. I will call it the 'corgi post' as it featured an image of the rear end of a corgi dog. The tribunal edited some of it out, though the full text was before it in a witness statement from Person A.

16 As edited in the tribunal's decision, it was economically rendered as follows:

> 'Ever want to kick someone's c*** in so bad?! # diebitchdie f****** fat [name] Corgi can suck my d***'.

17 The word 'name' in square brackets denotes the omitted word […] which is the first name of Person A. She and Pillsbury were concerned and offended because they believed the corgi post referred to her rather than to any dog.

18 Ms Kathleen Pearson, Pillsbury's Chief HR Officer, reported that and other potential disciplinary matters to the SRA on 30 July 2018, informally and without at that stage identifying Ms Lu. On 30 July 2018, Pillsbury dismissed Ms Lu's appeal against the decision not to uphold her grievance against Person C.

19 On 22 August 2018, the barrister Ms Stone produced her report. I have not seen it but according to the tribunal she had (in the tribunal's words) 'difficulties' with Ms Lu's evidence, which she treated 'with caution'. Ms Lu 'lacked candour'.

20 Ms Stone preferred the evidence of nine people from Pillsbury against whom Ms Lu had complained. Some of the complaints about Person A were (this time in Ms Stone's words quoted by the tribunal) 'inconceivable' or 'highly implausible'. She rejected Ms Lu's claim that Pillsbury's witnesses colluded to fabricate a basis for her suspension.

21 The second matter over which Ms Lu was later accused of misconduct was that two posts allegedly appeared on her Instagram account on 29 August and 23 September 2018. This led to what I will call the 'abuse and threat posts' allegation. The two posts clearly related to Person B, Ms Lu's senior work colleague during her time at Cadwalader.

22 The abuse and threat posts (and the tribunal's description of them) were more detailed and complicated than the corgi post. Since the tribunal ultimately found that the SRA could not prove Ms Lu was the author of those posts, I need not set them out in full. They were deeply offensive to Person B and if penned by Ms Lu would without question have amounted to serious misconduct. The second post included what appeared to be a threat to Person B:

> '… it's only a matter of time before I take you down. I will do it when you least expect it to keep it fun.'

23 In the light of Ms Stone's report, Pillsbury dismissed Ms Lu's grievance of March 2018 in a detailed letter of 27 September 2018. They also rejected a suggestion from Ms Lu that Ms Stone had been biased and unfair.

24 On 11 October 2018, Ms Pearson of Pillsbury spoke to Mr Nicholas Leach of the SRA about the matter. She followed up with an email the next day, attaching documents, including the corgi post, and informing Mr Leach that Pillsbury was commencing disciplinary proceedings against Ms Lu. She requested that the SRA should not contact Ms Lu until after the disciplinary process was complete, while undertaking to inform her that Pillsbury had notified the SRA.

25 Also on 12 October 2018, Ms Lu appealed internally against the decision to dismiss her grievance. At the time of these events, she was on paid leave as she had been since 27 February 2018. On 16 October 2018, Mr Adam Blakemore, a partner at Cadwalader and its compliance officer, reported Ms Lu to the SRA, relying on the abuse and threat posts of August and September 2018 and holding Ms Lu responsible for them.

26 At the end of November or early December 2018, Pillsbury revived the disciplinary process, citing the performance related matters alleged earlier (in the letter of 2 March 2018) and adding an allegation of misconduct in posting the corgi post in June 2018. The disciplinary hearing was to be heard on 17 December 2018 by an external HR consultant. However, the disciplinary process was overtaken by other events.

27 On 30 November 2018, Ms Lu emailed Pillsbury denying that the corgi post related to Person A. Ms Lu gave the account she later gave the tribunal:

> '… it concerned an acquaintance's dog who bit me and was then put down. I do believe I enjoy the freedom of speech and if such post did not violate the Instagram community guidelines, I doubt it would have breached the firm's social media policy when it was directed at an animal that has ceased to exist.'

28 On 12 December 2018, the SRA sent purported screenshots of the abuse and threat posts to Ms Lu. In an email the same day, Ms Lu denied authorship. She asserted that the apparent presence of the posts on her Instagram account was faked and (as she later maintained in the tribunal, successfully) that she believed someone must have hacked into her account and sought to create a semblance of the posts appearing there in an attempt to taint her character.

29 On 3 January 2019, Pillsbury dismissed Ms Lu's appeal against the decision of 27 September 2018 to dismiss her second grievance brought in March 2018. Ms Lu then denied and rebutted the disciplinary allegations against her in a document dated 22 January 2019. The disciplinary process was not completed; negotiations took place with a view to Ms Lu parting company with Pillsbury.

30 This led to a settlement agreement signed in March 2019. I have not seen it. According to the tribunal, it provided for Ms Lu's employment to terminate on 13 March, with six months' pay in lieu. Pillsbury made no admission of liability. There was a waiver of any claims, presumably on both sides.

31 The SRA then considered Ms Lu's case and gathered evidence with a view to subjecting her to a disciplinary process. This seems to have taken about a year, since it was not until March 2020 that witness statements were signed by Ms Pearson, Person A and Mr Blakemore, Cadwalader's compliance officer.

32 The SRA then served a 'r 12' statement on Ms Lu in March 2020, stating the allegations against her. There were two. They can be summarised as (1) posting the corgi post on 15 June 2018 and (2) posting the abuse and threat posts on 29 August and 23 September 2018.

33 A case management hearing took place on 12 October 2020, in private. There was an argument over whether the tribunal had disciplinary jurisdiction over Ms Lu. She denied jurisdiction on the basis that she was not an 'RFL' (registered foreign lawyer). The SRA successfully argued that she was an RFL. That issue occupied much time and was not determined until later, but it is not relevant to this appeal; there is no longer any challenge to the tribunal's jurisdiction.

34 Ms Lu applied at the case management hearing for the cause list for the substantive hearing to be anonymised, for the substantive hearing to take place

in private and for the tribunal's decision not to be published. She sought to keep the issues wholly outside the public domain. There was not enough time to hear and determine that application on 12 October 2020. It was adjourned to the substantive hearing date, 27 October 2020.

35 The hearing lasted four days, 27–29 October and 30 November 2020. Ms Lu appeared in person. The tribunal heard argument and evidence on all issues. On Ms Lu's adjourned application to keep the matter wholly outside the public domain, the SRA's position had shifted from neutrality to opposition. Mr Inderjit Johal, counsel for the SRA, accepted only that the hearing should be in part private and the judgment in part anonymised.

36 Subject to that limited concession, Mr Johal's submissions championed open justice. He did not accept anonymity for Ms Lu. He did not seek anonymity for Cadwalader or Pillsbury, nor for individuals from those firms. He referred to the applicable procedural rules (the Solicitors (Disciplinary Proceedings) Rules 2019 (SI 2019/1185) (**the SDPR**), to the common law principle of open justice, to art 8 of the European Convention and to case law.

37 Ms Lu's arguments centred on protecting her identity as a complainant alleging sexual harassment, included among her grievance allegations. She argued that the identity of those complaining of sexual harassment is always protected by the courts. She also relied on medical evidence to support her contention that her health and mental state would be endangered if her identity became known.

38 It appears from para 56 (and following) of the 'anonymised and unredacted' version of the tribunal's subsequent judgment that the chairman picked up on Mr Johal's references to probable allegations of sexual harassment against individuals who would not be giving evidence. The chairman wished to protect 'persons who were not present to defend themselves'.

39 Rule 35(5) of the SDPR, read with r 35(2), does indeed provide for a tribunal to sit in private for all or part of a hearing, even without an application from a person affected, provided such a person would suffer 'exceptional hardship' or 'exceptional prejudice'; and provided the tribunal 'considers that a hearing in public would prejudice the interests of justice' (r 35(5)(b)).

40 Mr Johal said the chairman's concern was a 'valid point'. He noted and accepted the tribunal's distinction between Ms Lu, who would be present and able to defend herself, and others who would not be. He withdrew his objection to the whole of the hearing being held in private (para 58). The chairman suggested that the same considerations would apply to publication of the judgment; ways could be found to protect the privacy of those not present.

41 The tribunal's decision on Ms Lu's application was at paras 61 and 62. The cause list would no longer be anonymised. Ms Lu could not herself reach the threshold of 'exceptional hardship' or 'exceptional prejudice'. Generally, the public and profession should know the identity of those subject to tribunal proceedings, and their outcome.

42 However, the hearing would be conducted wholly in private to protect the individuals whose privacy would be violated if the hearing switched from public to private session. The judgment would be made public but anonymised, by the same reasoning.

43 It is, possibly, implicit in the tribunal's reasoning that the affected individuals and the two US law firms, in the tribunal's view, met the standard of 'exceptional hardship' and/or 'exceptional prejudice' in r 35; that Ms Lu did not; and that it would 'prejudice the interests of justice' to sit in public to any extent or to allow publication of the names of the two firms and individuals.

44 There is, however, no reference in the decision to the position of Cadwalader and Pillsbury as partnerships, as distinct from the position of individuals working for those firms. Nor is there any mention of the position of Ms Stone, the barrister, who had done no more than accept a brief and perform the task she was briefed to perform. Nor is there any reasoning about why an information technology (**IT**) expert to be called by Ms Lu should not be identified by name.

45 At the conclusion of the hearing on 30 November 2020, pending publication of the tribunal's judgment, in so far as it was to be published, the tribunal reserved its judgment announced to the parties that Ms Lu was acquitted on both charges and that the tribunal proposed to make no order as to costs.

46 The tribunal issued a 'memorandum' dated 3 December 2020 regarding logistical arrangements in respect of the judgment. This was in anticipation of a further management hearing which eventually occurred, as I shall explain, on 15 February 2021. The parties were to be given (as stated in the 3 December 2020 memorandum) a further opportunity to make submissions on anonymity and redaction at that case management hearing.

47 The 'anonymity and privacy applications' part of the judgment was not to be included in the published version; not even, as I understand it, in a form that would protect the identity of the individuals and firms just mentioned. Only the parties would receive that part of the judgment, ie the part I have just (publicly) outlined. The parties were invited to 'agree any additional points of anonymity or redaction that they wish the tribunal to consider'.

48 An earlier memorandum concerning secrecy arrangements following the case management hearing held on 12 October 2020, was itself to be kept secret and not disclosed beyond the parties to anyone without the consent of the tribunal. Thus, the tribunal treated the arguments about derogations from open justice as qualifying for the same level of derogation as the subject matter of those arguments.

49 The tribunal made a draft of its judgment available to the parties on or about 18 January 2021. A hearing on consequential matters was listed for 15 February 2021. At that hearing, the parties made further submissions on the draft judgment, touching again on anonymity and redaction of names.

50 In detailed submissions, Ms Lu tried unsuccessfully to persuade the tribunal to keep her name out of the public domain. She also made submissions to the effect that the tribunal had applied a double standard, requiring her but not the other affected individuals to meet the 'exceptional hardship' or 'exceptional prejudice' threshold.

51 In a later written ruling dated 26 February 2021, the tribunal recorded the parties' submissions in detail and ruled (at para 44 and following) that it would stick to its earlier decisions on identification of Ms Lu, anonymisation of others and redaction of the main judgment. The tribunal had been ready to hear further submissions, but those submissions did not persuade the tribunal to change its earlier decision or reasoning.

52 The tribunal concluded its written decision by ruling that the content of that ruling, which I have just (publicly) outlined, should not be made public or disclosed beyond the parties except with the tribunal's consent. On the same date, 26 February 2021, the tribunal published its main judgment, but redacting out the arguments about anonymity and redaction, as I have already indicated.

53 The main judgment was entitled 'redacted judgment of an application conducted remotely, heard in private'. Within it, beneath para 47, appeared the subheading '[a]pplication by the Respondent [Ms Lu] for anonymisation of the Cause List, for the decision (judgment) not to be published and for the entire hearing to be held in private'. The text then proceeded to state that paras 48–62 were 'redacted' and continued with para 63.

54 The evidence of the witnesses was rehearsed at length but it is very difficult at times to discern which witness is being referred to since the term 'the witness' is used to denote the initials of the anonymised witness. Gender neutrality of language is at times observed, though not all the time. For example Ms Lu's IT expert, Mr Alistair Ewing, was referred to as 'AE' but with masculine pronouns.

55 The tribunal found unproved the allegation that Ms Lu had intended the corgi post to refer to Person A. The SRA did not dispute that Ms Lu had been bitten by a dog on 15 June 2018, the date of the corgi post. The post was not found to be threatening to Person A.

56 The tribunal further found that the SRA had failed to prove that Ms Lu was the author of the abuse and threat posts. The tribunal criticised the quality of the evidence the SRA had deployed against Ms Lu, following Cadwalader's report of alleged serious misconduct by her. The case against Ms Lu was based on unverified hearsay. Person B had not been called. There was no audit trail to show that Ms Lu had posted the two posts.

57 The tribunal's main judgment was then published online, subject to the redactions I have mentioned and with Ms Lu named but the anonymity of Cadwalader and Pillsbury and the various individuals preserved. Ms Lu's identity as the acquitted accused has therefore been in the public domain since February 2021 (and indeed earlier, since the tribunal's cause list ceased to be anonymised at some point during the hearings in late 2020). The tribunal declined to make any order as to costs.

58 Ms Lu then appealed to this court on 19 March 2021, with solicitors. The appeal was against the decision of 26 February 2021 to 'publish the name of the appellant … and information personal to her ..'. She asked for that order to be 'set aside'. She also applied for interim relief, ie an order that 'the judgment … identifying the appellant and her personal details be removed pending the hearing of any appeal'. However, that application was not pursued.

59 The 11 grounds of appeal were prepared by Mr Tim Nesbitt QC, now sadly deceased. After that, the appeal progressed towards a hearing, though with developments along the way; namely, an application by the SRA to strike out the appeal, made in October 2021; and a very late application by Ms Lu (acting in person again) in May 2022 to amend her grounds of appeal.

60 **ISSUES, REASONING AND CONCLUSIONS**
Preliminary issue: jurisdiction
The SRA submits first that the court should (under CPR r 52.18) strike out the appeal for the compelling reason that the court has no jurisdiction to entertain it. Mr Mulchrone submits that case law shows that the apparently untrammelled right of appeal under s 49(1) of the Solicitors Act 1974 excludes interlocutory case management decisions not attracting the formal requirements of s 48.

61 Mr Mulchrone submitted that only the acquittal and costs decisions were appealable under s 49; the operative decisions on anonymity and redaction, taken at the case management hearing on 15 February 2021, were not. They were case management decisions that could be challenged, if at all, by judicial review, despite the reluctance of the court to intervene by judicial review in domestic proceedings before they are complete.

62 No judicial review was brought within the time limit. If it had been, Ms Lu would have required the court's permission to proceed. The SRA would not, Mr Mulchrone said, have opposed permission on the ground that Ms Lu had a right of appeal under s 49(1) of the 1974 Act. However, he accepted that the SRA had itself appealed against an anonymity decision, in *Solicitors Regulation Authority v Spector* [2016] EWHC 37 (Admin), [2016] 4 WLR 16, [2016] 1 Costs LR 35.

63 Mr Mulchrone relied on the reasoning of Simon Brown LJ (as he then was) in *Re a Solicitor* (*No 6119/92*), *Re a* (1994) Times, May 4 (transcript pp 14–15), (1994) 144 NLJ 707; of Garnham J in *Obi v Solicitors Regulation Authority* [2013] EWHC 3578 (Admin), [2013] All ER (D) 271 (Nov) (at [26]); of Ouseley J in *Hudson v Solicitors Regulation Authority* [2017] EWHC 3478 (Admin) (at [3]–[15]); and of Morris J in *Ali v Solicitors Regulation Authority* [2021] EWHC 2709 (Admin) (at [101]).

64 In my judgment, these submissions are not well founded. *Obi* was not an appeal under s 49 at all, but under s 41. *Re a Solicitor* and *Hudson* both concerned appeals against decisions that the case below should proceed and not be stopped. They were not about anonymity and redaction. In *Ali*, the issue was severance.

65 **1732.1, 4123, 4323**
I agree with Ms Lu's submission that the relevant decision here was the one recorded at paras 56 and 57 of the tribunal's memorandum dated 26 February 2021, under the heading 'Decision and Directions of the Tribunal'. The tribunal revisited the issues of anonymity and redaction on 15 February 2021 having made its full reasoning known to the parties in the draft judgment.

66 **1732.1, 4123, 4323**
The reasoning in para 56 shows those were not mere case management decisions, as in *Re a Solicitor*, *Hudson* and *Ali*. They were matters of open justice and human rights of the kind considered in *Spector*. The SRA's description of the decisions appealed against here as 'administrative in nature' (para 25 of its skeleton argument) is misconceived and wrong.

67 **1732.1, 4123, 4323**
An appeal under s 49(1) lay against the decision that the directions on anonymity and redaction in the memorandum of 3 December 2020 'stand and continue to stand' (memorandum of 26 February 2021, para 57.1). That decision was 'an order of the Tribunal … signed by the chairman …' within s 48(1).

68 **1732.1, 4123, 4323**
To fall within that provision, it did not have to be an order making provision for any of the matters set out in s 47(2)(a)–(i) (striking off the roll, suspension

restoration to the roll, etc or costs). The list at (a)–(i) in s 47(2) is not exhaustive. Section 48(2) states that certain further steps must be taken where an order 'which has been filed *includes* [my italics] provision for any of the matters referred to paras (a)–(i) of s 47(2) …'.

69 **1732.1, 4123, 4323**
The order is required to be filed because it falls within s 48(1). An order under s 48(1) may therefore deal with matters outside the scope of (a)–(i) in s 47(2). So it did here. The appeal is competent and I refuse to strike it out. There is no compelling reason to do so. Simon Brown LJ's reasoning in *Re a Solicitor* does not apply to final decisions on anonymity, redaction and application of the open justice principle.

70 **The substance of the appeal**
The appeal is limited to a review of the decision below (CPR 52.21). Neither party suggested I should conduct a rehearing. The original eleven rather diffuse grounds of appeal raise three closely linked alleged errors: (i) wrongly refusing to anonymise Ms Lu's identity (covered in parts of grounds 1–3 and 8–11); (ii) wrongly refusing to redact out the content of Ms Lu's social media account (covered in parts of grounds 1, 2 and 4); and (iii) wrongly refusing to redact out Ms Lu's employment history (mainly covered in grounds 5, 6 and 7).

71 There are now four further grounds, subject to a very late application for permission to advance them. These raise three further issues: (iv) wrongly anonymising the two law firms and certain individuals (ground 13); (v) serious procedural irregularity, by allowing the case to proceed without adequate evidence (ground 14); and (vi) refusing to order the SRA to pay all or part of Ms Lu's costs of the proceedings below (ground 15).

72 Both parties referred me to the usual cases on open justice, publication of decisions, anonymity and redaction of published decisions, arising both at common law and under the European Convention, particularly arts 8 and 10 and the balance between them. The learning is well known and I do not think it would assist for me to repeat it yet again here. I was also referred to the SDRP and the Judgment Publication Policy of May 2020, applicable in the tribunal.

73 Among the numerous authorities cited were *Scott* (*orse Morgan*) *v Scott* [1913] AC 417, [1911–13] All ER Rep 1; *A-G v Leveller Magazine Ltd* [1979] 1 All ER 745, [1979] AC 440; s 12 of the Human Rights Act 1998; *Re S* (*a child*) (*identification: restriction on publication*) [2004] UKHL 47, [2004] 4 All ER 683, [2005] 1 AC 593; *Re Officer L* [2007] UKHL 36, [2007] NI 277, [2007] 1 WLR 2135; *Re Guardian News and Media Ltd* [2010] UKSC 1, [2010] 2 All ER 799, [2010] 2 AC 697; *Pink Floyd Music Ltd v EMI Records Ltd; Practice Note* [2010] EWCA Civ 1429, [2011] 1 WLR 770; *Bank Mellat v HM Treasury* [2013] UKSC 38, [2013] 4 All ER 495, [2014] AC 700; *A v British Broadcasting Corporation* [2014] UKSC 25, [2014] 2 All ER 1037, [2015] AC 588; *Yassin v General Medical Council* [2015] EWHC 2955 (Admin), [2015] All ER (D) 210 (Oct); *Solicitors Regulation Authority v Spector* [2016] EWHC 37 (Admin), [2016] 4 WLR 16, [2016] 1 Costs LR 35 (cited above); *Dring* (*on behalf of the Asbestos Victims Support Groups Forum UK*) *v Cape Intermediate Holdings Ltd* [2019] UKSC 38, [2019] 4 All ER 1071, [2020] AC 629; *Khuja v Times Newspapers Ltd* [2017] UKSC 49, [2019] AC 161, [2017] 3 WLR 351; *XXX v Camden LBC* [2020] EWCA Civ 1468, [2021] 3 All ER 1034, [2020] 4 WLR 165; and *Newman v Southampton CC* [2021] EWCA Civ 437, [2022] 1 FLR 97, [2021] 1 WLR 2900.

74 **The tribunal's refusal to anonymise Ms Lu's identity**
The appeal was originally supported in April 2021 by a skeleton argument from the late Mr Nesbitt. He submitted that the tribunal had not undertaken a proper balancing exercise at common law, weighing the value for open justice of disclosing Ms Lu's name against the risk of harm to her legitimate interests. The tribunal had applied the too high test in r 35 of the SDPR of 'exceptional hardship or exceptional prejudice'.

75 Mr Nesbitt further submitted that the tribunal had not undertaken a fact specific balancing exercise 'approaching the issue through the lens of Convention rights', ie by asking itself 'whether there was a sufficient general, public interest in publishing a judgment without the Appellant's name … being anonymised to justify the incursion into her art 8 rights that publication would involve'.

76 He said the tribunal overlooked the point that Ms Lu had been acquitted of all charges, yet the publication of her name, given the subject matter of the judgment, 'would risk having a serious impact on her future career'. Ms Lu was a young, female, relatively junior lawyer. The tribunal, Mr Nesbitt argued, had failed to weigh the likely impact on her future career properly in the balance.

77 More broadly, Mr Nesbitt advanced the tenth ground of the appeal, which applied to all parts of the decision: it stated that the tribunal had failed:

> 'to act consistently and treat the Appellant's application in the same way in which requests made on behalf of third parties (many of whom were male) were: the Tribunal should have adopted a consistent approach to all applications, and applying the same approach that it did to requests made on behalf of third parties should have also made the anonymisations / redactions requested by the Appellant'.

78 At the hearing of the appeal, Ms Lu used a 'replacement' skeleton argument in place of Mr Nesbitt's, though retaining some of its content. In relation to the original grounds of appeal, the focus of her argument was that she had sought to have her name (and Instagram account) anonymised 'in respect of the ***unrelated*** allegations by redacting them'. The bold italics are Ms Lu's.

79 By the 'unrelated' allegations, I understood her to mean allegations made both by her and against her. The allegations made by her were made in her complaints against various individuals in both the law firms. They included allegations of sexual harassment. The allegations made against her were the allegations of poor work practices that had led to termination of her employment by Cadwalader and the disciplinary matters raised against her by Pillsbury.

80 It is common ground that the tribunal did not adjudicate on these allegations. It did not need to. The making of those allegations formed the narrative backdrop to the SRA's case against Ms Lu, which was that she had committed misconduct by posting the corgi post and the abuse and threat posts. The submission of Ms Lu is that the other allegations by and against her are 'unrelated' to that alleged misconduct and ought not to have been made public alongside her name.

81 As I understand Ms Lu's position by the time of the hearing before me, it was that she was no more able to defend herself against those unadjudicated allegations against her, than were the absent third parties

against whom she had made allegations, also unadjudicated. Yet, the tribunal protected the identities of the third parties but not hers.

82 Viewed in that light, Ms Lu submitted, the balancing exercise, both when applying the common law principle of open justice and when weighing the competing considerations arising under arts 8 and 10 of the Convention, should have led to the tribunal protecting her identity and anonymity. Once it recognised that a derogation was justified in the case of the third parties, the same justification must exist for a parallel derogation to protect her identity.

83 Ms Lu echoed Mr Nesbitt's submission that the tribunal had not carried out the balancing exercise properly. It had not properly examined the competing interests, had not carried out a fact specific art 8 balancing exercise and had not found that the interference with her art 8 rights was justified under art 8(2) as necessary and proportionate. It had failed to weigh in the balance the likely adverse impact on her future career, notwithstanding her acquittal.

84 For the SRA, Mr Mulchrone submitted that the threshold for interference was high; the appellate court should defer to the evaluative decision of the specialist adjudicative body unless there was a clear error of principle or irrationality. Furthermore, such a tribunal is not expected to draft its decisions with the same degree of erudition and precision as a higher court such as the present one.

85 Mr Mulchrone submitted that the tribunal would have been wrong to ignore the reasoning of the Divisional Court in *Spector*. He reminded me of the importance the press rightly attach to names, by reference to Lord Rodger's utterance in *Re Guardian News and Media Ltd*, at [63] ('[w]hat's in a name? "A lot", the press would answer'). And he reminded me of Nicol J's judgment in *Spector*, at [27] citing from Lord Steyn's speech in *Re S* at [30]:

> 'the public interest may be as much involved in the circumstances of a remarkable acquittal as in a surprising conviction'.

86 The tribunal's assessment and its decision to permit publication of Ms Lu's identity was properly reasoned and should be respected, he argued. There was no taint on Ms Lu's character arising from the acquittal. An order preventing publication of her name would put the tribunal in a difficult position; how should it respond to an enquiry from someone unaware of the proceedings but wishing to know if she had ever been subject to disciplinary proceedings?

87 Mr Mulchrone pointed to the Judgment Publication Policy which stated that in the light of the *Spector* case it was 'unlikely' that an application for anonymity from an acquitted defendant would be granted; the principle of open justice was likely to prevail. Ms Lu bore the heavy burden of displacing that conclusion and the tribunal rightly found that she had failed to do so. The appellate court should not interfere with that evaluation.

88 Mr Mulchrone submitted that the tribunal was entitled to differentiate the position of the third parties whom it anonymised, on the basis that Ms Lu was before the tribunal but they were not. She had made serious allegations against individuals, including of harassment and intimidation. The allegations against her had nothing to do with those allegations and the third parties could not defend themselves against them.

89 **4321**
I come to my reasoning and conclusions on this issue. First, there is no appeal against the decision to sit entirely in private. But I have concerns about the tribunal's decision to do so. Ms Lu favoured the tribunal sitting in private; Mr Johal, initially, did not. I do not need to decide but I think Mr Johal was right; the hearing should have been held mainly, if not wholly, in public. It appears from the judgment that sitting in private was convenient rather than necessary.

90 **1732.1, 4123, 4323**
Next, I do not accept the submission of the SRA that the threshold for interference by an appellate court is the high one for which Mr Mulchrone contended, verging on a *Wednesbury* threshold of unreasonableness. Where open justice is at issue, the court in the appellate proceedings has a duty itself to deliver justice openly, subject to exceptions codified in CPR r 39.2. By r 39.2(4) (with my italics):

> 'The court must order that the identity of any person shall not be disclosed if, *and only if*, it considers non-disclosure *necessary to secure the proper administration of justice and in order to protect the interests of that person*.'

91 **1732.1, 4123, 4323**
Mr Mulchrone's high threshold would cut across that duty. Where a balancing exercise has been done weighing the rival demands of art 8 rights to respect for a person's private life and art 10 rights to report proceedings freely and fully, the appellate court itself has a duty (being a body falling within s 6 of the Human Rights Act 1998) to uphold those rights and get the balance right.

92 **1732.1, 4123, 4323**
That does not prevent the appellate court from according all the respect that is due to the assessment made by the tribunal from which the appeal is brought. The appellate court should do so. On the other hand, the appellate court must be free to decide that the lower tribunal's decision on the balancing exercise was wrong because the balance is clearly the other way.

93 **1732.1, 4123, 4323**
Here, in my judgment the tribunal was right not to accept Ms Lu's invitation to protect her identity. The reasoning of the Divisional Court in *Spector* weighed heavily against doing so. While Mr Spector was found to have committed one minor act of misconduct of a venial or technical kind, he was in substance acquitted; and that was not enough to defeat the claims of open justice.

94 **1732.1, 4123, 4323**
The same reasoning applies here. The tribunal's reasoning was not fully articulated but it was right not to accept the proposition that the *Spector* reasoning should be ignored because of the likely impact of the publicity on Ms Lu's future career, or because she is a female relatively junior lawyer who had made allegations including some of sexual harassment.

95 **1732.1, 4123, 4323**
I do not accept that the making of allegations by and against Ms Lu had nothing to do with the charges of misconduct. Mr Nesbitt accepted that allegations made by Ms Lu were 'background'. They were more than that. They provided the context and a possible motive, both for posting the offending posts (on the SRA's case) and, on the other hand, for fabricating the abuse and threat posts (on Ms Lu's case).

96 **1732.1, 4123, 4323**
The evidence that those allegations were made, by Ms Lu and against her, was admissible in support of both the SRA's case and Ms Lu's defence to it. It is commonplace for domestic and other tribunals to

hear evidence about and write judgments about unadjudicated allegations and counter-allegations. They are not exceptional and should not readily lead to derogations from open justice.

97 **1732.1, 4123, 4323**
As for the submission that the tribunal adopted an inconsistent approach to bestowing anonymity, I will return to that shortly. For present purposes, it is sufficient to say that if the tribunal was wrong to grant anonymity to the third parties, it does not follow that it should have redeemed itself by another wrong, shielding Ms Lu's identity from the public.

98 **The tribunal's refusal to redact out the content of Ms Lu's social media account**
Mr Nesbitt reiterated his arguments about publication of Ms Lu's name. If the Instagram account details were published, Ms Lu's name would be public because the account name revealed her name. Further, he submitted that the tribunal was wrong to reject Ms Lu's assertion that the account and the posts on it were part of her private life because she had, as the tribunal put it, 'of her own volition created and developed a public Instagram facet to her life …'.

99 Mr Nesbitt pointed out that access to a user's account is limited to 'followers' of the account holder; the information is not widely available publicly. Further, Ms Lu had closed the account out of privacy concerns about a year before the hearing below. That she had operated it in the past with limited access to a relatively small class of followers should not have impelled the tribunal to discount the proposition that its contents could form part of her private life.

100 Ms Lu submitted at the hearing (and in her replacement skeleton argument) that the same reasoning applied as in the case of the argument about anonymising her name in the judgment. The details of her Instagram account would reveal her identity. A social media platform could include details of a person's personal affairs and they did not become public property merely because they had been posted and the posts were then referred to in disciplinary proceedings.

101 Mr Mulchrone submitted that the tribunal had properly weighed the competing interests in the balancing exercise between art 8 and art 10 rights. With specific reference to Ms Lu's Instagram account, the tribunal was entitled to attach weight to the voluntary nature of posts and their accessibility to what the tribunal called 'her numerous followers'. Evidence referred to in the judgment suggested she may have had over 330,000 followers.

102 **1732.1, 4123, 4323**
I think the tribunal's decision not to anonymise Ms Lu's Instagram account details was correct. The reasoning is, essentially, the same as already stated in relation to the previous issue. If Ms Lu's name and identity were correctly allowed to enter the public domain, the details of her Instagram account added little. The decision was justified on the simple ground that evidence of her account details was admissible and there was no good reason to suppress them.

103 **1732.1, 4123, 4323**
Further, the tribunal was entitled to give weight to the voluntary nature of social media posts. While it is true that the account holder would not anticipate their use in subsequent disciplinary proceedings and does not choose to be subject to them, she does decide to place swathes of personal information in a semi-public domain of followers. Private text messages and emails are regularly admitted in evidence; social media posts are no different.

104 **1732.1, 4123, 4323**
A person making an electronic communication should generally be expected to take the risk that its contents may become public by becoming relevant in litigation and thus disclosed publicly. Hence, the adage that you should not put in an email something you would not want to see on the front page of next day's tabloid newspaper. There are exceptions as formulated in the case law, but this case should not be one of them.

105 **The tribunal's refusal to redact out Ms Lu's employment history**
In the original skeleton, Mr Nesbitt contended that details of complaints made by and against Ms Lu, referred to as her 'employment history', should have been redacted out by the tribunal to protect Ms Lu from future damage to her career. The tribunal had already decided to derogate from open justice by sitting in private and protecting the identity of the third parties; yet it had failed to apply the same logic to protection of Ms Lu, despite her acquittal on both counts.

106 The tribunal, Mr Nesbitt argued, had been wrong to say that the contested material was 'an essential part of the comprehensibility of the judgment' and 'accordingly should be placed in the public domain'. The 'workplace issues' were, said Mr Nesbitt, 'at most – matters of background, which ultimately had little or no bearing on the Tribunals [sic] analysis of or findings about the matters it had to determine', which related narrowly to the Instagram posts.

107 That was wrong, Mr Nesbitt argued. The judgment could have been made comprehensible, he said, if 'some of the material the Appellant asked to be left out of the published judgment were omitted'. It was irrelevant that, as the tribunal observed, Ms Lu had herself placed the evidence about her employment history before the tribunal. She could hardly do otherwise as she had to defend herself against the allegations; she was an accused, not a litigant by choice.

108 Mr Nesbitt complained (under the ninth ground of appeal) that the tribunal had slavishly relied on *Spector*. That case did not ordain that every defendant appearing before the tribunal must inexorably be identified. The *Spector* case was no substitute for a fact specific balancing exercise, which was not carried out, Mr Nesbitt argued. The decision in *Spector* said nothing about redacting out irrelevant and damaging employment history from a tribunal's decision.

109 Ms Lu in her replacement skeleton added the submission that there was no general public interest in publication of the workplace issues, which she again characterised as 'unrelated' to the allegations (while Mr Nesbitt had called them 'at most … background'). The allegations were not determined by the tribunal; their publication interfered with her right (under art 6 of the Convention) to a fair trial because those allegations were not properly determined at a fair and public hearing by an independent and impartial tribunal established by law.

110 Ms Lu complained that the tribunal ignored the common practice in other legal forums of observing 'safeguards aimed at providing privacy and protection to the maker of the allegation' and that the rationale for that policy, especially in relation to young women, is obvious. She complained that the two firms had made extensive and false allegations against her and distorted her employment history. The tribunal then adopted inconsistent, conflicting and contradictory reasoning for anonymising the firms and the third parties but not herself.

111 Mr Mulchrone submitted that the tribunal's assessment was not flawed and that its assessment and conclusion should be respected. The tribunal was the best arbiter of what needed to be included in order to make its judgment comprehensible. It was entitled to decide that the employment history should be included, in the tribunal's words, 'to avoid neutering the judgment and seriously undermining its usefulness to both the public and the profession.'

112 Furthermore, Mr Mulchrone pointed out, the tribunal had sensibly not included any reference to 'sexual' harassment in its published decision. It had omitted reference to any of the alleged harassment being sexual, presumably through sensitivity to the particular considerations that arise where complaints are made of sexual harassment by young female lawyers.

113 **1732.1, 4123, 4323**
Again, I find no fault with the tribunal's decision to allow the contextual material to appear in the judgment. The tribunal was entitled to let readers of its judgment know what had been alleged by Ms Lu and what had been alleged against her by her accusers. It was relevant to the case against her and relevant to her defence against the charges. I have already explained why.

114 **1732.1, 4123, 4323**
I think it would have been possible to draft the judgment in language that omitted those matters, without rendering the judgment incomprehensible. But there was no obligation on the tribunal to do so. The default position is that hearings are held in public and judgments published. Although, regrettably, the hearing did not take place in public here, the judgment should not exclude relevant material without adequate cause. Here, I find no adequate cause.

115 **The tribunal's decision to anonymise the two firms and certain individuals**
This subject has been touched upon already but it is necessary to return to it because Ms Lu asks the court to grant permission to add various further grounds including one numbered 13:

> 'Wrongly and/or in error of law to have derogated from the principle of open justice by anonymising the SRA's witnesses and redacting the SRA's evidence, when no application for anonymisation / redaction to this effect was made, no competing demands were in place, no Article 8 rights were engaged and no requirement of the administration of justice was present to have justified such derogation; failing to consider the Appellant's Article 6 of the ECHR right to fair trial and the interference with her Article 6 right.'

116 This complaint bears some resemblance to Mr Nesbitt's ground 10 complaining of a failure to act consistently; however, Ms Lu now seeks to formulate the complaint, as I understand it, as one of conducting an unfair trial in breach of art 6 of the Convention. The essence of the complaint is of a lack of even-handed treatment as between herself and the anonymised third parties.

117 The purpose of the proposed new ground 13 is to support a new head of relief sought, stated in Ms Lu's witness statement: '[p]ublication of the SRA's witnesses and those who gave hearsay statements in respect of Allegations 1.1 and 1.2'. This is something like the antithesis of the relief sought when the appeal was brought, which was to anonymise her own identity.

118 As long ago as April 2021, Mr Nesbitt stated in his original skeleton (para 53) that Ms Lu had made applications to the tribunal below to anonymise her identity and Instagram account details and redact out personal information concerning her employment history; and also an 'alternative' application:

> 'that the persons who provided statements / reports / witness statements to the SRA and the Tribunal (excluding the third party expert witnesses), who brought and participated in the Tribunal proceedings be published in the judgment'.

119 Ms Lu now revives this attempt to lift the anonymity the tribunal directed in respect of these third parties. She does not explicitly mention the two law firms, but I take her request to include them. They are limited liability partnerships and thus legal persons. The relevant persons have not been named as interested parties or served with the application for permission to amend the grounds; but I have considered such comments on my draft judgment as they have made.

120 Ms Lu is making something of a volte-face. She no longer seeks to have her own identity removed from the public domain, where it has been by virtue of the published judgment since early 2021 (and in cause lists before that). She did not ask for the cause list for the appeal to be anonymised; nor did she ask the court to sit in private to hear the appeal; nor did she pursue her initial application for interim relief to protect her identity.

121 Ms Lu submits in support of this newly formulated ground that there was no justification for anonymising the third parties including those who gave hearsay evidence in the form of written statements containing (undetermined) allegations against Ms Lu, but who were not called to give oral evidence before the tribunal. She submits that the protection of anonymity was not sought, their art 8 rights were not engaged and the tribunal's derogation from open justice to protect their identities was unjustified.

122 Ms Lu submitted that she enjoys the right under art 6 to a fair trial and under art 10 to freedom of expression. The right of the third parties to protection of their identity was weaker than Mr Spector's; like him, they merely participated in the proceedings as providers of evidence but, unlike him, they were not accused of anything or acquitted of anything. Unwanted publicity frequently attends litigation and is part of the price of open justice.

123 In support of this new ground, Ms Lu championed the importance of open justice; an irony not lost on the court. Derogations were a matter of evaluation not discretion; they should be exceptional; and the burden is on the party seeking a derogation to show that it is, exceptionally, justified. The tribunal's unjustified derogation from open justice by anonymising the third parties compromised the fairness of the trial; the anonymity order should be quashed.

124 Mr Mulchrone complained of the lateness of the application to amend; so late was it, he noted, that he had to work on it over the weekend (21–22 May 2022) before the hearing, before it was actually sealed and issued (on 24 May 2022). He was able, to his credit, to produce a full note of the SRA's arguments in opposition to the application for permission to amend. Ms Lu said that the lateness was due to the very late loss of the services of her counsel.

125 Mr Mulchrone submitted that the late application sought to raise completely new points which the SRA would have no opportunity to answer. In so far as fairness required an opportunity to respond with further evidence, that was plainly impracticable. Even where a new ground raised a 'pure point of law'

three criteria identified by Haddon-Cave LJ in *Singh v Dass* [2019] EWCA Civ 360 at [18] needed to be satisfied.

126 The first is that the other party must have had adequate time to deal with the point; the second, that the other party has not acted to its detriment on the faith of the earlier omission to raise the point; and the third, that the other party can be adequately protected in costs.

127 Mr Mulchrone also submitted that the new ground 13 attacking the decision to anonymise the third parties did not appear to have been argued below. However, as Mr Nesbitt noted, Ms Lu clearly complained below of differential treatment and application of a double standard in the tribunal's consideration of anonymity. That is the essence of the complaint.

128 **1732.1, 4123, 4323**
In relation to the proposed new ground 13, Mr Mulchrone repeated his submission (which I have rejected) that anonymity decisions are case management decisions not appealable under s 49 of the 1974 Act. He submitted alternatively that the tribunal was entitled to sit in private to protect the third parties from exceptional prejudice or exceptional hardship; and repeated his submission (in response to ground 10) that the tribunal was entitled to differentiate between Ms Lu and those not before the tribunal.

129 I am satisfied that the SRA was not prejudiced by the lateness of the amendment. It was the same argument as already made in the 10th ground of appeal. The only difference was that there was a new request for relief, in the form of an order lifting the anonymity of the persons to whom the tribunal had granted it. The SRA has not acted to its detriment on the faith of the earlier omission to raise the point; nor has it incurred significant costs arising from the point.

130 In my judgment, it is just to allow the amendment for those reasons and because there is a real issue as to whether the anonymity granted to the third parties was justified. The amendment is made very late but I take into account that Ms Lu has lost the services of two counsel since the appeal started; that the point is one that she did raise before the tribunal below; and that the new head of relief sought follows the logic of the 10th ground of appeal.

131 The third parties should, ideally, have been notified and given an opportunity to make representations in respect of this ground of appeal, even though they made none to the tribunal, as far as I am aware, and did not seek the anonymity bestowed on them. I therefore made available to them a draft of this judgment and considered their comments on the draft before finalising it.

132 I permit this ground of appeal to be raised also because this appellate court must conduct the appeal on the basis of open justice, unless otherwise provided under the Civil Procedure Rules (r 39.2, discussed above). I would be hampered in performing my duty to conduct the appeal openly if I were to adopt anonymity decisions made by the tribunal which I do not consider were justified.

133 In my judgment, this new ground of appeal is well founded, as is the existing 10th ground of appeal, quoted above. I uphold both grounds. I do not consider that the anonymity orders made below were justified. Nor do I consider that I would be justified in continuing them in this judgment, applying the tests in CPR r 39.2. However, I make an exception (with some hesitation) in the case of Persons A, B and C because of their contractual rights, as already stated.

134 The chairman took it upon himself to intervene in support of anonymity. It was sought neither by the third parties themselves nor by the SRA. Mr Johal's submissions had supported open justice. It was Ms Lu who wanted the hearing to be held in private. The chairman did not conduct a fact specific evaluation bringing intense focus to the factual position of the third parties and their rights under art 8. He merely mentioned their absence from the hearing.

135 The SRA had brought its case without calling the absent witnesses the tribunal took it upon itself to protect. They could have attended or been called as witnesses. The chairman did not make any clear findings that they would suffer exceptional hardship or prejudice if identified. Nor did he analyse why the reasoning in the *Spector* case should not be applied to accusers as well as accused, at any rate where the accused is acquitted.

136 **1732.1, 4123, 4323**
In the ruling, the tribunal did not differentiate between the two law firms and the individuals, nor between the individuals against whom allegations were made and others such as Ms Pearson and Mr Ewing against whom no particular wrongdoing was alleged. Yet, the two firms were shielded from being accountable publicly for reporting alleged misconduct and bringing accusations to the SRA which went before the tribunal and were then found not proved.

137 **1732.1, 4123, 4323**
I see no good reason why Ms Pearson, Ms Stone, Mr Ewing and Mr Blakemore, should have been anonymised by the tribunal. They were individuals properly doing their jobs. Their role was not remarkable or particularly controversial. There was no reason not to apply the default position of open justice. They had no particular private or family life issues to protect. I can find no justification in r 39.2 for continuing their anonymity in this judgment.

138 **1732.1, 4123, 4323**
In my judgment, the sweeping anonymity orders in respect of the third parties ought not to have been made. Courts and tribunals should not be squeamish about naming innocent people caught up in alleged wrongdoing of others. It is part of the price of open justice and there is no presumption that their privacy is more important than open justice.

139 **1732.1, 4123, 4323**
I do not shrink from naming Cadwalader and Pillsbury in this judgment. While I have narrowly decided to continue the anonymity of Persons A, B and C, the tribunal's decision to anonymise them was not adequately reasoned. My decision does not mean I would have made the same decision or that I endorse the tribunal's decision and reasoning on that point.

140 **1732.1, 4123, 4323**
The fact that those persons were unrepresented; that allegations were made against them; and that the power under r 35 of the SDPR existed, were not good and sufficient reasons to justify intervening, unasked, on their behalf. The decision to do so created a disturbing impression of unequal treatment, offering succour for the SRA's side of the case while denying it to the innocent accused.

141 **1732.1, 4123, 4323**
The favour was extended to the corporate LLPs employing Persons A, B and C without adequate reason. Anonymity was applied, for no apparent reason, even to a barrister and an expert witness who had innocently and fortuitously become part of the narrative.

142 **1732.1, 4123, 4323**
It is particularly unfortunate that while the tribunal granted 'X LLP' (Pillsbury) anonymity, it went on to criticise the firm it was calling X LLP. That gave the impression of favour, according to Pillsbury the luxury of anonymity and shielding the firm from publicity despite the criticism. Thus, in the published decision at para 196.54, the tribunal said this:

> 'The Tribunal had a number of concerns about the investigation carried out by X LLP: the Tribunal was told that HI who was based abroad apparently found the post and drew it to the attention of WB also based abroad but in a different part of the world and to Person A in London. However, the Tribunal did not hear any evidence from HI. Person A had not seen the post before it was drawn to their attention. The investigation was carried out abroad and headed by WB even though the post related to Person A, who was based in London in the same office as the Respondent. Nobody in this country or those abroad investigating the matter spoke to the Respondent to get her explanation of the post. Instead this issue was tied in with a self-reporting exercise by the firm to the Applicant which related mainly to grievances that had been raised by the Respondent including relating to bullying and harassment. The Tribunal generally found the Respondent to be a credible witness in respect of allegation 1.1. The Tribunal found that if the firm had informed the Respondent and obtained her explanation rather than simply reporting it to the Applicant, the fact that she had been bitten by a dog on 15 June 2018 and had medical treatment on that day would have come out and the outcome might have been quite different from what transpired.'

143 **4321**
I am also concerned that the test for sitting in private in r 35 of the SDRP, exceptional prejudice or hardship, including in cases where no application is made by the person affected, is out of tune with the common law principle of open justice and with the case law on balancing art 8 and art 10 rights. I hope the issue and the rule will be looked at again to avoid further difficulties of the kind that have arisen in this appeal.

144 **The allegation of serious procedural irregularity**
In her witness statement supporting the application for permission to amend the grounds, made as late as 20 May 2022, Ms Lu states that she has fresh evidence and that she wishes to deploy it to support an allegation verging on one of bad faith against the SRA. She seeks the court's permission to amend her grounds to add a new ground 14, in the following terms:

> 'Unjustly to have allowed the proceedings to proceed when there were serious procedural irregularities, namely that: (i) the SRA had no digital evidence to prove the existence of the alleged online posts upon which Allegations 1.1 and 1.2 were brought and the SRA's witness evidence contained assumptions / inconsistencies / inaccuracies; and (ii) the SRA had not complied with notices served under Rules 28 and 29 of the Solicitors (Disciplinary Proceedings) Rules 2019 and Civil Evidence Act 1995, the SRA failed to prove the authenticity of the documents and the version of facts set out in the statements it sought to rely on.'

145 This attempt to amend arises from evidence of emails obtained by Ms Lu from Cadwalader, by means of a subject access request. It is said that certain emails she thereby obtained, indicated that the SRA was aware when it decided to continue with the proceedings that the images it possessed of what purported to be screenshots of the incriminating posts, were not actual screenshots and could not be reliably linked to Ms Lu's Instagram account because the presence of posts on the account is temporary and the images relied on could not be reliably matched to the dates of the alleged posting.

146 In her skeleton argument for the appeal, Ms Lu submitted that the SRA 'knew that it could not prove the alleged online posts existed or advance Allegation 1.1/1.2; it concealed this material information from the SDT [ie the tribunal] and the Appellant and continued to pursue the SDT proceedings'. That was 'a serious procedural irregularity, it misled the SDT, it affected the SDT's decision making on a number of issues, including anonymisation / redaction and costs'.

147 I refuse to permit this ground of appeal to be added to the appeal. The application to amend is made very late. The SRA is prejudiced because it would need an opportunity to answer the serious allegation that it pursued a case it knew or should have known it could not win. An examination of this ground would involve something like an inquest into how the case was conducted below. It would be a complex and detailed exercise.

148 It is also very unlikely that there is any merit in the proposed new ground. The SRA was entitled to rely on the context and content of the posts as, at least, strong circumstantial evidence that Ms Lu was their author. Indeed, she admitted as much in the case of the corgi post. Her defence centred on her explanation for the post, namely that she had been bitten by a dog.

149 In the case of the abuse and threat posts, it was not an unreasonable starting point for the SRA to bring a case founded on the likelihood that the apparent author was also the real author. That this was not proved does not come near to condemning the SRA's decision to bring the charge on the evidence it had. I refuse permission to amend to add the new 14th ground of appeal.

150 **The tribunal's refusal to order the SRA to pay all or part of Ms Lu's costs**
Finally, Ms Lu asks the court's permission to amend to add a 15th ground of appeal, in the following terms:

> 'Wrongly and/or in error of law to have refused to order the SRA to pay all or part of the Appellant's costs.'

151 The essence of the complaint is that if the tribunal had been made aware that the SRA knew it had no case against Ms Lu, the tribunal would probably have ruled in her favour on the issue of costs, rather than making no award of costs. The court in this appeal should therefore reverse the decision to make no order as to costs and should substitute an award of costs in Ms Lu's favour.

152 The tribunal's decision not to award Ms Lu's costs seems to me to be properly reasoned on the information available to it. I do not find arguable merit in this ground independently of the content of the previous ground. The tribunal's decision in respect of costs was one for its evaluation and discretion and I do not find any arguable flaw in it. I refuse permission to advance this ground.

153 **1732.1, 4123, 4323**
Concluding observations
For those reasons, the appeal succeeds in part. I uphold grounds 10 and 13 only. However, I do not find it necessary to go further and remit the matter, set aside the anonymity orders or require the tribunal to publish its decision in a different form. This judgment naming the relevant persons suffices, without the

grant of further relief. The court's dissatisfaction with the decision appealed against is sufficiently demonstrated by the terms of this judgment.

154 The passage quoted above from the judgment shows how much less clear a heavily redacted decision is to the reader trying to make sense of it. No wonder reporters are deterred from reporting such decisions. The lack of clarity was compounded by the tribunal persistently referring (see published decision, paras 106–194, *passim*) to an anonymised witness as 'the witness'.

155 This was done, the tribunal explained, in the interest of gender neutral terminology, but 'the witness' was not even referred to by each witness's equally gender neutral initials. This makes it difficult to know to which anonymous witness, at first denoted by initials, the tribunal was referring without laboriously searching earlier in the decision.

156 Having held that grounds 10 and 13 of the appeal succeed, I have identified in this judgment the persons identified in it but not identified by the tribunal below. I decline to make any further order by way of remedy. On all other grounds, the appeal is dismissed. But the bringing of the appeal has raised some important issues, as I have mentioned.

157 **1732.1, 4123, 4323**
In future, if in any appeal to this court from a domestic tribunal, a party asks the court to lift an anonymity order or other restriction on publication of information in (or in connection with) the judgment below, affected parties should be asked if they consent. Unless their written consent is obtained and can be provided to the court, they should generally be served with the papers as interested parties.

Notes
[1] *Homage to Catalonia*, App 1, p 1 (Penguin Orwell Centenary edition; formerly ch V).

Neutral Citation Number: [2024] EWHC 2428(Ch) **Claim No. BL-2024-001250**

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Royal Courts of Justice
Rolls Building, Fetter Lane, London, EC4A 1NL

Hearing Date: 19/9/2024

Before: **Charles Morrison**
(sitting as a Deputy Judge of the High Court)

B E T W E E N:

PUMP COURT CHAMBERS LTD

Claimant/Applicant

-and-

GILLIAN BROWN (also known as GILLIAN GOODFIELD)

Defendant/Respondent

- -

Saaman Pourghadiri (instructed by **Cooke, Young and Keidan LLP**) for the **Claimants**
The Respondent in person

Hearing date: 19 September 2024

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 10.30 am on 25 September 2024.

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The Background

1. Earlier this month Edwin Johnson J, heard an application by a company (**PCC**) for proprietary and freezing injunctions in respect of money it said had been wrongfully taken from it by its former credit control manager (**Mrs Goodfield**). PCC is a company through which a barristers' chambers (the **Chambers**) conducts its business. PCC is one of three companies that manages the affairs of the Chambers. Its role is to receive monies owed by solicitors (and other clients) to barristers. Those monies are then paid by PCC to the barrister to whom they are owed.

2. Until June of this year, Mrs Goodfield had responsibility for the bank account into which fees due to barristers were paid, and for ensuring that those funds were then paid on to the relevant barrister. Following her departure, PCC began to discover that during the past five years, Mrs Goodfield had stolen in the order of £2.75m from the bank account. Having been served with the Orders granted by Edwin Johnson J, Mrs Goodfield produced an affidavit in which she candidly admitted to her wrongdoing; she had indeed taken the money and now bitterly regretted it.

3. At the original without notice hearing, Edwin Johnson J had been invited to and did, sit in private; the learned judge also agreed to make the anonymity order that PCC asked for. On the matter coming before me last week for the inter partes hearing, I made it clear at the outset that I was uncomfortable with the notion that the court should again sit in private and that given Mrs Goodfield had now accepted the thrust of the allegations against her, there could be no justification for a continuation of the anonymity order.

4. In his most helpful skeleton argument which I received prior to the hearing, Mr Pourghadiri who appeared for PCC, submitted that I ought to carry on sitting in private and also continue the anonymity order. The matter was not however fully developed even by the standards of a skeleton and none of the accompanying authorities touched on the matter. At the sitting of the court, I offered Mr Pourghadiri the option of coming back before me the following Tuesday with the existing order being stood over in the meantime. After taking instructions, I was informed by counsel that PCC had decided to press its case before me; it felt that securing the disclosure orders asked for forthwith outweighed the benefit of having more time to prepare argument on the privacy points.

5. Having heard argument on the privacy issues, I indicated to Mr Pourghadiri that I was against him on both points. The court thereupon sat in public and I proceeded to hear submissions on the injunctions. In the event, I was content to continue the proprietary and freezing orders made by Edwin Johnson J, and in light of the full and frank admissions set out in the evidence delivered by Mrs Goodfield, and the additional facts and matters disclosed in the evidence put before me from the Senior Clerk of the Chambers, Mr Atkins, I was also willing to make the further disclosure orders sought. There was in my judgment quite clearly a serious issue to be tried. The balance of convenience favoured the making of the order and it was just and convenient to do so. Insofar as the basis for the freezing order requires the application of a different analysis, I was satisfied that PCC had a good arguable case on the merits. Given her now admitted past behaviour, but importantly on Mrs Goodfield's evidence, a less than

comprehensive explanation as to what was taken, what use it was put to and where it is now, I was satisfied that there remained a real risk of dissipation.

6. It was plainly, in my judgment, just and convenient to make the freezing order in addition to the proprietary injunction. I accept that to the extent the proprietary claim and any tracing based upon it fails, it is right and proper to seek to secure the position with an *in personam* order.

7. I should say that Mrs Goodfield, who was throughout the hearing showing no little signs of distress, made no attempt to resist the orders asked for. Her demeanour was consistent with the approach taken in her written evidence which was that she could not quite come to terms with the scale of her wrongdoing which she could now so very clearly see. At any rate, I took time to explain the proceedings to Mrs Goodfield so as to ensure that as best she could, she was able to follow the developing case. That however was a poor substitute for being properly advised by lawyers. I urged Mrs Goodfield at the outset and at the end of the hearing to seek advice; I reminded her of the availability of legal aid; I suggested that a trip to the Royal Courts of Justice Information desk might point her in the direction of free representation units. Despite her claims that she had tried hard to engage assistance but to no avail, I made it clear that she ought to keep trying.

8. Returning to the privacy issues, having conveyed the decision of the court to Mr Pourghadiri, I indicated that I would, given the serious nature of the points raised, give full reasons by way of a judgment to follow. It is to those reasons that I will now turn.

The arguments advanced by Counsel

9. Rule 39.2 of the Civil Procedure Rules confirms the well-known general rule that a hearing must be held in public. A hearing must however be held in private if the court concludes that it is necessary to sit in private in order to secure the proper administration of justice and that one of the grounds set out in CPR 39.2(3) is established. I was invited to reach the view that grounds (a) "*publicity would defeat the object of the hearing*", (c) "*it involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality*" and (g) *the court for any other reason considers this to be necessary to secure the proper administration of justice*", could be made out for the reasons relied upon by PCC.

10. The first ground developed by Mr Pourghadiri was that being called upon to respond to the inevitable consequences of publicity would affect the ability of PCC to conduct these proceedings. He invited me to consider how barristers organise themselves; resources are thin, he submitted, and costs are defrayed "from the pockets of self-employed individuals". A small team within the Chambers were being themselves compelled to devote their own time to dealing with the alleged fraud; to have to simultaneously also attend issues that would flow from publicity would be "all the worse". For this reason alone, I was invited to preserve the private nature of the proceedings not for the four months originally asked for but, having been pressed by me to reconsider the ambition, for four to six weeks.

11. Whilst all current members of the Chambers had now been informed of the wrongdoing and the expected loss, past members had not. It was not yet known if past members would also be affected; far better, it was submitted, if the full picture could be understood as a result of

effective disclosure and upon receipt of an expected report of the losses; at that stage the correct position could be communicated to those past members of the Chambers.

12. Allowing the matter to become public now, it was submitted, put at risk the integrity of the Chambers as a going concern. The result could be something analogous to "a run on the bank". High earning barristers might decide to leave before their expenses were increased, something that they might consider a real possibility given the nature and extent of Mrs Goodfield's wrongdoing: but this was not the only issue. Former members might make claims for sums unpaid to them, despite not having any continuing obligation to meet the expenses of the Chambers. A spiral of decline could thus be the result of members of the Chambers arriving at the view that they should not be last to leave.

13. I was also invited to take into account a likely practical problem that would afflict PCC. Debtors, the preponderance of whom being firms of solicitors, might use the circumstances surrounding the wrongdoing as a reason to delay making payment upon sums properly due and owing to PCC. Such an outcome would merely serve to exacerbate the already painful liquidity problem caused by the actions of Mrs Goodfield. The problem was serious enough to allow Mr Pourghadiri to refer to it as posing an existential threat.

14. Turning away from the position of the Chambers, in the context of the application and the orders sought, it was submitted, although not in the skeleton argument of 17 September, that a public hearing would result in a material tipping-off risk. Third parties who might have received proceeds of the wrongdoing would be alerted to the existence of the order in circumstances that would permit them to take steps to dissipate or conceal the relevant assets. On the PCC case, some £2.75m had been taken; Mrs Goodfield appeared to be saying that all of the money taken by her had been spent on her lifestyle. PCC found it hard to accept that what would amount to approximately £700,000 a year had been, as they put it, "frittered away". It was submitted that some funds must still be preserved and a proper opportunity to trace should be afforded.

15. For all of these reasons it was submitted that a private hearing was necessary to:

    a. secure the proper administration of justice,
    b. avoid defeating the purpose of the hearing, and
    c. protect the interests of "Pump Court".

The Law

16. The open justice principle to which this court will have regard, was explained over a century ago by the House of Lords in *Scott v Scott* [1913] AC 417. In that case, Lord Shaw of Dunfermline observed "Publicity is the very soul of justice." The position was more recently reviewed by the Supreme Court in *Cape Intermediate Holdings Ltd (Appellant/Cross-Respondent) v Dring* [2019] UKSC 38, in a case concerning access to documents which featured in the proceedings. In opening her judgment, citing a principle of broad application, Lady Hale P, observed:

> "With only a few exceptions, our courts sit in public, not only that justice be done but that justice may be seen to be done."

17. In *Scott*, Lord Atkinson's view [**463**] was that:

> "The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses, and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trial is to found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect."

18. The position of Viscount Haldane LC, [**435-437**] was that the court would only sit in private if there was "some other and overriding principle", and where "justice could not be done at all if it had to be done in public". In addressing the exceptions to the general principle, the Lord Chancellor said this:

> "The other case referred to, that of litigation as to a secret process, where the effect of publicity would be to destroy the subject-matter, illustrates a class which stands on a different footing. There it may well be that justice could not be done at all if it had to be done in public. As the paramount object must always be to do justice, the general rule as to publicity, after all only the means to an end, must accordingly yield. But the burden lies on those seeking to displace its application in the particular case to make out that the ordinary rule must as of necessity be superseded by this paramount consideration. The question is by no means one which, consistently with the spirit of our jurisprudence, can be dealt with by the judge as resting in his mere discretion as to what is expedient. The latter must treat it as one of principle, and as turning, not on convenience, but on necessity."

19. With all of this mind I must apply the rule as laid down in CPR 39.2(3). As is made clear in the notes to the rule set out in the 2024 edition of *The White Book*:

> "However, that rule is not absolute. CPR 39.2(3) is facilitative and permits certain limited exceptions, always assumed to that being subject to the interests of justice."

Discussion

20. It is said that PCC and the Chambers to which it is related will have to spend time dealing with the consequences of publicity if I do not sit in private. The resources of PCC are slim. This indeed may be an inconvenience, perhaps even a severe distraction. But is that a good reason to depart from the principle of open justice? I have to say I don't think that it is. Is it the position that the more impecunious the applicant, the more likely the court will be to close the doors of the court? That is not an argument that holds any attraction for me.

21. It does not seem to me that the outcome feared by PCC is such as would stand in the way of the proper administration of justice or defeat the object of the hearing.

22. It is also necessary to consider what is the object of the hearing. To my mind the object was not, as was submitted by Mr Pourghadiri, to protect the integrity of the Chambers, but rather to decide if PCC was entitled to the injunctions it asked for, along with the disclosure orders. Would in these circumstances a public hearing prevent the object of the hearing being achieved? The orders have been made. Mrs Goodfield's assets, or perhaps more properly the assets belonging to PCC, have been frozen in her hands. She must now explain what has

become of the money she took; if the funds are now represented by chattels, she must explain what they are and who has them. None of this is prejudiced by the court doing its business, as it usually does, in public.

23. Whilst it might be convenient to be able to approach former members of Chambers in four weeks' time with a full and detailed explanation of precisely what might have been lost to them as compared to having to deal in generalities at this juncture, does such a benefit weigh more heavily in the scales than the deeply entrenched principle to which I have made reference? Once again, I cannot see that it does; the point does not persuade me on the two tests which I am invited to apply. Moreover I can see that former members of the Chambers, and indeed solicitors' firms having dealings with PCC, might want to know of the problem at the earliest opportunity. In my judgment it is not for the court to regulate such affairs without a proper case for doing so being put before it. I don't see that it was in the context of the question of whether or not the court would sit in private.

24. I also had to weigh in the scales the likely impact on PCC of the disclosure of the wrongdoing. That argument, to my mind, lost its force upon the disclosure that all members of the Chambers are now aware of the extent of the wrongdoing of Mrs Goodfield. Matters will now take their course, although I did not in any case find it easy to come to the position that sophisticated members of a respected chambers would feel it necessary to seek to practise elsewhere when it was patent that their management colleagues were doing their utmost to recover the proceeds of an alleged fraud.

25. I confess to a degree of difficulty with the "tipping-off" point raised at the hearing by Mr Pourghadiri. Although no authorities on the point were put before me, such an argument, it seems to me, can provide a justification for the court to sit in private and for the making of an anonymity order. It is at once obvious why the object of the hearing might be prejudiced by the subject matter of a tracing claim being ventilated in public and as a consequence, immediately communicated to a wrongdoer.

26. On balance, I do not in the circumstances of this case, see that the risk to the freezing and disclosure exercise makes it necessary for the matter to be heard in private so as to secure the proper administration of justice, or to avoid defeating the purpose of the hearing. There has been privacy hitherto; the injunctions were granted on 21 August; those acting in concert with Mrs Goodfield, if there are any, the privacy attaching to the order of Edwin Johnson J notwithstanding, would have had ample opportunity in the past four weeks to take steps aimed at concealment or dissipation.

27. The question of whether to make an anonymity order is dealt with under CPR 39.2(4). The rule provides:

> "The court must order that the identity of any person shall not be disclosed if, and only if, it considers non-disclosure necessary to secure the proper administration of justice and in order to protect the interests of any person."

28. For the reasons that I have given, *mutatis mutandis*, I am not persuaded that non-disclosure of the party names is necessary so as to secure the proper administration of justice, nor is it necessary in order to protect the interests of PCC. Whilst it was appropriate to make such an

order at the *ex parte* stage, in light of the admissions of Mrs Goodfield, such an order is not now necessary on her account.

Disposal

29. For the reasons that I have given, I refuse to order that this matter be heard in private. I also decline to make any anonymity order under CPR 39.2(4).