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Case No: HQ12X00440

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/05/2012

Before :

THE HONOURABLE MR JUSTICE TUGENDHAT

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Between :

CVB	**Claimant**
- and -	
MGN Ltd	**Defendant**

- -
- -

Hugh Tomlinson QC (instructed by **Atkins Thomson**) for the **Claimant**
Gavin Millar QC (instructed by **Reynolds Porter Chamberlain**) for the **Defendant**

Hearing dates: 19 April 2012

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Judgment

Mr Justice Tugendhat :

1. CPR Part 16 and the Practice Directions 7A and 16 to the CPR give effect to what have long been some of the requirements of open justice. PD16 para 2.2 provides that "The claim form must include an address at which the claimant resides or carries on business", (although para 2.5 refers to the court dispensing with that requirement). PD16 para 2.6 provides that

> "The claim form must be headed with the title of the proceedings, including the full name of each party. The full name means, in each case where it is known: (a) in the case of an individual, his full unabbreviated name and title by which he is known; …"

2. CPR Part 7.1 provides that "Proceedings are started when the court issues a claim form at the request of the claimant".

3. If a claim form is to be issued and served which does not comply with the requirements of PD 16 on identifying the claimant, then the intending claimant must apply to the court for a dispensation from those requirements before the claim form is issued.

4. A defendant to an action must be served with a claim form, and will be entitled to production of documents from the court pursuant to CPR r.5.4B.

5. The rights of a non-party to see documents from the court records are more restricted than the rights of a party. The rights of a non-party are set out in CPR r.5.4C:

> "(1) The general rule is that 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;...
>
> (3) A non-party may obtain a copy of a statement of case or judgment or order under paragraph (1) only if – (a) where there is one defendant, the defendant has filed an acknowledgment of service or a defence;... (c) the claim has been listed for a hearing; or (d) judgment has been entered in the claim.
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> (4) The court may, on the application of a party or of any person identified in a statement of case – (a) order that a non-party may not obtain a copy of a statement of case under paragraph (1); (b) restrict the persons or classes of persons who may obtain a copy of a statement of case; (c) order that persons or classes of persons may only obtain a copy of a statement of case if it is edited in accordance with the directions of the court; or (d) make such other order as it thinks fit.
>
> (5) A person wishing to apply for an order under paragraph (4) must file an application notice in accordance with Part 23.
>
> (6) Where the court makes an order under paragraph (4), a non-party who wishes to obtain a copy of the statement of case, or to obtain an unedited copy of the statement of case, may apply on notice to the party or person identified in the statement of case who requested the order, for permission."

6. A further provision of the CPR which may be invoked to protect the private lives of parties and others is CPR 31.22(2). The Claimant asks for an order under this rule for that purpose in respect of the witness statement of her solicitor. This rule reads:

> "The court may make an order restricting or prohibiting the use of a document which has been disclosed, even where the document has been read to or by the court, or referred to, at a hearing which has been held in public."

7. CPR r.23 provides:

> "23.1 In this Part –
> 'application notice' means a document in which the applicant states his intention to seek a court order; and
> 'respondent' means –

> (a) the person against whom the order is sought; and
> (b) such other person as the court may direct....
>
> 23.2 … (4) If an application is made before a claim has been started, it must be made to the court where it is likely that the claim to which the application relates will be started unless there is good reason to make the application to a different court…
>
> 23.3(1) The general rule is that an applicant must file an application notice.
>
> (2) An applicant may make an application without filing an application notice if –
> (a) this is permitted by a rule or practice direction; or
> (b) the court dispenses with the requirement for an application notice.
>
> 23.4(1) The general rule is that a copy of the application notice must be served on each respondent.
>
> (2) An application may be made without serving a copy of the application notice if this is permitted by – (a) a rule; (b) a practice direction; or (c) a court order.
>
> 23.9(1) This rule applies where the court has disposed of an application which it permitted to be made without service of a copy of the application notice.
>
> (2) Where the court makes an order, whether granting or dismissing the application, a copy of the application notice and any evidence in support must, unless the court orders otherwise, be served with the order on any party or other person – (a) against whom the order was made; and (b) against whom the order was sought.
>
> (3) The order must contain a statement of the right to make an application to set aside or vary the order under rule 23.10.
>
> 23.10(1) A person who was not served with a copy of the application notice before an order was made under rule 23.9, may apply to have the order set aside or varied.
>
> (2) An application under this rule must be made within 7 days after the date on which the order was served on the person making the application".

8. CPR Practice Direction 25A para 5 provides:

> "All applications made before a claim is commenced should be made under Part 23 of the Civil Procedure Rules. Attention is drawn in particular to rule 23.2(4)".

9. On 3 February 2012 the Claimant applied to the Master for a dispensation from each of the requirements that the name and address of the Claimant be given in the claim form. The Master gave the dispensation in the form of an order. The order of the Master also contained a provision relating to access to the court file, including that an application made by a non-party to the court be made on notice to the Claimant. The substance of the order was that the Claimant, who was at that time an intending

claimant, be permitted to issue the Claim Form in which the title named her as "CVB" and in which her address is given as that of her solicitor.

10. The issue in this application now before the court is whether the order made by the Master on 3 February 2012 should be continued, and if so whether it should be continued in the form in which it was made.

11. Orders to this effect are commonly referred to as "anonymity orders". But there are other orders that the court has power to make to prevent publication of the identity of a party or a witness, and since they too are commonly called anonymity orders, I shall refer to the order made on 3 February as "the 3 February order" or as a "r.16 Order".

12. The order of 3 February also includes provisions which appear to be wider than any envisaged by CPR r.5.4C and r.16, including that

> "2. There be substituted for all purposes in these proceedings in the place of references to the Applicant by name and whether orally or in writing, references to the letters CVB".

13. The Master did not himself draw up the order, and it was his requirement that there be added to it the reference to the right to apply to set it aside. I shall consider the form of the order separately from the issue of principle as to how such orders should be applied for.

14. The claim form was issued on 6 February 2012 and Particulars of Claim served on 20 February 2012. The Application Notice now before the court was issued on 28 March 2012. In it the Defendant asks that the court set aside or vary the 3 February order on the grounds that it was unjustifiably made without notice to the Defendant and that it is an unjustifiable derogation from open justice.

15. The 3 February order was made without notice to the (then) intended Defendant. The Defendant submits that that was wrong, and that notice should have been given to it as the intended defendant. The Defendant does not now submit that the fact that the order was made without notice is an independent ground for this court to refuse to continue the order. But the Defendant submits that what has occurred raises an issue of principle as to the proper practice to be followed by applicants for r.16 orders. It is for that reason that this application has been listed before me, instead of before the Master, who could otherwise have heard the application to vary or discharge his own order.

16. It is to be noted that there is no application or order in this action for an interim injunction of any kind. If there had been, then that application would have had to have been made to a judge, not a Master. It may well be that any r.16 order would also have been made by the judge who heard that application.

17. There is no dispute that the court has jurisdiction to make an order that the title to the proceedings need not contain the full name of each party as would otherwise be required.

18. It is to be noted that an order under CPR r.16 or r.5.4C is not in itself an injunction or order that the identity of a claimant referred to anonymously in the title to the action

must not be disclosed. A non-disclosure order relating to the identity of a claimant may also be made by the court. There is specific reference in CPR 39.2(4) which reads:

> "The court may order that the identity of any party or witness must not be disclosed if it considers non-disclosure necessary in order to protect the interests of that party or witness".

19. A non-disclosure order under CPR 39.2(4) is also sometimes referred to as an anonymity order.

20. The fact that a party, a witness, or any other person, may have been referred to in court proceedings has important consequences. For example, reports of proceedings in court may be the subject of a defence of privilege in any proceedings for libel. And where the court has made a non-disclosure order relating to the name of such a person, disobedience to a court order may be a contempt of court. The Contempt of Court Act 1981 s.11 provides:

> "In any case where a court (having power to do so) allows a name or other matter to be withheld from the public in proceedings before the court, the court may give such directions prohibiting the publication of that name or matter in connection with the proceedings as appear to the court to be necessary for the purpose for which it was so withheld."

21. That section has sometimes been understood as being the source of the court's power to which the section refers, namely to allow a name to be withheld from the public. But that view is mistaken: see *In re Guardian News and Media Ltd* [2010] UKSC 1; [2010] 2 AC 697 para [31]. In that case the Judge had ordered that no report of the proceedings directly or indirectly identify the applicant: para [3]. As Lord Rodger explained, until the passing of the Human Rights Act 1998, the source of the power to prohibit the publication of the name of a party or other person was derived from statutes such as the Children and Young Persons Act 1933 s.29. Since the passing of the HRA s.6 and ECHR Art 8, there is a positive obligation upon the court to respect private life, and the making of orders that give anonymity is one of the ways in which the courts carry out that obligation: see paras [28]-[30]. There are special rules governing the procedure in the Family Division on identification of parties and others.

22. Another order that a court may make in order to prevent disclosure of the name of a party or witness (or other third party) is that the court sit in private. In the Administration of Justice Act 1960 s.12 it is provided that:

> "The publication of information relating to proceedings before any court sitting in private shall not of itself be contempt of court except in the following cases, that is to say— ... (e) where the court (having power to do so) expressly prohibits the publication of all information relating to the proceedings or of information of the description which is published".

23. It is not in dispute that a r.16 order, and a non-disclosure order under CPR 39.2(4), are each derogations from the principle of open justice and might affect the Convention

right of freedom of expression. An order that the court sit in private would be a greater derogation and interference. Derogations from open justice must only be ordered where that is necessary, and only to the extent that is necessary. In a case where the derogation is sought at common law the requirement of necessity is set out in *Scott v Scott* [1913] AC 417 and *A-G v Leveller Magazine Ltd* [1979] AC 440, cited in *R v Legal Aid Board Ex p Kaim Todner* [1999] QB 966, 976C-H. In a case where the derogation is sought from the Convention rights of open justice and freedom of speech, the requirement of necessity is set out in Arts 6 and 10(2).

24. Anonymity orders can be made in a wide variety of different types of claim. In *R v Legal Aid Board Ex p Kaim Todner* [1999] QB 966 at page 973F Lord Woolf MR referred to a number of examples, including *R v Westminster ex p Castelli* (1995) 28 HLR 125, which was an application for judicial review. He said:

> "In addition to the cases referred to in *Ex parte Castelli*, Mr. Lawson relies upon a variety of cases where anonymity has been granted in addition to the obvious situations, of which cases involving rape or blackmail victims and children are examples. Among the cases to which he refers are *T v. Secretary of State for the Home Department* [1996] A.C. 742 (the case which went to the House of Lords concerning an asylum seeker who claimed that he was in fear for his life or freedom but was himself a member of a terrorist group); *P. v. T. Ltd*. [1997] 1 WLR. 1309 (a case which was heard by Sir Richard Scott V.-C. and involved an issue of discovery in a dispute between an employer and an employee where the allegations were of "gross misconduct" and the employee was complaining that his career had already been wrecked (as a result of it being well known that he had been dismissed for impropriety)) and *Director of Public Prosecutions v. H*. [1997] 1 WLR. 1406 (a decision of the Divisional Court, where the issue was whether H. could rely upon insanity as a defence to a charge of driving when the proportion of alcohol in the blood exceeded the prescribed limit contrary to section 5(1) of the Road Traffic Act 1988)."

25. Other examples of cases where anonymity may be sought are those involving clinical negligence, or other causes of action related to medical and other highly personal information. See for example *A (Minor) v A Health and Social Services Trust* [2010] NI QB 108 and *JXF (a child suing by his mother and litigation friend KMF) v York Hospitals Foundation Trust* [2010] EWHC 2800 (QB).

26. Since a r.16 order may be made in so many different types of claim, and in respect of so many different types of claimant, the facts specific to any particular claim are of limited assistance in formulating the principles which should govern an application for such an order.

27. Some guidance was laid down in *R v Westminster ex p Castelli* (1995) 28 HLR 125 at p131 Latham J (as he then was) for judicial review cases. It is cited in the White Book (2012) Vol 2 at 3C-75. He said this:

> "On 27 July 1995 I refused applications made by the applicants in these two motions for judicial review in which each sought orders that the matters be listed in the cause list by reference only to their initials, but their names and addresses should not be referred to in the course of the substantive hearing, and that orders be made pursuant to section 11 of the Contempt of Court Act 1981 preventing publication of their names, addresses or photographs".

28. Thus in that case the orders sought included non-disclosure orders. Latham J refused those applications following argument in which he had the benefit of submissions not only by experienced counsel for the Applicants but also counsel for the Daily Mail and an amicus curiae (Mr Ian Burnett, as he then was) instructed by the Attorney-General.

29. At page 135 Latham J gave this guidance:

> "During the course of argument I was urged to give consideration to the way in which applications such as this could be made in such a way as to protect the interests of the applicants and other interested parties. I do so, but with some diffidence. In many cases, particularly in those where the name of the applicant will not of itself contain any risk of publicity before the hearing of the application for leave merely by the fact of it being published in the cause list or appearing in the Notice of Application, the application for anonymity and an order under Section 11 can be made at the same time as the application for leave. Clearly if any notice were given to the press before the application was made, that would be likely to defeat the object of the application. It seems to me that the right course is to deal with the application for anonymity and an order under Section 11 of the Act *ex parte*, as I did in the present applications, and, if appropriate *in camera* [that is in private]. The court can then consider whether there is power in the circumstances to make an order and whether or not there is a good argument for exercising that power. If there is, the court may, as I did in the present case, grant such an order for a short time so that notice can be given to the press and, if it was considered appropriate to request the Attorney General to provide an *amicus curiae* so that the matter can be fully argued. I heard the matter in chambers. But it may not be an appropriate way to deal with the issue, if the only question is anonymity. Although the *ex parte* application may have to be made in camera, the necessary protection for the applicant during the inter parties hearing can be secured by a Section 11 order effective until the conclusion of the hearing.
>
> In cases where the applicant's name may itself give rise to the possibility of publicity, a different procedure may need to be adopted. The application for the order under Section 11 may have to be made as soon as the papers are lodged for the

> application for leave to move the judicial review. In that type of case the applicant should not lodge the papers until he has ensured by enquiry with the Crown Office that the application can be dealt with immediately. Otherwise there may be the risk however small, of someone who is exercising his right under Order 63, rule 4 to inspect the office documents discovering the information which it has sought to protect before the court can make any order protecting it.
>
> The second practical problem which is raised by these applications is the way in which information is made public about the nature and extent of any particular application at the hearing for leave to move. This poses a number of interesting and potentially difficult questions, which I have drawn to the attention of Simon Brown LJ, who is the judge in charge of the Crown Office List".

30. That case of course preceded the passing of the Human Rights Act and so Latham J did not have to consider s.12 of that Act.

31. The procedure that was followed in the present case, namely the application to the Master before the issue of the claim form, is in practice the equivalent of the procedure envisaged in the second of the paragraphs quoted from page 135 of Latham J's judgment. As both counsel and I understand it, the procedure adopted in the present case is a procedure which is commonly adopted in the Queen's Bench Division where, as here, there is no application for an interim injunction, for example in the negligence cases brought by children and protected parties where there is good reason why the name of the claimant should not be identified. It is not commonly adopted in cases where a news publisher is a defendant, perhaps because in such cases there is usually also an application for a non-disclosure order, and a non-disclosure order cannot be made by a Master, but only by a judge.

SUBMISSIONS FOR THE DEFENDANT

32. Mr Millar submits that, because a r.16 order is a derogation from open justice and might interfere with freedom of expression, the practice approved by Latham J is not compatible with HRA s.12(2) and the guidance of the Master of the Rolls in *JIH v News Group Newspapers Limited* [2011] EWCA Civ 42; [2011] 1WLR 1645 para [21] applies.

33. HRA s.12 applies where the court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression. S.12(2) provides:

> "If the person against whom the application for relief is made ("the respondent") is neither present nor represented, no such relief is to be granted unless the court is satisfied— (a) that the applicant has taken all practicable steps to notify the respondent; or (b) that there are compelling reasons why the respondent should not be notified".

34. In *JIH* as judge on the return date I had granted an interim non-disclosure order to restrain the misuse of private information about a sexual relationship. The judge who had heard the initial application for the non-disclosure order, which was before the issue of the claim form, had made both a non-disclosure order and a r.16 order. On the return date I had declined to continue an order in a form which prohibited disclosure of the name of the applicant. The guidance in *JIH* was therefore not confined to a r.16 order, but was given in the context of the Court of Appeal's decision to continue the order that the identity of the claimant be not disclosed. It reads as follows:

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

35. I have also received from a number of lawyers letters written on behalf of other news publishers: Elizabeth Hartley for Associated Newspapers Ltd, Gillian Phillips on

behalf of Guardian News and Media Limited, the Group Legal Department for the London Evening Standard, The Independent and The Independent on Sunday, Justin Walford and Ben Beabey on behalf of Newsgroup Newspapers Limited, publisher of the Sun and the Sun on Sunday and Clare Shields on behalf of Telegraph Media Group Limited. These letters, written as they are by lawyers very experienced in this field of the law, are of great assistance to the court. The letters are in substantially similar terms. They refer to the Human Rights Act 1998 s.12(2). They state that, as is undoubtedly the case, as in-house lawyers with many years' experience they can be trusted to distinguish between information provided to them for legal reasons and information provided for editorial purposes, with the result that the giving of notice to them ought not to raise the concern that that would defeat the object of the application. They point out that an anonymity order affects the wider public because it means that information about court proceedings to which the public would normally have access (such as the identities of the parties) becomes unavailable.

SUBMISSIONS FOR THE CLAIMANT

36. Mr Tomlinson stated that the Claimant is neutral on the issue as to how applications for r.16 orders should be made. But he made the following submissions with a view to assisting the court.

37. It is important to understand the nature of the order made by the Master. It was not an injunction of any kind (which the Master has no power to make) or an "interim remedy" under CPR Part 25. It was, rather, an order permitting the issue of proceedings anonymously.

38. The order does not prohibit the publication of anything. It is permissive rather than prohibitory. The only restriction which it places on anything is a restriction on access to the court file. That is a reference to a provision in the order which is mis-described, but which is obviously meant to be an order under CPR Part 5.4C (supply of documents to a non-party from court records). It does not include a non-disclosure order of the kind, for example, to be found in para 6(b) of the Model Order attached to the Practice Guidance: Interim non-disclosure Orders, issued by the Master of the Rolls in August 2011. That clause includes:

> "…the Defendants must not … (b) publish any information which is liable to or might identify the Claimant as a party to the proceedings and/or as the subject of the Information or which otherwise contains material … which is liable or might lead to, the Claimant's identification".

39. The effect of the r.16 order in this case is simply to avoid the automatic removal of the Claimant's privacy, and further intrusion into her private and family life, by the inclusion of her name and other information in public court documents. It is not an order made "against" the defendant or anyone else, as the word "against" is used in the CPR or in HRA s.12(2). It is a less restrictive order than a non-disclosure order, and so is an order encouraged by para [21(4)] of *JIH*.

40. Mr Tomlinson cited as another example of this *Cream Holdings v Banerjee* [2005] AC 253 at para [26] where Lord Nicolls of Birkenhead said this:

> "I recognise that without reference to the content of the confidential information this conclusion is necessarily enigmatic to those who have not read the private judgments of the courts below. But if I were to elaborate I would at once destroy the confidentiality the Cream Group are seeking to preserve. Even if the House discharges the restraint order made by the judge, it would not be right for your Lordships to make public the information in question. The contents of your Lordships' speeches should not pre-empt the "Echo's" publication, if that is what the newspaper decides now to do. Nor should these speeches, by themselves placing this information in the public domain, undermine any remedy in damages the Cream group may ultimately be found to have against the "Echo" or Ms Banerjee in respect of matters the Echo may decide to publish."

41. Mr Tomlinson submits that the submissions made for the Defendant and the letters written on behalf of the other news publishers suggest a course that would be inappropriate and disproportionate, at least insofar as it is suggested that notice should be given to any person other than a defendant. The wide range of different types of cases in which anonymity orders are made are such that in many cases the defendant would not be a news publisher and would not be concerned to make submissions on open justice or freedom of expression. Giving notice to a news publisher or to another person who would have such concerns is not practical. He submits that if the procedure followed on behalf of the Claimant in the present case is held to be wrong, then the most that the court should require is that in future an application for a r.16 order should be made either with a return date, or on notice to the intended defendant before the pre-issue application was made.

DISCUSSION ON PROCEDURE

42. What the case of *Castelli* and the other case referred to by Lord Woolf MR illustrate is that the interest of the Defendant in this case is two fold: one interest is as defendant and the other is as a news publisher. Those interests give rise to different considerations.

43. The defendant who happens also to be a news publisher will be in a different position, both from other news publishers, and from members of the public in general. The experience of this court is that defendants who are not news publishers commonly welcome a r.16 order for a claimant, and even ask for one for themselves (often unsuccessfully). Alternatively, defendants who are not news publishers are often indifferent as to whether such an order is made or not, regarding it as a matter for the court to decide without the benefit of any submissions from them. Any defendant will of course know the identity of the claimant, even if that identity is not given in the title to the claim form. Persons other than a defendant may not know the identity of the claimant from the claim form, although of course they may happen to know from other sources. A person who does not know the identity of a claimant will be in a more difficult position to challenge an anonymity order than a defendant or other person who does know that identity.

44. While the letters from other news publishers understandably address the concerns of themselves as news publishers, or the media, the special consideration given to the media as "watchdogs" (in the term used in the Strasbourg jurisprudence on freedom of expression) is because they are engaged in the activity of journalism. There is a wide range of media organisations, some of which may be interested only in very limited kinds of litigation, or have no interest in litigation at all. Many other members of the public may nowadays be engaged in journalism. In recent years the virtual monopoly of the media in carrying on that activity has been broken by the internet. There are now many people who carry on the activity of journalism directly through the internet without the need for premises, in-house lawyers or the other resources of the news publishers for whom these letters were written.

45. In considering to whom notice should be given of an application to the court, the court and the intending claimants must be able to be able to distinguish those to whom notice must be given, if any, and those to whom it need not be given. A requirement for the giving of notice must not be so onerous as to be disproportionate to the aim that the requirement is intended to achieve.

46. An illustration of the risk to a claimant who does not apply for an anonymity order before issuing proceedings is given in the case of *RA, Re Judicial Review* [2010] NIQB 27. In that case the ground given by the court for refusing anonymity was that the applicant's name had been disclosed earlier in the proceedings, so that the risk of harm to him would not be averted by an anonymity order made at the time of the application which was refused: see paras [6], [13] and [29]. Henderson J made a similar point in *HMRC v Banerjee* [2009] EWHC 1229 (Ch) at para [34], as did the Court of Appeal in *Pink Floyd Music Ltd v EMI Records Ltd* [2010] EWCA Civ 1429; [2011] 1 WLR 770 at [67].

47. In my judgment Mr Tomlinson is correct in his submission that a r.16 order by itself is not an injunction of any kind, and is not an "interim remedy" under CPR Part 25. It is permissive only. This view is supported by the observations of Henderson J in *HMRC v Banerjee* [2009] EWHC 1229 (Ch) at para [39].

48. The practical effect of a r.16 order is that the defendant, or anyone else who happens to know the identity of the claimant, if they do disclose to the public the identity of the party who is referred to in the title to the action, is unlikely by that fact alone to be committing a contempt of court or interfering with the administration of justice. But if the disclosure of that identity does amount to an interference with the administration of justice, or if it amounts to a tort such as defamation or misuse of private information, the person making the disclosure will not be able to rely by way of defence on the fact that the identity of the claimant is available as a matter of public record, as he otherwise would be.

49. On this understanding of the effect of a r.16 order, in my judgment it cannot be said to be relief granted, or to be granted, "against" the defendant or anyone else, as the word "against" is used in HRA s.12(2). "Against" connotes that the person referred to in that section as "the respondent" is either a party to the intended action, or a person to whom it is intended to give notice of the order granting the relief referred to in that section. The same applies to the use of the word "against" in CPR r.23.9.

50. Accordingly, there is no requirement under HRA s.12(2) or CPR r.23 to give notice to an intended defendant or anyone else of an application to apply for a r.16 order.

51. Paras (1) to (9) of the guidance in *JIH* can readily be applied to a r.16 order, always bearing in mind that it is not an order restraining the publication of anything. Para (10) of the guidance re-iterates the requirements in CPR Part 25.3(1) and HRA s.12(2). But the Court of Appeal was not speaking in the context of an application for a r.16 order unaccompanied by a non-disclosure order. It is to be noted that in *Pink Floyd Music Ltd v EMI Records Ltd* [2010] EWCA Civ 1429; [2011] 1 WLR 770 at para [66] the Court of Appeal had said that

> "party anonymisation will be granted in the Court of Appeal only if, and only to the extent that, a member of the Court is satisfied that it is necessary for the proper administration of justice".

52. I reach this conclusion without regret. It seems to me that the procedure approved by Latham J in *Castelli* is a convenient one that causes the least possible interference with the rights of others. If there were a requirement of notice to be given, that would be disproportionately burdensome to intending claimants of modest means (as many such applicants are). It would confer little material benefit on defendants or upon news publishers and others who might wish to exercise their right to freedom of expression. The reasons are explained by Latham J.

53. Any person affected by a r.16 order made without notice can apply to discharge the order. Such an application is not required to be within any time limit. This gives to non-parties an effective means to enforce their rights under Art 10.

WHETHER THE ORDER SHOULD BE CONTINUED

54. The Claimant is a widow with children. Her husband died some years ago, together with a number of other people, in an incident which is well known. Recently she attended a service held to commemorate those who died on that occasion. A photograph was taken of which she alleges shows her in a manifestly distressed state and it was published by the Defendant in the Daily Mirror. The Defendant also offered to licence other publishers to reproduce that and other photographs taken of the Claimant in similar circumstances on the same occasion. The Claimant alleges that the photographer asked her for her name, but that she refused to give it and said that the photographer was not to take or publish any photographs of her or her family. It was notwithstanding this, she claims, that the photograph was published. Her solicitor set out her case in substance in a letter before action.

55. The Defendant responded that it was prepared, voluntarily, to offer not to use again the photograph which had been published in the Daily Mirror. But it did not admit liability or agree to other requirements made on behalf of the Claimant. It is in these circumstances that the claim came to be issued. The claim is for damages for breach of confidence or invasion of privacy, and for an injunction.

56. The Defendant gave notice of this application to discharge or vary the order of 3 February. It made a number of criticisms of the evidence that had been put before the Master. That evidence had been in the form of a witness statement from the

Claimant's solicitor and not by herself, and that was one of the criticisms. To meet that point, the claimant has subsequently made a witness statement personally and has enlarged upon the reason why she seeks to maintain the anonymity order. It is not suggested for the Defendant that any defect that there may have been in the evidence before the Master is a reason why, given the new evidence, the anonymity order should not be maintained. The Defendant's objection remains that the evidence, even as it is now, is insufficient to support the making of the order, which must be made, if at all, only because it is strictly necessary.

57. Mr Millar rightly reminds the court of the great importance of the principle of open justice, as explained in the cases already cited above, and in other cases including *R (on the application of Guardian News & Media Ltd) v City of Westminster Magistrates Court* [2012] EWCA Civ 420. Open justice protects litigants from the mischief of secret justice, as well as being a means by which the judiciary makes itself accountable to the public. The ability of the media to identify the names of litigants is important, as Toulson LJ repeated in para [77] of *Q*.

58. Mr Tomlinson accepts that the test is that set out in *JIH* para [21(6)] namely:

> "There is sufficient general public interest in publishing a report of proceedings which identify the 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".

59. The evidence for the Claimant includes the following. Her family has suffered a tragedy which continues to be the subject of coverage in the press from time to time. When the tragedy occurred it was known amongst the friends and acquaintances of the Claimant and her family that her family was a victim of it. The family was treated differently. This was as a result of good intentions, but it had the effect that in particular the children, but also herself, felt unable to lead normal lives. People asked them questions which required that they re-live the event. They found this upsetting. In order to address this difficulty the Claimant moved home and sought to start life again amongst people who did not know that she and her family were the victims of this tragedy. She took employment in an activity in which, if people knew about the tragedy and her relationship to it, she states that she would find it more difficult to exercise her role.

60. The information the disclosure of which is said to be a breach of confidence or of her right to privacy, and which is pleaded in the Particulars of Claim is confined to the photographs. She makes no claim in respect of the information that she became a widow as a result of the tragedy in question. Nor does she make any claim as litigation friend on behalf of the children, who are not parties to the action. This is not therefore like many claims for breach of confidence where it can be said that disclosure of the information sought to be protected would defeat the very purpose of the proceedings.

61. The point made by the Claimant is that disclosure of that information in reports of the litigation would lead to that information becoming known to the friends and acquaintances of herself and her family who do not in fact know about it. However sympathetic such people would be, that would have the consequence from which the

family suffered from before they moved home. Their ability to live their lives freely without having to respond to questions and statements about the tragedy would be lost.

62. The Defendant has made clear that it does not challenge the evidence of the Claimant and it is not unsympathetic to the situation in which she finds herself. The Defendant's case is that that evidence is simply insufficient to demonstrate the necessity for derogating from the principles of open justice, even by the relatively restricted form of the r.16 order in question in this case. Mr Millar submits that little detail is given as to how the Claimant's role in her employment would be affected or how the lives of the children would be affected. The information that her family is the victim of the tragedy has been widely published, and is not information in which she could now claim to have a reasonable expectation of privacy.

DISCUSSION ON CONTINUATION OF THE ORDER

63. The facts that the claim in this case is in privacy and that the Defendant is a news publisher are factors which are relevant to whether the 3 February order should be continued.

64. The Defendant has not submitted any evidence on the merits of the making of any order derogating from open justice. Nor, at the time of the hearing, had the Defendant filed a Defence. There was no evidence before the court that there is any issue of fact in the action. Mr Millar stated in submissions that there were expected to be disputes of fact. Until the issues (if any) in the action are made clear, the court can only proceed on the assumption that a claimant's claims are likely to be established as true. That may be one reason why the rights of third parties under CPR r.5.4C(3)(b) are deferred until after the service of a defence, if any. If there is no real issue between the parties, the public interest in the litigation may be less than if there is an issue which the court is required to resolve, or even non-existent.

65. Although the Claimant is not claiming in this action that the fact that she and her family are victims of the tragedy is a fact in respect of which they have a reasonable expectation of privacy, it does not in my judgment follow that her and her children's right to their private life is not engaged. In my judgment the Claimant has demonstrated a real interest in her children and herself keeping knowledge of that fact from being acquired by more of their acquaintances than those who already happen to know it.

66. The exercise before the court is the balancing exercise described by Lord Steyn in *Re S* [2005] 1 AC 593 and summarised in *JIH* at para [21](6). It is an exercise that has to be carried out on the information now before the court. If the action proceeds, and different information comes before the court, then the exercise may have to be carried out again, as envisaged in *JIH* at para [21](8). There is no return date in the present action, because there is no interim injunction. But all derogations from open justice must be kept under review by the court, and varied or discharged if they cease to be necessary.

67. In my judgment the answer to the question at the present time is that there is no sufficient general public interest in publishing a report of proceedings which identifies the Claimant or her children to justify the curtailment of their right to respect for their

private and family life which I think is likely to be the result of the name or address of the Claimant being identified.

68. However, the order is wider than is necessary at this stage in so far as it includes para 2 (para 12 above). Any derogations from open justice that may be sought in respect of any oral hearing should be applied for at such time in the future as may be appropriate. But in my judgment it is necessary that when the Defence is served, and until any review of this question by the court, that non-parties should not obtain from the court such parts of the statements of case and the witness statements as may identify the Claimant or her children as being the victims of the tragedy.

CONCLUSION

69. For these reasons the order that the Claimant be dispensed from giving her name and address on the claim form will be continued, subject to the qualifications set out above. And there will be an order under CPR r5.4C restricting the rights of non-parties. I invite the parties to agree a form of order before this judgment is handed down.

70. It may be that the procedure for applying for dispensation from the requirements of PD16 and for orders under CPR r.5.4C might be set out in the CPR or a Practice Direction. I have drawn the attention of those responsible for considering such matters to this judgment.

71. At the hearing I made an order extending the time for service of a Defence by a further 7 days. A Defence was served, and a copy provided to me while this judgment was in draft. The Defence admits that the Claimant did not give express consent to the publication of the photographs, but contends (amongst other defences) that the photographs were taken at a public event, and that for this and other reasons the Claimant had no reasonable expectation of privacy.