Neutral Citation Number: [2020] EWHC 774 (QB)

Case Nos: QB-2019-000524
QB-2019-002869

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MEDIA AND COMMUNICATIONS LIST

Remote hearing via Zoom

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be as shown opposite:

Date: 3 April 2020

Before:

MR JUSTICE WARBY

- - - - - - - - - - - - - - - - - - - -

Between:

(1) Zenith Logistics Services (UK) Limited	
(2) Uniserve (UK) Limited	
(3) James Kemball Limited	**Appellants**
- and -	
Halena Louise Coury	**Respondent**

and between:-

UUU	**Claimant**
- and -	
BBB	**Defendant**

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Nicholas Goodfellow (instructed by **Holman Fenwick Willan**) for the **Appellants**
Victoria Jones (instructed by **Royds Withy King**) for the **Respondent**
Louis Flannery QC (instructed by **Stephenson Harwood LLP**) for the **Claimant**
The Defendant did not appear and was not represented

Hearing date: 25 March 2020

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Approved Judgment

Mr Justice Warby:-

Introduction

1. These two cases have been heard together because, although very different on their facts, they raise related issues of principle: whether it is compatible with the requirements of open justice for the Court to make an order staying proceedings on terms contained in a confidential agreement extraneous to the order, or in a confidential schedule to the Order.

2. *Zenith v Coury* ("the Appeal") is an appeal against a decision of Master Davison. The action is brought by three companies, all part of the Uniserve group of companies, against 11 defendants. The claim is for damages in excess of £5m, and other remedies, arising out of the alleged misapplication of corporate assets by the first defendant, Peter Keates, for his own benefit and that of various individuals and companies with whom he is associated. Those individuals included the fourth defendant, Ms Coury, who is or was Mr Keates' girlfriend. The claimants and Ms Coury, who are both represented by solicitors and Counsel, reached a confidential compromise agreement. They put a consent order before the Court, in Tomlin form, with a Schedule referring to the compromise agreement. Master Davison indicated by email that his practice was not to "make Tomlin orders with confidential schedules unless confidentiality is justified on the usual grounds." This prompted an exchange of correspondence, at the end of which the Master confirmed his decision to decline to make the order, on the grounds that it contravened the open justice principle. He gave judgment explaining that conclusion. He granted permission to appeal.

3. *UUU v BBB* ("the Application") is an application for the Court to make a consent Order in Tomlin form. The action is a Part 8 claim by one (male) individual against another (male) individual for an injunction to restrain alleged harassment, contrary to the Protection from Harassment Act 1997 ("PHA"). The claimant is represented by solicitors and Counsel. The defendant is unrepresented. An interim injunction was granted at an urgent hearing on short notice, and later continued after a hearing on notice. The parties then reached a compromise of the action. They submitted a draft order, intended to give effect to the settlement. The draft Order was expressed as a "Confidential Consent Order". It provided for a stay of proceedings, save for the purposes of enforcing the terms set out in a Confidential Schedule, which recorded undertakings to be given by BBB to the court. This was put before Master Davison for approval. In the light of his practice, and his decision in *Zenith v Coury,* the Master referred the Application to a Judge. It came to me, and I directed that the Application be determined by the same Judge as heard the Appeal.

The procedural history in more detail

<u>*The Appeal*</u>

4. The claim was issued on 13 February 2019, asserting three causes of action against Ms Coury: (1) participation in an unlawful means conspiracy, (2) dishonest assistance of breach of duty by Mr Keates (3) knowing receipt of benefits acquired in breach of duty. On 13 April 2019, a Defence was filed, denying any liability. Following service of Reply, there was a CCMC on 6 December 2019.

5. On the day of the CCMC, the claimants and Ms Coury reached a compromise agreement. The Master, informed of this, made an order that the claim against Ms Coury "shall be stayed on the terms set out in a Tomlin Order, to be approved by the Master". The order made clear that the directions given in relation to the progress of the case generally were not to apply to the claim against Ms Coury.

6. On 9 December 2019, the claimants' solicitors wrote to the Master, recording that their clients and Ms Coury had "reached a settlement on terms set out in a confidential settlement agreement" and asked the Court to make a Tomlin order, "staying all further proceedings against the fourth defendant, save for the purpose of enforcing the terms of the settlement". The letter enclosed "for the court's consideration" a draft Order signed by solicitors on behalf of all parties.

7. The draft Order was in this form:

> "UPON reading the correspondence from the parties' solicitors dated 11 December 2019
>
> AND UPON the Claimants and the Fourth Defendant having agreed confidential terms of settlement
>
> IT IS ORDERED THAT:
>
> 1. All further proceedings in this action between the Claimants and the Fourth Defendant be stayed upon the terms set out in the confidential settlement agreement identified in the schedule to this Order ("Settlement Agreement"), save for the purpose of enforcement of those terms.
>
> 2. The Claimants and the Fourth Defendant shall each have permission to apply to the Court to enforce the terms of the Settlement Agreement, without the need to bring a new claim.
>
> 3. There shall be no order as to costs.
>
> Dated this day of December 2019
>
> SCHEDULE
>
> The terms of settlement are set out in a confidential settlement agreement between the Claimants and the Fourth Defendant dated 6 December 2019, the original of which has been kept by the Claimants' solicitors and a copy of which has been kept by the Fourth Defendant's solicitors"

8. The letter continued:

> "Please kindly note that the Settlement Agreement contains a confidentiality provision stating that the Settlement agreement may only be disclosed to a third party either with the express consent of the other party, or in a limited set of defined circumstances, including insofar as it is necessary to comply with any Court Order made in the claim.... In those circumstances, the Court is invited to approve the Tomlin Order in accordance with the attached draft."

9. The Master replied the following day, on the lines I have mentioned above. Having explained his practice, and the reason (that he regarded such orders as contrary to the open justice principle), the Master stated that the parties must "ether justify the confidentiality or submit an order with an open schedule". He observed that it was open to them to settle the action other than by way of a Tomlin order.

10. Correspondence followed, on 11 and 12 December 2019. The claimants' solicitors submitted that the Master's approach was mistaken, and inconsistent with the authorities, and with established practice. They referred to *Vanden Recycling Ltd v Kras Recycling BV* [2017] EWCA Civ 354 [2017] C. P. Rep 33 and passages in the White Book. These included a passage in the Chancery Guide (at 22.23) stating that:-

> "it is not the normal practice for Judges or Masters … to inspect schedules or agreements annexed to Tomlin Orders, and the Judge who makes the order undertakes no responsibility for the scheduled terms, and cannot be taken to approve them."

11. The Master, who referred to *JIH v News Group Newspapers Ltd* [2011] EWCA Civ 42 [2011] 1 WLR 1645, was unpersuaded. On 13 December 2019 he emailed to say that he did not agree with the propositions advanced, and "will not make the Tomlin order in its present form". He promised to provide a short formal judgment to that effect so that the claimants could seek to appeal if they wished.

12. In that judgment, given on 10 January 2020 ([2020] EWHC 9 (QB)), the Master began by emphasising the centrality of open justice to the administration of justice, citing *Scott v Scott* [1913] AC 417, *JIH* (above) and *R (C) v Secretary of State for Justice (Media Lawyers Association intervening)* [2016] UKSC 2 [2016] 1 WLR 444. He reasoned that the only available justification for approving the draft Tomlin order would be that the principles of open justice "simply do not apply to such orders". He analysed the parties' submissions as "boiling down" to "one proposition, which was that the schedule to the Tomlin order was not part of the order". That proposition was rejected. The Schedule is, said the Master, a part of the order as a matter of language, and as a matter of substance and reality. There is little difference between a Tomlin order and an "ordinary" consent order:

> "24 … Because the two types of order are, in reality, so similar, a common practice in the Queen's Bench Division (and in apparent contrast to that in the Chancery Division) is to scrutinise the schedule to a Tomlin order at the stage that the order is made. The purpose of this is to ensure that the terms are within the jurisdiction of the court to enforce and do not, for example, offend some principle of public policy. There would be no point in making an order providing for a subsequent application to enforce if it were clear that the terms were, in fact, unenforceable. The practice reflects the underlying reality, which is that a Tomlin order engages the coercive powers of the court in much the same way as an "ordinary" order does. Even if the open justice principle could be said to be restricted to coercive orders, (which, in my view, it is not), Tomlin orders are in this category."

13. The Master made two further points. The first was that the default position under the CPR is that the Schedule to a Tomlin order is open to public inspection: CPR 5.4C. A retrospective application to confer confidentiality on such a Schedule would be refused, unless the applicant could show that the case fell within one of the recognised exceptions to the open justice principle. The same principles must apply to a prospective application for such protection. Secondly, the Master mentioned, only to reject, a point not raised by the parties to *Zenith v Coury,* but which had been raised in other cases where he had refused to make a Tomlin order with a confidential schedule: "that the derogation from the open justice principle may be regarded as merely deferred – in the sense that confidentiality may or may not be ordered when it comes to the enforcement stage". The Master said:

> "26. … This justification only needs to be stated to be rejected. Open justice is not to be deferred or made contingent upon the happenstance of a party making an application to enforce. In any event, if the point were correct, the overall effect would be to open up only a very small minority of such orders to the public gaze and, even then, only those parts of the schedule to the order which had allegedly been breached. I do not regard this as a satisfactory answer to a principle of law and public policy which is of such importance."

14. On 10 January 2020, that is the day that judgment was delivered, the claimants applied in writing for permission to appeal on the grounds that the Master erred in law:

(1) "by holding that a settlement agreement identified in the schedule to a Tomlin Order forms part of the Court's order" that it is the Court's function to approve; and

(2) by holding "that the open justice principle applies to the terms of settlement in an agreement identified in the schedule to a Tomlin Order".

15. On 22 January 2020, the Master granted permission to appeal on both those grounds, giving three additional reasons.

(1) The first was that although "there are authorities to the effect that the schedule to a Tomlin order does not form part of the order itself … there are also authorities which seem to recognise that the schedule is part of the order: see, e.g. *Bostani v Piper* [2019] EWHC 547 (Comm)."

(2) The second reason for granting permission to appeal was that "the actual practice" of the Queen's Bench Division was "at variance with the proposition that the schedule is not part of the order and thus not the function of the court to approve". The Master referred in that context to practice in the Commercial Court, saying this:

> "I refer to the following statement of Popplewell J [Judge in Charge of the Commercial Court] dated 1 February 2018 made in the context of the electronic filing of consent orders: *All Tomlin orders must include the relevant schedule*

> *notwithstanding any confidentiality. The Court will not make an order providing that the parties can enforce its terms on an application without checking whether all the terms make that appropriate*; see C.P.N. Issue 2/2018 13 February 2018. A similar practice is widespread (though by no means uniform) in the Queen's Bench Division."

(3) Thirdly, the Master mentioned cases where judges have amended the schedule to a Tomlin order, suggesting that "These instances of judicial intervention imply that the schedule to a Tomlin order is part of the order". He cited two cases from 1994, reported in The Times: *Islam v Askar* 20 October 1994 and *Allied Irish Bank v Hughes,* 4 November 1994.

16. On 28 January 2020, the claimants' solicitors, Holman Fenwick Willan, wrote to enquire whether the Master would be prepared to approve the Tomlin Order on the basis that the settlement terms were not included in the schedule but disclosed to the Court "in confidence" and then returned once the Tomlin Order had been approved. Failing that, the solicitors asked for leave to appeal on the grounds that this approach was satisfactory in the present case. In support of this approach, the solicitors cited the relevant part of the Commercial Court Guide (the emphasis is theirs):-

> "Where the parties reach agreement that a case should be settled on the basis that the Court makes an Order for the proceedings to be stayed save for the purposes of enforcing agreed terms that are set out in a schedule or held separately (a "Tomlin" order), a copy of the agreed terms must be provided to the Court with the draft of the Order that a Judge is invited to make. **The copy of the agreed terms may be provided marked "in confidence" and, once a Judge has reached a decision on whether to make the Order, may be returned to the solicitors for the parties if they are to hold the same for the future."**

17. The Master made clear that he would not be prepared to approve the Order on that basis. He added that "To the extent that your email raises another ground of appeal, I am happy to treat it as implicit in the grounds already lodged". He suggested that technically this was a matter for the appeal Judge. I am inclined to think it was for him, as the challenge is to a fresh decision post-dating the grant of permission to appeal the original decision. At all events, the grounds of appeal lodged with the Appellant's Notice included a third ground in the following terms, and to the extent necessary I grant permission for that ground to be argued:

> "(3) The Master erred in law by declining to adopt an approach that involves the parties supplying the schedule to the Tomlin Order for the Court's approval "in confidence" to then be returned to the parties."

18. By letter dated 8 February 2020, Ms Coury's solicitors made clear by letter that she supported the appeal.

<u>The Application</u>

19. The proceedings in *UUU v BBB* began with an urgent application in the Long Vacation. The claimant sought an interim injunction to restrain disclosures of information which had been threatened in emails of 27 and 29 July 2019, in the context of a commercial dispute. It was said that disclosure would amount to harassment and/or misuse of private information, and that the defendant was engaging in blackmail. The application was made before the issue of proceedings. The claimant sought a private hearing and other derogations from open justice, including anonymity for both parties and restrictions on non-party access to documents on the court record.

20. The application came before Morris J on 9 August 2019. Desmond Browne QC appeared for the claimant. The defendant was on notice, but did not appear and was not represented. The Judge heard the application in private, and granted the other derogations from open justice, and the substantive relief sought. The Judge's reasons were explained in a short public judgment given later the same day. He explained that the derogations from open justice were justified "in view of the nature of the matters threatened to be disclosed and, more particularly, the element of blackmail inherent in those threats".

21. As to the substance, he applied the test in s 12(3) of the Human Rights Act 1998 as interpreted in *Cream Holdings v Banerjee* [2005] 1 AC 253 [20-22]. He reasoned that there was a threat of disclosure that "still exists and hangs over the ongoing negotiations and thus has the oppressive effect upon the Claimant in those negotiations to which he objects", and that "the Claimant's prospects of success at trial are sufficiently strong to warrant the grant of the interim injunction".

22. The order dated 9 August 2019 ("the Morris Order") contained the following relevant provisions:-

> "**ACCESS TO DOCUMENTS**
>
> 3. Upon the Judge being satisfied that it is strictly necessary:
>
> (a) (i) no copies of the statements of case; and
>
> (ii) no copies of the witness statements and the applications,
>
> will be provided to a non-party without further order of the Court.
>
> (b) Any non-party other than a person notified or served with this Order seeking access to, or copies of the abovementioned (sic) documents, must make an application to the Court, proper notice of which must be given to the other parties.
>
> **INJUNCTION**
>
> 4. Until 16 August 2019 (the return date) or further Order of the Court, the Defendant must not:
>
> (a) use, publish or communicate or disclose to any other person (other than (i) by way of disclosure to legal advisers instructed in relation to these proceedings (the **Defendants' legal advisers**) for the purpose of obtaining legal advice in relation to these proceedings or (ii) for the purpose of carrying

this Order into effect) all or any part of the information referred to in Confidential Schedule 2 to this Order (the **Information**);

(b) publish any information which is liable to or might identify the Claimant or the Defendant as a party to the proceedings and/or as the subject of the Information or which otherwise contains material (including but not limited to the profession or age or nationality of the Claimant) which is liable to, or might lead to, the Claimant's or Defendant's identification in any such respect, provided that nothing in this Order shall prevent the publication, disclosure or communication of any information which is contained in this Order other than in the Confidential Schedules or in the public judgment of the Court in this action given on 9 August 2019.

(c) threaten the Claimant, his company or any other party that he will take any of the steps restrained by paragraphs 4(a) and (b) above."

23. I can set all this out because the body of the Order was and remains a publicly accessible document. However, as will be obvious from the terms of paragraph 4(a), the information which the defendant was restrained from using, publishing, communicating or disclosing was not set out on the face of the order, but in a Confidential Schedule. Confidential Schedule 2 was entitled "Information referred to in the Order" and it identified "Any information or purported information" concerning nine different topics, lettered (a) to (i), and "any other information, detail or allegation concerning the legal dispute between the Defendant and the Claimant described by" a specified letter sent by the defendant to the Claimant. All of this is standard practice, based on and consistent with the Model Order annexed to the Master of the Rolls' *Practice Guidance: Interim Non-Disclosure Orders* of 2011, [2011] 1 WLR 1003 ("the INDO Practice Guidance").

24. The return date was adjourned, by consent. In due course, the matter came before Steyn J, DBE. On 21 November 2019 she heard Mr Browne QC and Junior Counsel for the claimant, and the defendant in person. She heard the matter in private, continued the grant of anonymity, rejected a contention by the defendant that the claimant had failed to disclose material facts to Morris J, and continued interim relief until trial in the terms sought. Those terms reduced the scope of the information or purported information which was the subject of the injunction, by eliminating categories (h) and (i). Otherwise, they were as granted by Morris J. In a public judgment handed down the following day Steyn J gave full reasons for her decisions: see [2019] EWHC 3190 (QB).

25. At [7-8], Steyn J explained that she had granted derogations from the principle of open justice because she was "satisfied, having regard to the sensitive and personal nature of the matters threatened to be disclosed, whether they are true or false, and having regard to the nature of the case as one in which blackmail is alleged, that a public hearing or identification of the parties in connection with the claim would frustrate the aim of the proceedings". The public interest in open justice was satisfied, in this context, by the Court giving a public judgment. She further explained that, as the judgment was public:-

> "I have explained the facts and referred to the correspondence in more general terms than I would otherwise have done in order to avoid identification of the parties or disclosure of confidential information."

26. The Judge's reasoning as to the substance can be found at [24-37]. Key features of her conclusions were that it was more likely than not that the claimant would establish at a trial that the defendant's emails of July 2019 amounted to blackmail, which could not be justified on the basis that it was true, or on the basis that disclosure was in the public interest; and that the threatened publication would amount to harassment, contrary to the PHA.

27. The Order dated 22 November 2019 ("the Steyn Order") provided for the injunction contained in the Morris Order to continue until after judgment or further order in the meantime, subject to the removal of two of the nine sub-paragraphs of the Information in Confidential Schedule 2. The Judge also ordered the defendant to pay the claimant his costs of the application, summarily assessed in the sum of £33,540, including VAT. The deadline for payment was specified as 4pm on Friday 6 December 2019.

28. On 10 February 2020, the parties submitted a draft consent order providing for the action to be stayed on terms. The draft was signed by the claimant's solicitors and by the defendant in person, as he remained unrepresented. The body of the draft Order read as follows:-

> "CONFIDENTIAL CONSENT ORDER
>
> PENAL NOTICE IF YOU THE DEFENDANT DISOBEY THE UNDERTAKINGS RECORDED BY THIS ORDER YOU MAY BE HELD TO BE IN CONTEMPT OF COURT AND MAY BE IMPRISONED OR FINED OR HAVE YOUR ASSETS SEIZED.
>
> UPON the Defendant giving undertakings to the Court as recorded by the Confidential Schedule
>
> AND UPON the parties consenting to the terms of this Order
>
> IT IS ORDERED BY CONSENT:
>
> 1. All further proceedings in this action be stayed except for the purpose of enforcing or otherwise taking steps to ensure compliance with the undertakings recorded by the Confidential Schedule, signed by the defendant and attached herewith.
>
> 2. There be no order as to costs."

29. The Confidential Schedule contains four paragraphs. Paragraphs 1 and 2 contain permanent undertakings in terms that correspond precisely with the terms of the interim injunctions granted by the Morris Order, as varied by the Steyn Order. Paragraph 3 contains an undertaking to pay the sum in costs ordered by the Steyn Order, coupled with provision for payment of that sum by instalments, and for what will happen in the event of default. Paragraph 4 contains an undertaking "to release all claims" against the claimant and a corporate non-party, the claims being identified in extraneous documents. I give this much information about the content of the

Confidential Schedule because, as I will explain, I do not believe that in doing so I infringe any genuine confidentiality.

30. On 18 February 2020, the Master referred the Application to me, as Judge in Charge of the Media and Communications List.

This hearing

31. On 26 February 2020, I made orders of my own initiative. I directed a hearing of the Appeal and the Application before a Judge of the Media and Communications List on Wednesday 25 March 2020, with a time estimate of half a day, and gave directions for the submission of written representations or a skeleton argument and oral argument by the parties to the Application. I directed the parties to co-operate with a view to the efficient preparation and determination of the Appeal and Application.

32. Then came the Covid-19 pandemic. On 16 March 2020, the Government introduced stringent social distancing measures. The judiciary moved swiftly. On Friday 20 March 2020, the Master of the Rolls, President of the Queen's Bench Division and the Chancellor issued a Protocol Regarding Remote Hearings. On the evening of Monday 23 March 2020, the Prime Minister introduced what has become known as "lockdown", instructing the population to stay at home, with limited exceptions. Those included travel to work but only where absolutely necessary. Under those circumstances, arrangements were made for the hearing of the Appeal to go ahead as a remote hearing, by online video-link.

33. I attended from home. Counsel in the Appeal and their instructing solicitors attended remotely. The appellants' solicitors prepared and submitted an excellent e-Bundle, which all were able to navigate easily during the hearing. The hearing was public, not in private: the court's duty under CPR 39.2(2A), to take reasonable steps to ensure that the hearing was of an open and public character, was discharged by giving notice in the Daily Cause List that the hearing would proceed in this way, with contact details for those who wished to attend remotely. The Press Association sought and was given the meeting details, and was able to and did attend through a reporter.

34. The parties to the Application did not take advantage of the opportunity to submit written representations, but Leading Counsel for the claimant, UUU, attended the hearing remotely, and I heard oral submissions from him. The defendant, a litigant in person, did not appear. I was told he was in Vietnam, with a poor internet connection. The hearing therefore consisted of oral argument in favour of allowing the Appeal from the appellant, short supportive submissions from the respondent to the Appeal, submissions from Mr Flannery QC for the claimant in favour of allowing the Application, and questioning of Counsel by me, to explore some aspects of the issues.

Decisions

35. At the end of the hearing I announced that the Appeal would be allowed, for reasons to be given later. This judgment sets out my reasons for concluding that I should, as I do, approve the Tomlin order in *Zenith v Coury* in the form it was submitted to the Court. In summary, I uphold the first and second grounds of appeal. I do not find it necessary to reach a conclusion on ground three.

36. I reserved judgment on the Application, to allow the parties to *UUU v BBB* to consider some points that I had made to Counsel for the claimant, and to which he had indicated provisional agreement, subject to instructions. Subsequently, a revised agreed form of order was submitted, which removed the term "Confidential" from the body of the order. The agreed order was otherwise identical. For the reasons given below, I do not regard that form of order as ideal; but I conclude that the requirements of open justice are adequately met by approving and making an Order in the terms of the revised agreed draft, supplemented by this public judgment.

Reasons

The framework of law, rules, and practice

37. Transparency is a key feature of litigation in a democratic society, and open justice has long been recognised as a cardinal principle of English law. Perhaps the best-known statements are those of the House of Lords in *Scott v Scott* (above). At 463, 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 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."

38. The principle is immutable. As Lord Judge observed in *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2011] QB 218 [38], nearly 100 years after *Scott v Scott*:-

> "The public must be able to enter any court to see that justice is being done in that court, by a tribunal conscientiously doing its best to do justice according to law. For that reason every judge sitting in judgment is on trial. So it should be, and any exceptions to the principle must be closely limited. …."

This statement, referring as it does to entering a court, requires modification in the practical circumstances that obtain just now. The underlying principle, however, is that proceedings should be open to scrutiny.

39. The matter goes beyond granting access to a court room, whether it be a physical or a virtual room. One of the ways in which the Court gives effect to the requirement of transparency is by making documents accessible to the public. CPR 5.4C(1) sets out the general rule:

> "… a person who is not a party to proceedings 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) …".

40. There are, however, exceptions. As for access to hearings, Earl Loreburn explained the position in *Scott v Scott,* at 446:-

> "… in all cases where the public has been excluded with admitted propriety the underlying principle … 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."

41. As for orders, as implied by r 5.4C(1)(b) these are not automatically accessible to non-parties if they are made in private. In that case, access is only available with the Court's permission: r 5.4C(2). And r 5.4C(4) allows the court, on the application of a party or of any person identified in a statement of case to derogate from the general rule set out in r 5.4C(1). The court can prohibit or restrict access to statements of case, or allow access only to edited versions, or "(d) make such other order as it thinks fit".

42. In *JIH v News Group* (above) the Court of Appeal identified the principles that should govern the exercise of these powers, in the context of an action to restrain the publication of private information by a newspaper. An interim non-disclosure injunction was obtained at an urgent hearing. The parties then agreed that an interim non-disclosure order should be continued until trial, on terms (among others) that the claimant be anonymised. Tugendhat J declined to make such an order without hearing argument to justify the derogations from open justice. Following his own previous decision in *Gray v UVW* [2010] EWHC 2367 (QB), he held that "an order for anonymity and reporting restrictions cannot be made simply because the parties consent: parties cannot waive the rights of the public". The court approved that statement of principle: see [12]. The main issue on appeal was whether the Judge had been right to refuse anonymity (the appeal on that issue was allowed). But Lord Neuberger MR, with whom Maurice Kay and Smith LJJ agreed, enunciated some principles of broader application to cases of that kind. They included, relevantly, the following:

> 20 … 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 … (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. …*"

43. I have emphasised some wording in this passage, to draw attention to two aspects of the guidance provided by *JIH*: (1) The guidance is concerned with applications to restrain publication of aspects of the proceedings before the court, namely "details of the case which are normally in the public domain", or "the normally reportable details"; it is these which engage the open justice principle; (2) if the court determines that it is right to grant an injunction, restrictions on reporting of the proceedings, and editing of any judgment or order, may be necessary to avoid depriving the injunction of its effect.

44. Not long after the decision in *JIH,* Lord Neuberger issued the INDO Practice Guidance, accompanied by the Model Order to which I have already referred. These documents were the fruit of a Committee set up in the wake of the "superinjunction" furore of 2011, and represented the collective wisdom of the judicial participants and a variety of specialists in human rights and media law. They have stood the test of

time well, remaining unamended to this day and in almost daily use in cases of that kind. Paragraphs 9-15 deal with Open Justice. The following passages are relevant:

> "9. Open justice is a fundamental principle. The general rule is that hearings are carried out in, and judgments and orders, are public …
>
> …
>
> 11. The grant of derogations is not a question of discretion. It is a matter of obligation and the court is under a duty to either grant the derogation or refuse it when it has applied the relevant test …
>
> 12. There is no general exception to open justice where privacy or confidentiality is in issue. … Exclusions must be no more than the minimum strictly necessary to ensure justice is done and parties are expected to consider before applying for such an exclusion whether something short of exclusion can meet their concerns, as will normally be the case …
>
> …
>
> 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. It will also adopt procedures which seek to ensure that any ultimate vindication of Article 8 of the Convention, where that is engaged, is not undermined by the way in which the court has processed an interim application…."

45. Paragraph 3 of the Morris Order followed precisely the terms of paragraph 3 of the Model Order. These provisions represent an exercise of the power conferred by CPR 5.4C(4), to derogate from the general rule by prohibiting non-party access to statements of case on the court file. This part of the Morris Order pursued the aim identified in paragraph 14 of the Practice Guidance; as Morris J indicated in his judgment, it was designed to ensure that publicity for the proceedings did not defeat the very object of *UUU's* claim. This provision of the Model Order is often modified to allow access to the body of a statement of case, with the private information being placed in a Confidential Schedule to the statement of case, to which the Order prohibits access. But it is the invariable practice, in a privacy claim that relates to unpublished information, to prohibit public access to statements of case that record the information at stake.

46. Paragraph 4 and Confidential Schedule 2 of the Morris Order were also identical to the corresponding parts of the Model Order except, of course, that the substance and some detail of the Information was inserted in Confidential Schedule 2 to the Morris Order. This arrangement divides the Court's principal substantive order into two parts: a public order which restrains use or disclosure of the Information; and a Confidential Schedule which records the nature and detail of the Information, disclosure of which is prohibited. Paragraph 3 of the Model Order is often adapted to add an express prohibition on access to the Confidential Schedule. The Order in this case does not do so. But it is plainly implicit that the information in the Confidential Schedules to the Morris Order is not intended for public consumption. The manifest

purpose of this scheme is, again, to ensure that the object of the action is not defeated by giving public access to the information which the claimant seeks to protect. The source of the power to confer confidentiality on the Schedule is to be found in CPR 5.4C(4)(d), and the source of the duty to exercise that power is to be found in the obligation to protect the claimant's rights.

47. Paragraph 16 of the INDO Practice Guidance deals with interim non-disclosure injunctions made by consent, in a passage derived from *JIH*, which must apply equally to final orders of the same nature:

> "16. Interim non-disclosure orders which contain derogations from the principle of open justice cannot be granted by consent of the parties. Such orders affect the Article 10 Convention rights of the public at large. Parties cannot waive or give up the rights of the public. The court's approach is set out in *JIH* at [21]."

48. I am dealing with applications for final orders to be made, by consent, to stay further proceedings following a settlement of the claim, on terms set out or referred to in a Schedule to the Order, with liberty to the parties to apply to enforce those terms. An order in this form is generally known as a "Tomlin" Order. This has long been recognised as a useful form of order. It allows the parties to incorporate terms which the Court could not order; and it cuts out the need for separate proceedings on the compromise agreement, if either party alleges that the terms have been broken.

49. The White Book notes (40.6.2) describe Tomlin Orders in this way:

> "Under such an order the proceedings are stayed on agreed terms to be scheduled to the order. …
>
> … the order should read:
>
> > "The claimant and the defendant having agreed to the terms set out in the schedule hereto, IT IS ORDERED THAT all further proceedings in this claim be stayed except for the purpose of carrying such terms into effect. Permission to apply as to carrying such terms into effect."

50. The White Book notes make the following further points. The terms in the schedule to a Tomlin order are "not part of the order as such". They represent a binding contract between the parties, compromising their proceedings. They cannot be directly enforced as an order of the court, but only on an application to carry them into effect. The scheduled terms are not something for the court's approval. The court has no power to make an order in different terms.

51. Consistently with these points, CPR 40.6(1), (2) and (3)(b)(ii), and 40BPD 3.1 lay down, as a general rule, that an order by consent for "… the stay of proceedings on agreed terms, disposing of the proceedings" can be entered and sealed by a Court officer, "whether those terms are recorded in a schedule to the order or elsewhere". Where that general rule does not apply, the order must be approved by a Judge; and an application notice should be filed, with the draft order drawn so that the Judge's name and judicial title can be inserted: 40PBD 3.3. The general rule does not apply where one or more of the parties is a litigant in person: r 40.6(2)(b). Proceedings in

the Commercial Court are another exception, because Rule 40.6 does not apply in that Court: see CPR 58.15(3).

52. It is important to distinguish between a Tomlin order and a consent order which contains terms of settlement that can be enforced as an order of the Court. As the White Book notes at 40.6.2 observe:

> "If it is intended to *embody* terms of settlement which can be enforced as an order *the terms need to be in the order itself (not the schedule)* and set out clearly. Such an order should not include provision for a stay of the proceedings as there would be no point to such a stay.
>
> Practitioners need to decide whether the case requires an order of the court or a Tomlin order with the compromised terms set out in a schedule and take care to draft the order appropriately."

(The emphasis is mine).

53. The passages from the White Book notes that I have cited or mentioned faithfully reflect the authorities. The leading cases of relevance to the issues in the cases before me are *Community Care North East v Durham County Council* [2010] EWHC 959 (QB) [2012] 1 WLR 338 (Ramsey J), and *Vanden Recycling* (above). In *Community Care,* the parties compromised a claim by means of a Tomlin order in the classic form referred to in the White Book. The defendant later applied to vary the terms of the Schedule, to reflect subsequent events which were said to have been outside the contemplation of the parties at the time of the order. Ramsay J dismissed the application, saying this:

> "24…the schedule to a Tomlin order sets out an agreement which has been made between the parties as to the terms on which the proceedings have been settled. …
>
> 25. … where the terms are contained in a schedule to the Tomlin order the position is different from the terms being incorporated as part of a consent order. As set out in the commentary in Civil Procedure 2010 a party can settle a case and seek a court order in one of two ways. First it can seek to incorporate the terms of the settlement within the body of the order so that those terms are part of the court order. The alternative way is by way of a Tomlin order under which the parties seek a stay of the proceedings on terms that the parties will comply with the agreement in the schedule, with liberty to apply to enforce those terms. The court approves and orders the consent order in the first case but only approves and orders the terms of the order but not the terms of the schedule in the second case.
>
> 26. In the case of a Tomlin order a stay is given on the basis that the agreement is complied with. The terms of the schedule are not ordered by the court. Frequently the terms of the agreement in the schedule to a Tomlin order are detailed and

> contain matters which go beyond the scope of the original dispute in the proceedings.
>
> ...
>
> 28.In relation to the terms of the agreement incorporated in the schedule to the Tomlin order, other considerations apply. The terms of the schedule are not an order made by the court."

54. In *Vanden Recycling,* the claimant/appellant ("Vanden") challenged a decision to grant summary judgment in favour of the third defendant/respondent ("Kras"). Judgment had been entered on the basis that an order made in proceedings against the second defendant ("Bolton") took effect as a consent order for judgment in favour of Vanden, and that satisfaction of that judgment had the effect of releasing Kras from any liability as a joint tortfeasor. Vanden's submission was that the consent order was, in reality, a Tomlin order. It did resemble a Tomlin Order. But the appeal was dismissed. The judgment was given by Hamblen LJ (with whom Black LJ, DBE agreed). At [44] Hamblen LJ cited para [25] of *Community Care* with evident approval. He went on:

> "45. Kras further relies upon various differences between a consent order and a Tomlin order in terms of approval, breach, enforcement, variation, confidentiality and appeal. Thus a court will not make a consent order unless satisfied that it has power to do so, *whilst it has no right to disapprove a Tomlin order and such an order can include matters that the court has no power to order.* A breach of a consent order may be punishable as a contempt in appropriate circumstances, whilst *the remedy for breach of the scheduled terms of a Tomlin order is a claim for breach of contract*. In terms of enforcement, the remedies in CPR Pt 83 are available for breach of a consent order but not for breach of a Tomlin order. Variation of a consent order is possible in the interests of justice, whilst rectification would be necessary to vary the contractual terms of a Tomlin order. *Confidentiality for a consent order requires CPR 39.2 to be satisfied, whilst it can be contractually agreed for a Tomlin order.* An appeal of a consent order is possible subject to the usual permission test, whilst there is no appeal from the agreed terms of a Tomlin order. These differences reflect the fact that a consent order is an order of the court whilst the scheduled terms to a Tomlin order are a contractual agreement.
>
> …
>
> 47. As Vanden points out, the Consent Order is expressed in similar terms to a Tomlin order. It refers to Bolton being required to pay sums 'in full and final settlement of the claimant's claims and it purports to stay proceedings 'except for the purpose of enforcing and carrying out the terms of the settlement. It is clear, however, that it is not a Tomlin order. A Tomlin order involves a contractual settlement agreement and allows for proceedings to be continued for the purpose of carrying out that agreement. In the consent order the settlement

> terms are part of the court order. Enforcement does not require further proceedings. Application can be made directly to the court to enforce the terms of the order it has made."

55. The authorities I have mentioned so far speak of terms "set out in the Schedule" to the order, but there are some well-recognised variations on the theme of the Tomlin order. They stem from the parties' desire, in some cases, to obtain a court order whilst keeping the terms of their compromise confidential. Sir David Foskett explains in *The Law of Compromise*:-

> "**10-28** The parties may wish to keep the terms of their compromise confidential. There are two aspects that require to be considered: first, the agreement as to confidentiality itself; secondly, the means by which that agreement is given effect in any consent order reflecting it.
>
> …
>
> **10-31** As already indicated, in most cases it is not necessary for the terms of settlement to be mentioned in open court. However, any consent order or judgment will form part of the court record which is available for subsequent scrutiny. For example, the schedule to a Tomlin order, whilst not strictly part of the immediately enforceable court order, is part of the court record. If the normal form of Tomlin order is utilised, a direction from the court could be obtained to the effect that the schedule to the order "be not released" to any party other than the parties or their advisers. If concern is felt about the efficacy of this direction, the best approach would be to ensure that the terms which would otherwise be scheduled to the order are incorporated on a separate document, suitably identified on the face of the Tomlin order."

The practice of identifying confidential settlement terms by reference in an open Schedule is implicitly recognised by 40BPD 3.1.

56. A case of interest in the context of INDOs is *PJS v News Group Newspapers Ltd.* This is a well-known case about the sex life of a celebrity, in which the defendant pursued a challenge to the grant of an INDO as far as the Supreme Court. Following that Court's dismissal of the defendant's appeal, the parties reached a compromise and submitted a consent order for approval. The Order contained derogations from open justice, so it required judicial scrutiny. For that and other reasons I gave a public judgment, explaining the order and why I approved it:-

> "9. … provides for a stay of all further proceedings in the action on the terms set out in the order, except for the purpose of carrying such terms into effect, for which purpose there is liberty to apply to the Court. The main operative provisions of the order are (1) an order that the defendant pay a specified sum in full and final settlement of the claimant's claim for damages and costs of and occasioned by the action; (2) undertakings to the court given by the defendant, not to use, disclose or publish

> certain information and to remove and not republish certain existing articles. The sum to be paid is set out in a confidential schedule, as is much of the information which the defendant undertakes not to use, disclose or publish. But the undertakings also extend, on the face of the order, to not publishing any information which identifies or is liable to identify the claimant PJS as a party to this action, including identifying the claimant's partner or certain other parties, who are also given pseudonyms.
>
> 10. There are two allied provisions. One is a restriction on access to documents on the court file: no non-party shall be provided with a copy of the confidential schedules to the order, the statements of case, or confidential exhibits without further order, which is only to be made on notice. This is a repetition of an order made as part of the Court of Appeal's interim relief of 22 January 2016, enlarged to take in the schedules to the present order. The other provision is for "anonymity" … This anonymity provision also repeats but extends an order made by the Court of Appeal.
>
> 11. I accept the undertakings offered by the defendant, which are clear and plainly given on advice. I see no reason not to make an order for payment of the agreed sum. There is no reason not to allow the parties to keep the figure confidential.
>
> 12. I am satisfied that the other restrictions on access to the court file are necessary to ensure the effective protection of the claimant's private life rights. Third parties who have been served with or notified of the interim order have no need to gain access to the court file, as the claimant has undertaken to inform them when that order ceases to have effect. If the claimant wishes any third party to know of the specific terms of the undertakings now being given to and accepted by the court the claimant will have to disclose the content of the confidential schedule. But that is a matter for the claimant.
>
> 13. Similarly, the anonymity provisions for the claimant and the claimant's partner remain appropriate. …"

Assessment

57. On the face of it, there does appear to be a difference between the practices of the Chancery Division and those of the Commercial Court, when it comes to the inspection of confidential agreements which the parties wish to implement via a consent order in Tomlin form. It would appear that the practice of the Commercial Court is to inspect confidential agreements to check that their terms would be enforceable, if it came to it. But I do not think it necessary or appropriate to explore the practice in other courts, or the reasons for any real or apparent differences in practice. I am dealing with two cases brought in the Queen's Bench Division general list. I am doing so in the context of CPR 40.6, which prescribes a practice which

plainly differs from that in the Commercial Court. The relatively narrow issue is whether the draft orders should be approved, having regard to the confidentiality provisions they contain.

58. The Master took the view that this turned on whether the Schedule forms "part of the order". Mr Goodfellow submits, in reliance on the passages from the White Book, *Community Care*, and *Vanden Recycling* that I have cited above, that the Master's analysis and approach were wrong. It is clear, he submits, that the settlement agreement identified in the Schedule is merely a contractual agreement, and its terms are not part of the order. The Master was wrong, he submits, to take a different view. Ms Jones endorses that approach.

59. In my view to ask, without more, whether the Schedule is or is not "an order" or "part of an order" is to set up a false dichotomy, and risks semantic confusion. The answer depends on the context in which one is asking the question. In at least two senses it is clear that the Schedule to a Tomlin order *is* part of a Court order. First, the Schedule is an integral part of a document which is approved, sealed and issued by the Court, in the exercise of the judicial power of the state. That being so, as the Master rightly held, the Schedule forms part of the "order" within the meaning of CPR 5.4C, and is subject to the default rule that it is publicly accessible. It is, as Sir David Foskett says, "part of the Court record". Nothing said by Ramsay J or the Court of Appeal in the authorities I have cited is at odds with these points.

60. If, however, one asks whether the Schedule contains or records a direction or imperative issued by the Court in the exercise of its judicial function, one is asking a different question. The question is not one of material form, but an abstract question about what the Court is doing. And this, in my judgment, is the critical question for the purposes of the Appeal and the Application. The answer to the question is also different. In this sense, as Sir David Foskett says, the terms of settlement are "not strictly part of the immediately enforceable court order". The precise words of the White Book are to be noted: "not part of the order *as such"*. So too are the exact words used by Ramsay J in *Community Care* at [28]: "The *terms* of the schedule are *not an order made by* the court". This is similar to the wording of Mr Goodfellow's core submissions, as can be seen from the wording of his Grounds of Appeal, quoted at [14] above.

61. That is clearly right, when it comes to an order in the unvarnished, classic Tomlin form set out in the White Book ([49] above). The only parts of such an order that represent the exercise of judicial power to require, prohibit or allow a party to take any action are the stay of proceedings, and the liberty to apply. The Schedule to such an order does no more than record the terms of settlement, which amount to a contract between the parties. Those terms can only be enforced by means of a subsequent application. It is only at that point, if it arrives, that the Court may need to scrutinise the terms of settlement and adjudicate on their enforceability. That is what happened in the case of *Bostani v Piper,* referred to by the Master. The issue there was whether the Limitation Acts applied to the application to enforce. The Court held that they did, because the Schedule was a simple contract. There is nothing in the decision that supports the view that the terms in the Schedule to a Tomlin order represent an order of the Court, in the sense I am considering now. Nor do the other two cases mentioned by the Master assist. Both were cases of rectification, treating the Schedule as a contract.

62. Neither of the draft orders that are before me now is in the classic form, and both make reference to confidentiality. That calls for a closer look. As *Vanden Recycling* illustrates, the mere fact that an order contains reference to settlement, coupled with a provision for a stay and a Schedule does not conclude the question of whether it is a Tomlin order. *Vanden Recycling* also identifies an important difference between consent orders and Tomlin orders, when it comes to the requirements of open justice.

63. The draft order in *Zenith v Coury* can however be readily recognised as a genuine Tomlin order, following the second of the two options identified in *Foskett on the Law of Compromise* 10-31. It is not a consent order of the kind identified in *Vanden Recycling.* It does not amount to the entry of judgment, nor does it contain any coercive provisions, or of any other kind of order that could be enforced without more. The only operative terms of the order are the stay of proceedings and the liberty to apply.

64. This is made all the clearer by the fact that the parties have not chosen to seek confidentiality for any part of the document containing the Tomlin order. The terms of settlement are referred to, but not set out in, the Schedule. They have been removed from the face of the order in order to preserve confidentiality, recognising that the document itself will be accessible to third parties if no order to the contrary is made. There is, therefore, no "Confidential Schedule" (a feature of the case that has, perhaps, not so far been fully recognised). This form of order underlines what I consider to be as a clear distinction between a Tomlin order, and a consent order which contains enforceable provisions. It is impossible to argue that, in this form of order, the terms of settlement represent an order of the court, in the conceptual sense I have identified.

65. In my judgment, this form of settlement, and this form of order, are entirely unobjectionable. The central point is that what the open justice principle requires is that the Court's exercise of its powers should be transparent and open to scrutiny and criticism. When parties submit an order in this form, or the classic form of Tomlin order, they are not seeking to "engage the coercive powers of the Court", as the Master put it. They are seeking no more than the exercise of some simple case management powers following a compromise of the claim. If the order is made in this form, the requirements of transparency are fulfilled: the order will be publicly accessible, and it will reflect the entirety of what the Court has done, namely to grant an agreed application to stay the proceedings on terms that the parties may apply to enforce the settlement agreement, reserving to itself the power to make further orders if such an application is made, and the Court is persuaded that enforcement is appropriate. It therefore makes sense that an order in such a form can be made by a Court officer, provided the case does not involve a litigant in person or otherwise fall outside the scope of CPR 40.6(2)(ii).

66. True it is that, if an order of this kind is made, the terms of the settlement agreement will not be on the public record. But a decision to refer to those terms rather than set them out in the Schedule is not a derogation from open justice. The open justice principle does not require parties to make their settlement agreements public. Nor do they require parties who wish to seek a stay of proceedings on Tomlin terms to incorporate in an order the details of an agreement which they have stipulated should be kept private or confidential. These are not "normally reportable details" of the proceedings. Nor do they stem from any judicial decision. The agreement in such a

case results from autonomous decision-making by the parties, not the Court, and by definition its validity is not – at that stage - controversial. The mention of an agreement in an order does not give rise to any right of inspection.

67. For my part, I would favour the view that, as a rule, this Court should not demand to see a settlement agreement which the parties have designated as confidential. The position may be different where one or more parties is a litigant in person, or in other cases excluded from the scope of CPR 40.6. But generally, it would seem that there is no need to do so. The Court has no power to amend or vary the terms of the agreement. A Tomlin order, if made, does not represent endorsement or approval of those terms, or a conclusion that they are enforceable. The Court will normally have no business inspecting the terms unless and until an issue is raised on an application to enforce. And the general rule laid down by CPR 40.6 is at odds with any such practice.

68. I would add this. The court's duty to manage cases actively, to achieve the overriding objective, includes "helping the parties to settle ... the case": CPR 1.4(2)(f). To refuse approval of an order such as that before me now because it refers to terms of settlement which the parties have agreed should be confidential would be to raise an obstacle to settlement, or at best drive the parties into settlement on different terms, the enforcement of which would require a separate action, with all the extra administration and cost which that involves.

69. But it is not necessary to reach a final conclusion on these issues. Whether or not this reasoning is sound, I can see no basis in principle or authority for assessing, at the initial stage, the propriety of the label the parties have attached to their "confidential" settlement agreement. The open justice principle is not engaged. And nobody has suggested, nor do I consider it arguable, that the Court should at this initial stage be concerned for any other reason with whether the confidentiality purportedly conferred on the agreement would be enforceable if challenged. In my judgment, it is only if there comes an enforcement stage that the court's coercive powers are invoked, and the open justice principle will be engaged. This is not a submission made by the parties in this case. The Master was however right to consider it. With respect, I consider that he was wrong to dismiss it.

70. The Application raises quite different considerations. As Mr Flannery rightly observes, the draft Order in *UUU v BBB* is quite different from the draft in *Zenith v Coury.* It is different both in form, and in substance. Crucially, it goes beyond mere case management and contains immediately enforceable provisions. The enforceable provisions take the form of undertakings, rather than orders, but for present purposes their effect is not materially different. An undertaking to the court can be enforced by committal proceedings, without the need for any preliminary application to enforce. Indeed, the draft order contains no liberty to apply to enforce. This, therefore, is a consent order, and not a Tomlin order. When deciding whether to make such an order, including the acceptance of undertakings, the court is exercising a discretion, which must be governed by principles the same as or similar to those that would apply when approving an injunction by consent. Here, there is the additional fact that Articles 8 and 10 of the Convention are engaged, and the Court accordingly has a duty to ensure that its order is compatible with the Convention.

71. In the light of these factors, it is clear that the parties' proposals for confidentiality do impinge on the open justice principle. Like the draft orders in *JIH* and *PJS,* which it resembles in some respects, the draft order in *UUU* must be subjected to close scrutiny, to determine the extent of the derogations from open justice that are involved, and the extent to which they are shown to be necessary.

72. As to the substance of the undertakings, those at paragraphs 1 and 2 reflect the conclusions of the court, after argument, as to what would be likely to happen at a trial. They are acceptable. Paragraph 3 is a curious provision. The first limb is superfluous: there is no need for an undertaking to comply with an existing order of the court. But it is not for that reason objectionable. The second limb adopts a common form of agreement for payment by instalments, often found in open Tomlin orders. But there is nothing inherently objectionable about formulating it as an undertaking to the court. It seems a little odd to formulate paragraph 4, the release of claims, as an undertaking to the court but again I see no principled objection to that.

73. Turning to the question of confidentiality, in my judgment:-

(1) There can be no justification for conferring confidentiality on the body of the order. It contains nothing that is private or confidential. The parties were plainly right to remove the label "confidential" when revising the draft after the hearing, thus leaving the body of the order amenable to public inspection.

(2) It is not necessary to place in a confidential schedule the nature of the principal undertakings: not to use, publish, communicate or disclose the specified information. The corresponding injunctions are and always have been a matter of public record. Now that I have put that aspect of the order in the public domain in this public judgment, however, it is not necessary to require amendment of the agreed order.

(3) The nature and details of "the Information" are set out in a Confidential Schedule to the Morris Order. That is not always necessary, when there is an anonymity order. But I agree with Morris and Steyn JJ that it is necessary here. The categories of information, taken together, would risk indirectly identifying the claimant, the defendant, or both, as the parties to the proceedings and/or the subject of the information, and thus defeating the legitimate aim of the claim. I therefore approve confidentiality for that aspect of the order, and do not mention any of the details here.

(4) The only aspect of paragraph 3 that justifies a derogation from open justice is the detail of the instalment plan: the frequency and amount of the payments to be made. That is confidential financial information, within the scope of the recognised exceptions to open justice: see, for instance, CPR 39.2(3)(c) and (g). Plainly, it might not remain confidential if there were enforcement proceedings. The rest of the information is public via this judgment, so amendment of the agreed order is not necessary.

(5) I see nothing in paragraph 4 that requires a derogation from open justice. The details of the claims which the defendant undertakes to release are not set out in the Schedule, but elsewhere. There is therefore a comparison to be drawn with *Zenith v Coury*. But the cases are not the same, because this is an undertaking to

the Court. However, as I have set out the substance of this paragraph in this public judgment, transparency does not call for amendment of the agreed order.

74. This application has led me to look at the question of confidentiality for orders or parts of orders in this action more generally. As noted above, paragraph 3 of the Morris Order protects statements of case, and other documents, from public inspection. But it makes no mention of the Confidential Schedules to the order itself. It is better to make that protection express, and to extend it to the Confidential Schedule to the final order that I now approve. I shall therefore add to paragraph 3(a)(i) a prohibition on the provision to a non-party of any confidential schedule to any order of the Court. I shall however delete the protection for statements of case. I can understand why that was put in place, before proceedings had been issued. But in the event, the only statement of case that has been served is a Part 8 claim form. I have reviewed this. It is not "strictly necessary" to conceal it from the public. The parties are anonymised and nothing is given away about their identities or the nature of the information at stake. Paragraphs 3(a)(ii) and (b) may be superfluous, as the documents referred to are not accessible to non-parties without permission anyway. But they are harmless and will remain.