Case No: KA-2022-000199
Neutral Citation Number: [2023] EWHC 1920 (KB)

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand
Holborn
London
WC2A 2LL

BEFORE:

MRS JUSTICE MAY DBE

BETWEEN:

ROBIN SIMON GRAHAM MAKIN	**Claimant**
- and -	
MINISTRY OF JUSTICE	**Defendant**

Representation
Mr David Boyle on behalf of the Claimant
Mr Paul Joseph (instructed by the Government Legal Department) on behalf of the Defendant

Judgment date: 26th July 2023
Hearing date: 12th July 2023

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May J:

Introduction

1. The application currently before me was issued by the Defendant ("the MoJ") on 21 October 2021. It invites the court to revisit and remove an order for anonymity covering the Claimant. The order was originally made by Jeremy Baker J in 2014; it has continued and been extended into a number of costs and other proceedings which have taken place since.

Background

2. In 2003 the Claimant's wife died in distressing circumstances. Their two children were then very young. It came to the Claimant's attention that the Coroner had been in contact with an official at the Home Office about his wife's death, accordingly he made various Subject Access Requests to the MoJ relating to his personal data.

3. By two sets of proceedings issued against the MoJ in 2006 and 2007 the Claimant sought damages for delay in producing documents, together with an order for disclosure and destruction. The claims were consolidated and came before Jeremy Baker J for a trial over two days in February 2014 ("the AB claim"). Prior to the hand down of judgment on 11 June 2014, the Claimant put in a witness statement supporting his application for anonymity. The judge made an order for anonymity, explaining his reasons in his judgment at [2014] EWHC 1847, [60]-[62]:

> "60. ...I am aware and understand the concerns of the claimant that he would not wish any of the disclosed or withheld material to be in the public arena, or any details relating to that material to be disclosed. Indeed, as I have already noted the defendant has undertaken to destroy all of this material following the conclusion of these proceedings. I am of course aware that in normal circumstances the benefits of open justice to society will outweigh the individual's concern for privacy, and that necessity is required to be shown in order to overrule the general principle. In the present case I have read with care the evidence of the potential harm that may be caused to the claimant's family and am of the opinion that its level is such that in this case it is necessary to protect their Article 8 rights by affording them a suitable level privacy [sic] in this case.
>
> 61. I have throughout this judgement [sic] specifically refrained from setting out verbatim or indeed providing detailed descriptions of the disclosed or withheld material. Moreover the claimant's name has been anonymised and shall remain so. Therefore I do not consider that any part of [the judgment] will require to be made the subject of a non-disclosure order…
>
> 62. Furthermore I make an order pursuant to CPR r.5.4C that in the event that any application is made by any third party to view any of the evidence, pleadings, orders or ancillary judgments in this case, that not only should any application be made on notice to the claimant but that all details whereby the claimant might be identified from those documents be removed, together with any details disclosing the circumstances surrounding the death of his late wife".

4. Jeremy Baker J subsequently considered the costs of the AB claim, in respect of which he gave judgment and made an order for costs dated 28 November 2014. His order essentially required both parties to pay some of each other's costs. It is the course of the ensuing, protracted costs and other proceedings which have generated the occasion for the invitation made by the MoJ to this court to revisit the order for anonymity.

5. There is a detailed history of proceedings set out in the judgment of Murray J dismissing permission to appeal from orders of Costs Judge James: [2023] EWHC 72. I do not propose to rehearse every aspect of that history here. The most material milestones in what has occurred since 2014 appear to me to be these:

   (1) The MoJ started detailed assessment proceedings in January 2017 ("the First Bill"), obtaining a default certificate in Liverpool in November 2017.
   (2) The default certificate was set aside by DJ Jenkinson in Liverpool. He made various orders including an unless order requiring the Claimant to start detailed assessment proceedings and transferring all costs proceedings to the SCCO to be heard by a Costs Judge there. DJ Jenkinson made costs awards against the Claimant, including one on an indemnity basis, on 12 and 16 March 2018.
   (3) On 14 May 2018 the Claimant commenced detailed assessment proceedings ("the Claimant's Bill") and on 20 June the MoJ started detailed assessment proceedings on DJ Jenkinson's costs orders from March ("the Second Bill").
   (4) On 3 May 2019 a one-day hearing was scheduled to determine preliminary issues identified by the MoJ. The hearing was aborted after the Claimant's behaviour disrupted proceedings (see further below).
   (5) On 2 April 2020 Costs Judge James made directions relating to the First and Second Bills and the Claimant's Bill. She subsequently refused to set aside that order, on 5 June 2020. The Claimant's application for permission to appeal Judge James' later refusal, including on a ground of bias, was dismissed by Johnson J on 28 August 2020 as totally without merit.
   (6) Costs Judge James' directions provided for a hearing date of Monday14 September 2020. On Sunday 13 September 2020 the Claimant applied to the out of hours judge, Cavanagh J, for an injunction restraining Judge James from proceeding with that hearing. The Claimant failed to inform Cavanagh J of Johnson J's dismissal of his appeal. Cavanagh J made an order dismissing the application; he required the Claimant to inform Judge James of his order at the start of the hearing the next day.
   (7) On 14 September 2020 there was a telephone hearing before Costs Judge James, which was adjourned after the Claimant said that he could not hear properly. The Claimant did not tell the Costs Judge of Cavanagh J's order at the commencement of the hearing.

(8) On 7 December 2020 the Claimant lodged an appeal against four orders made by Costs Judge James.

(9) On 23 April 2021 Costs Judge James handed down a long and detailed judgment, given effect to by two orders dated 4 May 2021. Amongst other things the Claimant's Bill was reduced by 70% for misconduct. The Costs Judge gave further directions for a hearing to determine consequential matters including costs of the detailed assessments. The Claimant lodged an appeal against these orders on 20 May 2021.

(10) Meantime, by an order dated 13 March 2020 in entirely separate proceedings between the same parties ("the E11 claim"), HHJ Freeland QC had ordered the MoJ to pay 70% of the Claimant's costs of those proceedings. On 7 June 2021 the MoJ applied for an order requiring the Claimant to start detailed assessment proceedings of his costs in the E11 claim. The E11 costs proceedings were also listed before Costs Judge James, and were thereafter listed alongside the existing costs proceedings in the AB claim.

(11) On 25 June 2021 the Claimant issued a claim for declaratory relief against The Transcription Agency LLP and Judge James ("the Transcription Service claim"). In order to avoid any "jigsaw" identification his identity was anonymised in those proceedings. On the same date he applied for Costs Judge James to recuse herself from any further hearings in the AB/E11 costs proceedings.

(12) There was a hearing in person before Costs Judge James on 12 July 2021, at which both the AB costs proceedings and the E11 costs proceedings were listed to be heard at the same time, the same parties being involved in both. Costs Judge James declined to recuse herself from either. She made an unless order against the Claimant requiring him to start detailed assessment proceedings in the E11 claim, which he did on 4 August 2021.

(13) By her order dated 15 October 2021 Eady J gave various directions relating to applications made by the Claimant to appeal various orders of Costs Judge James. Eady J's order included extending the anonymity order to cover the E11 costs proceedings. However, she was clearly concerned about the continued anonymity and required the MoJ to file any application to remove it by 27 October 2021. Indeed, her order provided that even if the MoJ made no application the court may itself choose to consider the continuation of anonymity at any further hearing in the appeal proceedings "and the parties need to be prepared to deal with that issue". The Claimant was ordered to pay the MoJ's costs.

6. The MoJ issued the present application on 27 October 2021, supported by the 13th witness statement of Mr Sivarayan. The Claimant filed a witness statement in opposition dated 27 October 2021. Counsel for the MoJ lodged a skeleton argument in support of the application on 15 November 2021.

7. The Claimant's application for permission to appeal in the conjoined costs appeals was heard by Murray J on 8 December 2021. He extended anonymity until the

determination of the MoJ's application to lift it, which application was to await his judgment in the appeals.

8. On 20 January 2023 Murray J gave judgment dismissing all applications for permission to appeal, declaring each to be wholly without merit. He released the hearing of the MoJ's application for removal of anonymity to be heard by another judge.

9. On 1 March 2023 the Claimant made a further witness statement opposing the MoJ's extant application to lift anonymity.

10. On 27 March 2023 Eyre J considered and dismissed the Claimant's application for permission to appeal Costs Judge James' order made in the E11 costs proceedings declining to recuse herself, and on 30 March 2023 Eyre J made an Extended Civil Restraint Order ("the ECRO") against the Claimant in the joint AB/E11 costs proceedings.

11. On 9 May 2023 Farbey J handed down judgment in the Transcription Service claim (see [5(10)] above), dismissing the Claimant's case on all points.

12. The present application was finally listed before Chamberlain J on 28 June 2023, but adjourned on the morning and re-listed before me today, 12 July 2023.

Sealed Envelopes

13. Late on Friday 7 July 2023, before the hearing listed for the following Wednesday, I received from the court office an envelope containing two sealed envelopes marked AB1 and AB2, which appeared to come from the Claimant. Before opening or considering the contents of either envelope I asked my clerk to find out (i) whether they had come from the Claimant and (ii) if they had, whether the contents had also been served on the MoJ so as to allow them to make any necessary submissions. The response from the Claimant given later the same day was that the MoJ had seen and considered the contents of AB1 but had declined to accept or consider the contents of AB2, in the belief that they were documents which they had delivered to the Claimant in 2014 and in respect of which they had given undertakings to destroy all copies, in the original AB claim. In the light of this response I came into the hearing having read and considered the contents of AB1 but not having opened, or considered the documents contained in, AB2.

14. I have had drawn to my attention an application dated 4 July 2023 issued in accordance with the terms of the ECRO seeking the court's permission to apply to have the contents of AB2 seen and considered under confidential and restricted conditions by the MoJ's lawyers. Given the proximity of issue of this application to the hearing date it is hardly surprising that the Judge in Charge (being the nominated judge to hear applications made under the ECRO) was unable to see, consider and decide, or release the application to me, in time for the hearing. Had there been time, then no doubt some suitable arrangement could have been made for Mr Joseph to have seen the documents and made any necessary representations on them. His primary case was that, as a matter of case management I should decline to consider the contents of AB2; as a fall-back he was content for me to view them *de bene esse* on the basis that I would re-convene a hearing in the event of the contents being

likely to impact my decision. I shall have more to say about AB2 later in this judgment.

Open justice and the law relating to anonymity

15. The source of the court's power to grant anonymity is section 6 of the Human Rights Act 1998 and section 37 of the Senior Courts Act 1981: in *re BBC* [2009] 3 WLR 142 at [57].

16. The principles governing anonymity in the civil context are summarised in the Master of the Rolls' Practice Guidance on Interim Non-Disclosure Orders of 2011 [2012] 1 WLR 1003 ("the Practice Guidance"), also in volume 1 of the White Book at 53PG. Under the heading "Open Justice" the Practice Guidance includes the following:

> *"9 Open justice is a fundamental principle. The general rule is that hearings are carried out in, and judgments and orders, are public: see Article 6(1) of the Convention, CPR 39.2 and Scott v Scott [1913] AC 417…*
> *10 Derogations from the general principle can only be justified in exceptional circumstances, when they are strictly necessary as measures to secure the proper administration of justice. They are wholly exceptional…*
> *…*
> *12 There is no general exception to open justice where privacy or confidentiality is in issue…Anonymity will only be granted where it is strictly necessary and then only to that extent.*
> *13 The burden of establishing any derogation from the general principle lies on the person seeking it. It must be established by clear and cogent evidence: [reference to Scott v Scott and other authorities]*
> *14 When considering the imposition of any derogation from open justice, the court will have regard to the respective and sometimes competing Convention rights of the parties as well as the general public interest in open justice and in the public reporting of court proceedings…"*

17. The same principles apply equally in the criminal setting: *R (oao MNL) v Westminster Magistrates' Court* [2023] EWHC 587. The claimant in that case sought to challenge the decision of a district judge in the magistrates' court to lift anonymity in circumstances where the claimant, or companies of which he was the sole director and shareholder, had been named in the course of a claim for forfeiture of assets brought by the National Crime Agency against three other individuals under the Proceeds of Crime Act 2002. MNL argued that the damage to his reputation by him and his companies being named as a recipient of funds representing the proceeds of crime was such as to engage his rights under Articles 6 and 8, requiring protection through anonymity. The Divisional Court (Warby LJ and Mostyn J) held that the district judge had conducted the appropriate balancing exercise between the demands of open justice and MNL's private rights, and declined to interfere with his decision.

18. In *Scott v Scott* [1913] AC 417 at 463, Lord Atkinson observed 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 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".

19. There are other examples in the cases where anonymity has been refused, notwithstanding the potential adverse effect on individuals whose private rights were engaged: In the *BBC* case the House of Lords discharged an anonymity order granted to a defendant acquitted of rape so as to permit the BBC to name him in a programme suggesting that he ought to be re-tried on new evidence. The House of Lords held that his Article 8 right to the protection of his reputation was outweighed by the right to publish a matter of legitimate public interest. *In re Guardian News and Media Ltd* [2010] 2 AC 697 the Supreme Court lifted existing orders for anonymity granted in proceedings under which the Treasury had obtained freezing orders against the respondents under Terrorism legislation. One of the anonymised individuals, all of whom were appellants before the Supreme Court, resisted the lifting of the order on the basis that it would seriously impact his and his families' Article 8 rights for him to be identified in connection with facilitating terrorism. The Supreme Court held that his Article 8 rights were engaged, but that they were outweighed by the public interest in open justice. In the course of giving the court's judgment, Lord Rodger referred *to In re S (A Child)(Identification: Restrictions on publication)* [2005] 1 AC 593 in which the House of Lords held that the press could name a woman who had been charged with murdering one of her children, even though this would affect the private life of her other son.

20. These cases demonstrate the very significant weight given to the demands of open justice and the public reporting of matters of public interest, even where refusing anonymity was likely quite significantly to impact an individual's private rights. The cases also confirm that, as the Practice Guidance referred to above emphasises, "clear and cogent evidence" is required before the court will consider any derogation from the open justice principle.

The court's jurisdiction to vary an order which it has already made

21. CPR Part 3.1(7) gives the court, as part of its case management powers, the power to vary or revoke one of its own orders. The power to vary an existing order is subject, obviously, to the requirement for finality and may not be used in a way that could undermine ordinary appellate functions. One of the recognised circumstances in which it will be appropriate for the court to revisit an earlier order is where there has been a material change of circumstances: see *Tibbles v SIG PLC* [2012] EWCA Civ 518. It may also be appropriate to vary the order where subsequent events, unforeseen at the time the order was made, have removed or diminished the basis upon which it was made: *Roult v North West Strategic Health Authority* [2010]1 WLR 487.

The parties' arguments

22. Mr Joseph started by accepting that the order for anonymity was properly made in 2014. He grounds his case for revisiting and removing that anonymity now in three ways: first he argued that, 9 years after judgment in the AB claim, there is no remaining justification for concealing the identity of the Claimant in that and any subsequent costs proceedings, still less for extending it to the E11 claim or to the Transcription Service claim. The Claimant was and is a solicitor and higher rights

advocate. His children are now adults, well past the age of 18. 20 years have passed since their mother died.

23. His second reason for seeking to lift the order lies in the (mis)conduct by the Claimant in the costs proceedings. The MoJ was obliged to seek an order from Costs Judge James reducing the costs award on the basis of misconduct, which she made. Mr Joseph pointed out that the MoJ had sought a reduction of no more than 70%, which the Costs Judge awarded, but she made it clear at the time that, had it been left to her, she would have reduced it further. Moreover, the Claimant has conducted proceedings so vexatiously that an ECRO has been made against him.

24. The Claimant's conduct has been so egregiously bad that the MoJ wish to report him to the Solicitor's Regulation Authority ("SRA"). But at present they cannot name him, nor give the name of his previous law firm, nor the name of the company (of which he is a director) now on the record as his solicitors. Mr Joseph submits that the SRA and the Solicitors Disciplinary Tribunal (SDT) can hardly carry out an effective investigation into the conduct of someone whose identity it is not permitted to be told. He points out that when it was made, the order was put in place to protect the Article 8 rights of the Claimant in his private capacity and, in particular, the rights of his (then) minor children; there was no question at that time of protection of professional reputation and the purpose of the order was certainly not to protect the Claimant from the disciplinary consequences of any subsequent professional misconduct.

25. Third, Mr Joseph draws attention to the Article 10 interests of the press, public, SRA and SDT. He points out that the anonymity order is no longer "necessary to secure the proper administration of justice and in order to protect the interests of [the Claimant]", suggesting that the converse is now the case: it is now necessary to remove the anonymity order so as to secure the proper administration of justice and to protect the interests of the public in learning of, and having the SRA/SDT properly investigate, the professional behaviour of a solicitor. The focus of any reporting and investigation will be on that behaviour and not on the circumstances giving rise to the original AB claim.

26. In response Mr Boyle argued that anonymity would not prevent the SRA/SDT from investigating his lay client's professional conduct. He directed me to the evidence at paragraphs 8 to 13 of the Claimant's witness statement dated 9 June 2014 dealing with the impact of information readily available on the internet about his wife's death, and its impact upon his young daughter at the time. Mr Boyle submitted that the Claimant's purpose in obtaining the anonymity order in the AB claim was not just to keep the content of (in his words) "malicious and untrue, offensive, upsetting and inappropriate" documents from being reported, it went further than that; the purpose of anonymity was to keep from his family the fact that such document(s) had been brought into existence at all, or that the Claimant had engaged in costly litigation to hunt down the originals and to see that those and any and all copies were given up by the MoJ and destroyed. The effect on the Claimant's family – Mr Boyle mentioned his children and his elderly mother in particular – would be very damaging, as he would have to explain to them what the material had contained so as to account for the actions he had been forced to take in relation to it.

27. Mr Boyle pointed further to the Claimant's association with high-profile clients and cases. Members of the public inevitably elide him with his clients, Mr Boyle

suggested, making the maintenance of his public life both more difficult and at the same time so much more important for the health of himself and his family. Having spent his professional life taking on public cases, his family should be entitled to privacy in respect of events which were so catastrophic some time ago, which events continue to case a long shadow over their lives.

28. Mr Boyle referred to one document as being particularly offensive. He submitted on behalf of his client that it was bad enough to have to deal with the underlying event (being the Claimant's wife's death in 2003), but to be confronted with untrue and malicious speculation about it, to contemplate the fact that someone would even think about creating such a document, would impose an intolerable further burden on the family. Any suggestion that such a document exists or ever existed would call into question the truth of the narrative that the family have lived with, which has been difficult enough in itself. That is what has driven the Claimant to seek to expunge all record of it, so as to protect his family life. Mr Boyle stressed that from his client's viewpoint the malice has continued by reason of the fact that he has never received any apology from the MoJ.

29. Mr Boyle's further argument concerned health matters. For these purposes, when considering misconduct, he distinguished between professional conduct and personal behaviour. One of the matters of misconduct raised and referred to by Costs Judge James in her judgment concerned the Claimant's behaviour at a hearing on 3 May 2019, when the Claimant is said to have sworn and left the hearing, causing it to have to be adjourned. Mr Boyle submitted that the Claimant's behaviour on this occasion relates directly to his health conditions. If his identity in connection with this behaviour was made public, then he would be obliged to explain the behaviour by reference to those health conditions, and that would cause him immense professional embarrassment as they include a matter that is habitually stigmatised. The publicity which would go with that condition being made public would, in the Claimant's view, not only interfere with his professional relationships with colleagues but would also by association taint the causes which he has championed and the clients whom he continues to represent.

30. Mr Boyle drew my attention to the Equality Act 2010, arguing that the Claimant's health constitutes a disability. He submitted that lifting anonymity in connection with Master James' misconduct judgment would expose the Claimant to direct and indirect discrimination, as well as the risk of harassment, which is prohibited under the Act. I asked why, if the behaviour on 3 May was properly attributable to a health condition, this had not been drawn to the attention of Costs Judge James, or indeed to the attention of Murray J on the appeal? I was told that an attempt had been made to adduce the evidence properly, but that it had been "done wrongly", as a result of which neither Costs Judge James nor Murray J had considered it.

31. Towards the end of his argument Mr Boyle reverted to the contents of AB2, arguing that as those documents had formed the basis for Jeremy Baker J's decision to make the order in 2014, it would be wrong for me to remove anonymity without myself having seen the documents which had prompted the making of the order in the first place.

32. In reply, Mr Joseph dealt first with the contents of AB2. He pointed out that Eady J's order had alerted the Claimant to be ready to deal with removal of anonymity, requiring him to provide any response by 8 November 2021. The Claimant's witness

statement dated 8 November 2021 referred to "sensitive material" which had been the subject of undertakings given by the MoJ but did not seek to explain or exhibit such material, or to apply to bring it to the attention of the judge in any proper way. Mr Joseph pointed out that none of the current legal team dealing with this at the MoJ had been involved when the case came before Jeremy Baker J in 2014 and when undertakings were given to destroy all the sensitive documents held by the MoJ. That undertaking has been complied with, accordingly neither he nor those instructing him have any idea of what is in the "sensitive material" referred to by the Claimant in his statement. The Claimant's successive attempts to put that material before judges dealing with his case, namely Costs Judge James, Murray J, Eyre J and now me, by means of sealed envelopes sent to the court for the attention of the judge alone, was never the right way of going about it. Moreover, the fact that successive judges from 2021 onwards have declined to open the envelopes or to consider the material sent in that way must have indicated to the Claimant and those he instructed that they needed to make a proper application to the court. Finally doing that by means of an application to Soole J under the terms of the ECRO on 4 July 2023, which was itself no more than an application to make an application, less than a week before the hearing, was vexatious. Mr Joseph submitted that there had been plenty of opportunity over the years for the Claimant to put this material properly before the court and that I should refuse to consider the contents as a matter of case management. But as the MoJ were not prepared to have the hearing adjourned or put off in any way he suggested that if I felt I needed to see the documents in order to understand better why anonymity had been imposed in the first place, then the MoJ would invite me to look at them, trusting that if I saw anything which required a response before determining the outcome of the application then I would seek to reconvene another hearing.

33. As to the arguments about the Article 8 rights of other members of the Claimant's family, Mr Joseph drew my attention to the fact that no witness statements had been filed by other family members. The children are now adult, if matters arising from their mother's death were still impacting them in such a way as to call for anonymity to protect their Article 8 rights then it was open to them to have put in evidence explaining why.

34. Next, Mr Joseph pointed out that the SRA website requires certain matters to be self-reported. These would include the misconduct judgment of Costs Judge James, the dismissal by Murray J of applications for permission to appeal that judgment and the ECRO made by Eyre J. Moreover, if the Claimant has a health condition affecting his behaviour when acting as a higher rights advocate before the court (the Claimant was conducting his case himself at the hearing on 3 May 2019 referred to above) then that is another matter which he is required to report to his regulator. In Mr Joseph's words, if health matters caused the Claimant to have acted as he did on 3 May 2019, then he should have been reporting it to the SRA on 4 May.

35. There was a member of the press in court during the hearing who asked to be heard. When given the opportunity he introduced himself as Mr Charlie Moloney from the Law Society Gazette. Mr Moloney emphasised the important and trusted role of a solicitor and the impact which they can have on people's lives. There is a clear public interest, he stressed, in the public being aware of any misconduct by such a person. He pointed out that there appeared to have been no press present on the occasion when the order was made, pointing out that its continuation since then has, through "alphabet soup", effectively hidden from view matters about which, had the

press known of them, they would certainly have wished to have reported earlier. Mr Moloney suggested that, had the press made an application before now, then it would have been allowed and anonymity would have been lifted long ago.

Discussion

36. The matter of my having jurisdiction to revisit the anonymity order made in 2014 has never been in issue. It was plainly appropriate for me to do so, given all that has happened since that time.

37. In her judgment dated 23 April 2021 Costs Judge James made the following findings of fact relating to specific instances of misconduct on the part of the Claimant (references are to paragraphs of her judgment):

(1) At a hearing on 3 May 2019 at which he appeared as solicitor advocate in his own case, shouting and swearing at counsel for the MoJ and the solicitor from the GLD, before twice walking out and coming back in, causing the hearing to be abandoned (paragraph 105). Further, objecting at that hearing to the judge being told of a directly relevant (though unpublished) authority which was unhelpful to the Claimant's case, in breach of his duty to assist the court (paragraph 106). Costs Judge James found that the Claimant's behaviour on this occasion "was not only improper but also calculated" (paragraph 108).

(2) Failing to inform Cavanagh J, when making an out of hours application for an injunction, that Johnson J had already refused, as totally without merit, an application made by the Claimant to set aside the directions order made by Judge James (paragraph 130).

(3) Persistently accusing Judge James of bias despite decisions at the next tier that such allegations were totally without merit (paragraph 134).

(4) Charging hourly rates "many times the reasonable and proper amount" (paragraph 139), including an hourly rate for himself in 2014 of £779.48. Purporting to charge success fees upon a CFA concluded between the Claimant and his own law firm in respect of the AB claim. A particularly bad example given by the Costs Judge is that of charging hourly rates for a legally unqualified fee earner well in excess of those for a Grade A Solicitor with over 8 years post-qualification experience (paragraph 146). The Costs Judge described the level of fees charged in drafting checking and signing the Claimant's Bill as "an overcharge to the public purse so egregious that in its own right it is both unreasonable and improper" (paragraph 153).

(5) Signing a Bill of costs, thereby certifying to the court that the indemnity principle had not been breached, when (as indicated at (4) above) there had been very considerable overcharging. The total figure for costs claimed of £936,875 was assessed downwards to approximately £55,000, the Costs Judge finding that "the decision to present the Claimant's Bill in its original state was both unreasonable and improper", such that no reasonable solicitor and officer of the court could properly have signed the certificate on the Claimant's Bill (paragraph 154-155).

38. When considering the balance between open justice and the public interest in reporting on one side and any Article 8 or other private rights of the Claimant or his family on the other, the public interest in learning of misconduct on the part of a prominent solicitor, officer of the court and higher rights advocate must weigh very heavily. Even leaving aside (1) above (I consider the matter of behaviour further below) the above findings of misconduct, all of which were upheld by Murray J in refusing permission to appeal, are very serious breaches of the high standard of professional behaviour which the public is entitled to expect. As Mr Moloney pointed out, solicitors advise and deal with members of the public concerning important, often life-changing matters. Any investigation by the SRA/SDT must be at least significantly hampered by continued anonymity.

39. The fact that the court has assessed as necessary the making of an ECRO to curb the Claimant's activities in the costs arena is also a matter to be considered as significant when balancing the public interest and any private interest. Further, the current ECRO has the name of the person who is subject to the court's control anonymised, which is bound to hamper the proper administration of the ECRO itself.

40. Against the very powerful public interest against continuing anonymity I have looked for "clear and cogent" evidence which could render necessary a derogation from the principle of open justice. I asked Mr Boyle repeatedly during the hearing to direct me to it. In my view the evidence given by the Claimant to which I was referred comes nowhere near establishing the weight of private interest necessary to counterbalance the public interests:

    (1) The evidence was restricted to paragraphs in the original witness statement from 2014 dealing with the distress caused to the Claimant's daughter (then still at school) by material about her mother's death available on the internet, but that is now some 9 years ago. There was no further evidence in the Claimant's more recent statements touching on the family's Article 8 rights, and no evidence at all from other members of the family. The children are now adult. Their mother's unfortunate death when they were so young must have cast a shadow over their lives, yet family tragedy is, sadly, not uncommon.

    (2) I appreciate that it was the generation and retention by the MoJ of "untrue and offensive" material which was the occasion for the Claimant to issue the AB claim but as Lord Atkinson pointed out in *Scott v Scott*, litigation will often carry with it the risk of distress. In this case, the matters giving rise to the original claim have now faded into the background, overtaken in noise and volume by the Claimant's subsequent conduct of the costs and other litigation.

    (3) Neither Jeremy Baker J's original judgment nor any costs or other judgment handed down since refers to the content of the material which first gave rise to the claim. Thus, removing anonymity will not make public that which the Claimant succeeded in suppressing through his original claim.

41. The cases in this area which I have reviewed at [17] – [19] above demonstrate that the courts will not impose, or will remove, anonymity even in circumstances where serious reputational and other harm may result from the name(s) of litigants or others being made public, including distress to family members. It must be borne in mind that the process of litigation will frequently be accompanied by distress, often severe distress, in consequence of the circumstances which have occasioned it. Conferring anonymity can do nothing to relieve the upset attendant on the underlying

circumstances; meanwhile the public interest demands that the operation of justice be open and transparent.

The AB1 documents – health and behaviour

42. There is one aspect of the Claimant's Article 8 rights with which I deal separately, arising from the contents of the sealed envelope AB1 (the contents of which the MoJ had seen). Mr Boyle suggested that this material provided an explanation for the Claimant's behaviour at the hearing on 3 May 2019. He submitted that removing anonymity would require the Claimant to make that explanation, and accordingly the nature of his health condition, public, engaging his rights under the Equality Act not to be discriminated against.

43. I have (as other judges have had before me) very great concerns at the manner in which the material in AB1 came to be put before me. It arrived in a sealed envelope at the last minute, just days before the hearing, not exhibited to any witness statement. As the Claimant must know, this is not the way to put relevant evidence before the court. Moreover, the time for deploying such evidence, as an explanation for the Claimant's aberrant behaviour at court on 3 May 2019, was in front of Costs Judge James before she made any finding and/or before Murray J on the application for permission to appeal. Indeed, it seems, from the passage of her judgment I have quoted below, as if the Costs Judge may have seen and taken into account evidence of the Claimant's health condition, but did not accept that it provided an adequate explanation.

44. In any event, so far as the present application is concerned, the order of Eady J, to which I have referred above, was clear about the timing of service of evidence relating to the lifting of anonymity, requiring the Claimant to put in any evidence in response by 8 November 2021. As a matter of case management, I believe it would be open to me to disregard such very late evidence of the Claimant's health condition. However, as it was material which the MoJ had seen prior to the hearing, I have taken it into account.

45. Appreciating, as I do, the difficult and potentially stigmatising nature of the Claimant's health condition, nevertheless I cannot find that the Claimant's Article 8 and/or Equality Act rights arising in connection with it are sufficiently weighty in the balancing exercise. As the Costs Judge put it at paragraph 51 of her judgment: "...if he found proceedings in the SCCO too much, he could and should have sent someone else instead of causing a day-long Hearing to be abandoned…". Moreover, as Mr Joseph argued, the effect of his health condition upon his behaviour that day is a matter that the Claimant should already have reported to the SRA. I would also have expected him to acquaint the partners/co-directors in his own law firm which was on the record as acting for him on that (and every other) occasion.

AB2 – the documentation before Jeremy Baker J

46. AB2 also arrived on my desk just days before the hearing in a sealed envelope. The current team at the MoJ, including its counsel Mr Joseph, have not seen those documents, believing that they are the ones in respect of which the MoJ gave undertakings to destroy in 2014 during the original AB claim.

47. Much too late to enable that position to be corrected in time for the hearing, the Claimant issued an application under the terms of the ECRO designed to address the difficulty so as to enable the MoJ's counsel to see and make any necessary representations on the documents. It was all too little, too late, given the clear direction made by Eady J nearly two years ago.

48. As with AB1, it would have been open to me to disregard the documents in AB2 as a matter of case management, as Murray J and Eyre J both appear to have done when hearing the applications which came before them. But neither of those judges was specifically addressing the question of whether anonymity should be lifted; indeed, in both of the orders made on their judgments anonymity was continued.

49. The difficulty I faced on this application was the (very late) submission made by Mr Boyle on behalf of the Claimant that, as the order had originally been made by Jeremy Baker J based upon the contents of the documents in AB2, in particular a document described by Mr Boyle as "B16", it would be wrong for me to decide to remove anonymity without having a full appreciation of what had caused it to be imposed in the first place.

50. As I have said, this submission came late, appearing to me to be a last-ditch attempt to put off the decision I was to make. In the interests of finality therefore, and, with Mr Joseph's agreement, I resolved to look at the documents *de bene esse* in order to decide whether they could impact the balance of interests so decisively as to shift it the other way. I have borne in mind when doing so the Claimant's position that, even though no judgment from 2014 to-date reveals what is in the documents, he would nevertheless have to tell his family about the contents if the fact of his having taken proceedings to suppress them became known.

51. I have looked at the documents. The content of "B16" in particular bears out Mr Boyle's description of "malicious, untrue, offensive, upsetting and inappropriate". But it makes no difference to my view that anonymity cannot continue. Jeremy Baker J was very careful not to refer to the contents of any of the documents, and subsequent judgments on the costs of the claim have not needed to, and have not done so, either. Moreover, the extension of anonymity to the E11 claim, to the subsequent Transcription Service claim, even to the ECRO itself, because of concerns about "jigsaw identification" shows just how inappropriately pervasive in its effect the original order has now become.

52. If the Claimant chooses to give members of his family a full explanation of the proceedings he took in 2014 in order to suppress the documents in AB2 then that is a matter for him. There is no evidence before me indicating whether or to what extent he has already shared with members of his family his involvement in any of the litigation in which he has appeared as "AB/X". But even if they are all entirely ignorant of the steps the Claimant took in 2014, and of all that he has done since, that is far from providing "clear and cogent" evidence of their Article 8 rights being engaged, let alone engaged sufficiently to weigh against open justice and the public interest in reporting on the other side of the balance.

Conclusion

53. I am quite satisfied that continued anonymity is not justified. This is not a case where the private interests of the Claimant and/or members of his family should

exceptionally outweigh the principle of open justice and the public interest in reporting cases.

54. There is no question of partial anonymity here, as both counsel appreciated, whether for certain judgments or orders, or for parts of those judgments or orders. It is a binary, all or nothing process. If AB/X is named in the costs proceedings (for instance), then his identity must be known and lifted in the original AB claim, as well as the E11 claim, the Transcription Service claim and the ECRO.

55. The removal of anonymity will not of itself cause the contents of AB2 to come to light, since Jeremy Baker J was careful in his judgment to make no reference to them, and there has been no occasion for the contents to be revisited since then (until now). I invite counsel to draw up an order lifting anonymity, but which will at the same time prevent the disclosure of anything on the court file which might reveal all or part of that which the Claimant successfully sought to be suppressed and destroyed in 2014. In the event that they cannot agree on the wording, they may revert to me.