IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
[2022] EWHC 299 (Admin)

No. CO/2541/2021

Royal Courts of Justice

Friday, 28 January 2022

Before:

THE HONOURABLE MRS JUSTICE ELLENBOGEN DBE

(In Private)

B E T W E E N :

THE QUEEN
on the application of
NEWSQUEST MEDIA GROUP LIMITED

Claimant

- and -

THE LEGALLY QUALIFIED CHAIR OF THE POLICE MISCONDUCT TRIBUNAL

Defendant

- and -

(1)TERRY COOKE
(2)THE INDEPENDENT OFFICE FOR POLICE CONDUCT
(3)THE CHIEF CONSTABLE OF HAMPSHIRE CONSTABULARY

Interested Parties

REPORTING RESTRICTIONS APPLY

MR J. SCHERBEL-BALL (instructed by Jaffa Law) appeared on behalf of the Claimant.
MR J. PRICE (instructed by Preiskel & Co LLP) appeared on behalf of the Defendant.
MR D. HUTCHEON (instructed by Pennington Manches Cooper LLP) appeared on behalf of the First Interested Party.
THE SECOND AND THIRD INTERESTED PARTIES were not present and not represented.

J U D G M E N T

MRS JUSTICE ELLENBOGEN:

Introduction

1) At the outset of hearing to which this judgment relates, the claimant applied for a restricted reporting order under s.11 of the Contempt of Court Act 1981 and for an order that the hearing takes place in private. Neither application was resisted by the defendant, or the first interested party. The applications were made given the nature of the matters to be considered, which included the first interested party's application for anonymity in these proceedings, and the claimant's application to make collateral use of certain documentation which had been disclosed by the defendant and which, pending my ruling, was confidential. In those circumstances, for the purposes of CPR 39.2(3), I was satisfied that publicity would defeat the object of the hearing and that it was necessary to sit in private to secure the proper administration of justice. In accordance with CPR 39.2(4), I ordered that, until further order, Mr Cooke's identity must not be disclosed, which I considered necessary to secure the proper administration of justice and in order to protect his interests. I made an associated order under s.11 of the Contempt of Court Act 1981. Those orders remain in place and will be revisited following this judgment.

2) The claimant is a regional news publisher, which owns a portfolio of local newspapers and online media outlets, one of which is the *Basingstoke Gazette*. Until April 2021, the first interested party, Mr Cooke, was a police constable, serving, for approximately 20 years, with Hampshire Police (of which the third interested party is the chief constable), in the area for which the *Basingstoke Gazette* is the local newspaper. Following misconduct proceedings ('the Misconduct Proceedings'), culminating in a misconduct hearing in April 2021, of which the defendant was the independent panel Chair ('the Misconduct Hearing'), Mr Cooke was dismissed, with immediate effect, for gross misconduct. The Tribunal found that, in the course of his work, he had come into contact with vulnerable female members of the public, thereby obtaining their personal details. It concluded that he had "systematically abused" that information "for his own private purposes", being the pursuit of inappropriate and prohibited relationships with the vulnerable women concerned. It described Mr Cooke's conduct as having been of the "utmost severity" and "intentional, deliberate, targeted and planned". It held that his conduct had "multiple aggravating factors … including targeting, malign intent, abuse of power, sustained behaviour over a period of time, vulnerable and multiple victims and multiple proven breaches …", going on to conclude that no sanction other than dismissal without notice "would be sufficient to maintain public confidence in the police service and uphold the reputation of the police service and the high standards that are reasonably expected of police officers by the public." The claimant wishes fully to report on the Misconduct Proceedings, and on these proceedings for judicial review, as raising matters of significant public interest. The second interested party is the Independent Office for Police Conduct ("the IOPC"), which is the statutory body responsible for promoting public confidence in policing.

3) This judgment follows the hearing of:

   a) the claimant's application, dated 15 October 2021, by which it seeks:

      i) the court's permission, pursuant to CPR r.31.22(1)(b), to use specified documents, disclosed in these judicial review proceedings, for the purpose of reporting as indicated above;

      ii) an order that its costs of these proceedings be paid by Mr Cooke, on the indemnity basis, including an interim payment on account, of £20,000; and

      iii) to withdraw its claim for judicial review; and

b) Mr Cooke's application, dated 24 January 2021, by which he seeks an order for anonymity in these proceedings.

4) In circumstances to which I shall shortly turn, none of the parties resists the claimant's application to withdraw its claim for judicial review. Mr Cooke opposes the claimant's further applications. He has filed neither an acknowledgement of service nor any witness statement in response. In counsel's short written submissions, dated 25 November 2021:

   a) it was said that there should be no order as to costs; alternatively, any such order should be made against the defendant;

   b) it was submitted that the claimant's request for permission to use certain documentation should be refused, on the basis that the latter identifies him, alternatively, that any permitted use should not identify him; and

   c) the court was "invited" to make an anonymity order, pursuant to CPR r.39.2(4). As noted above, a formal application has since been made.

5) The IOPC has stated that its Director General is "content" with the claimant's proposal to withdraw its claim and with its application for access to the specified documents for the purpose of reporting the Misconduct Proceedings. Its position is that the Police Misconduct Tribunal is a neutral tribunal and, as such, should not be ordered to pay the claimant's costs. The claimant also resists Mr Cooke's alternative position on costs.

The claimant's applications

Withdrawal of the claim

6) The claimant's position is that it initiated judicial review proceedings because Mr Cooke had:

   a) represented (falsely) to the claimant that the defendant had made an anonymity direction in his favour in the Misconduct Proceedings;

   b) relied upon that reported anonymity direction as the basis for a threatened claim against the claimant for damages and injunctive relief for the tort of misuse of private information, were the claimant to report his identity in connection with the Misconduct Proceedings; and

   c) refused to provide the claimant with the purported anonymity direction and the reasons supporting it, upon the claimant's request.

7) The claimant asserts that it, first, responsibly, sought to engage with the defendant in order to obtain the necessary information and to apply to set aside the directions which Mr Cooke claimed to have been made. By email dated 1 July 2021, the defendant had refused to provide the requested directions, evidence and reasons in support, or to allow the claimant to challenge them. Accordingly, judicial review proceedings had been filed, on 16 July 2021, asserting three grounds of review:

   a) **Ground 1**: unlawfully and in breach of the claimant's Article 10 ECHR rights, the defendant had refused: (i) to provide the claimant with the evidence in support of Mr Cooke's stated applications and his note of the reasons for granting the purported anonymity

direction and the direction that the misconduct hearing be held in private; and (ii) the claimant's request that a hearing be convened to allow it to apply to set aside the defendant's purported decisions. The claimant explained that, as a result, it was "… not able to understand fully the purported lawful basis for the Derogation Decisions or apply to set them aside";

b) **Ground 2**: the purported anonymity direction was unlawful because it was *ultra vires*, as the Police (Conduct) Regulations 2012, which governed the Misconduct Proceedings, did not permit the making of such a direction; and

c) **Ground 3**: the purported anonymity direction and the direction to hear the Misconduct Hearing in private were unlawful as constituting unwarranted and unjustified interferences with the principle of open justice and with the claimant's rights under Article 10 ECHR.

8) In fact, the documentation subsequently disclosed by the defendant in these proceedings has shown that Mr Cooke's assertions were false; the defendant had never made an anonymity direction. Consequently, the claimant submits, these proceedings were brought on an erroneous basis and, in its submission, directly as a result of Mr Cooke's (i) false representations; and (ii) refusal to provide the requested information, from which their falsity would have been apparent.

9) Neither the defendant nor any of the interested parties had opposed the granting of permission to bring judicial review proceedings. The IOPC; the only interested party to have filed a substantive response with its acknowledgement of service, had stated that

> "… despite having engaged in regular correspondence with [Hampshire Police] concerning the hearing, the IOPC was not made aware of Mr Cooke's application concerning the private hearing and the publication of the Regulation 27(a) Notice and was, therefore, not invited and, therefore, unable to make any representations on the matter prior to any deadline set by the Chair, contrary to natural justice and the Home Office guidance. Consequently, it was unable to participate in the decision-making process to represent the wider public interest in police misconduct hearings taking place in public and assist the Chair in balancing the particular concerns of the accused officer against the public interest and the general presumption in favour of police misconduct cases being open to the public and the press …While the IOPC remains neutral on the particular issues the subject of this claim, it believes that there was a procedural irregularity which could have had the effect of undermining public confidence in the decisions reached by the Misconduct Panel."

10) After the deadline for filing an acknowledgement of service, Mr Cooke's solicitors sent a letter to the court, dated 1 September 2021, acknowledging that no anonymity direction had, in fact, been made, stating that it was only at some point after 11 August 2021 that they had realised that Mr Cooke's assertion might not be correct and that, consequently, they had written to the defendant on 24 August 2021 to clarify the position.

11) In light of the true position and information revealed by the defendant's disclosure, the claimant does not consider it to be an appropriate or worthwhile use of court resources to continue with these proceedings, which have become substantively academic on the particular facts and are based upon a decision which had not, in fact, been made. It is on that basis that the application to withdraw the claim is made. Whilst the claimant does not require permission to discontinue proceedings, by filing the notice of discontinuance it would accept that it was liable for the defendant's costs up until that date and a costs order would be deemed to have been made on

the standard basis (CPR. 44.9(1)(c)). In essence, therefore, the claimant's application is for an order departing from the general rule on discontinuance and for its costs to be paid by Mr Cooke, on the indemnity basis (see below).

Use of disclosed documents

12) The claimant submits that CPR r.31.22(1)(b) provides the court with a general discretion to permit collateral use of disclosed documentation and that the jurisdiction can be used to permit or restrict the use of disclosed documents for the purposes of journalistic reporting (*NAB v Serco & Anor* [2014] EWHC 2225 (QB)). The claimant's intended purpose in seeking such an order is said to be consistent with the guidance as to the exercise of the court's discretion set out in *Official Receiver v. Skeene & Anor* [2020] EWHC 1252 (Ch.) [40]; *Tchenguiz v. Director of the SFO & Ors* [2014] EWCA (Civ.) 1409 [66]; and *Smithkline Beecham PLC v. Generics (UK) Ltd* [2004] 1 WLR 1479. That purpose reflects the fundamental principle of open justice which applies to all courts and tribunals exercising the judicial power of the State, including disciplinary proceedings of the statutorily-regulated professions, and extends to identifying the persons involved (*Solicitors Regulation Authority v. Spector* [2016] 4 WLR 16 [21]).

13) It is the claimant's position that it has always been clear that it has no intention of publishing any information about (i) Mr Cooke's parents, or any of the witnesses involved, and/ or (ii) any specific information relating to Mr Cooke's state of health or safety concerns, save to state, in general terms, that his application to the defendant was made on the grounds of his personal safety and mental health, and that it would be content for those points to be addressed in any order made by the court. It is submitted that the documents of which it seeks to make use substantially further the open justice principle and highlight important matters of public interest in relation to both the Misconduct Proceedings and the instant proceedings for judicial review. Those are said to include the ability to demonstrate:

a) the exceptionally serious and repeated nature of Mr Cooke's conduct;

b) the proper and careful manner in which the tribunal considered the evidence and concluded that Mr Cooke's conduct was so serious that only immediate dismissal for gross misconduct would maintain public confidence in the Police;

c) the attempts which Mr Cooke made, through his Police Federation-funded lawyers, to prevent any publicity relating to the hearing at all, including intimating an application for injunctive relief, even in respect of a notice which did not identify him, and the allegedly inadequate nature of any representations made to the defendant to support the principle of open justice and transparency. The relevant documents are said to show that no proper submissions were made to the defendant about the importance of transparency and open justice — indeed, Hampshire Police had stated that it was "neutral" on Mr Cooke's application before it had been made. It had then abandoned, out of "pragmatism", its contention that an anonymised notice of hearing should be published, following Mr Cooke's intimation that he might seek injunctive relief. They are also said to demonstrate that the IOPC was excluded from the process, in its own words, "contrary to natural justice and the Home Office guidance" and that "there was a procedural irregularity which could have the effect of undermining public confidence in the decisions reached by the Misconduct Panel". In the claimant's submission, this case is, accordingly, an exemplar of how the openness and transparency in police disciplinary procedures, which underpin police accountability and the statutory disciplinary process, can be undermined, even in the most important of cases, thereby having a deleterious impact on public trust in policing generally;

d) that key parts of Mr Cooke's serious misconduct took place at around the same time (December 2017) as he had received a special commendation from the chief constable, who had described him as one of ten officers who were a "true credit to the policing family and the communities they serve". Mr Cooke's public record is, therefore, as a police officer who has gone above and beyond to protect vulnerable individuals, rather than as one who repeatedly abused his position to pursue vulnerable women; and

e) that, contrary to Mr Cooke's repeated false statements leading to the institution of these proceedings, no anonymity direction had been made by the defendant. Mr Cooke's conduct in relation to these proceedings is said to constitute an important and continuing theme; an attempt to stifle proper and legitimate reporting of his serious misconduct and the disciplinary process.

14) Mr Cooke's identity is said to be integral to the reporting of both the Misconduct Proceedings and the instant proceedings. The court's permission is not required to report on his role as an interested party in these proceedings, which have been extant for many months. It is not possible, fully and openly, to report on them without also being able to link them to the Misconduct Proceedings to which they directly relate. These proceedings were instituted as an exceptional and final resort, to avoid further stifling of the claimant's proper and legitimate reporting.

15) The claimant submits that the above matters not only are of significant public interest, but go to the heart of the rationale for the open justice principle. It is said that the documentation in question "shines an important light on how police disciplinary proceedings are conducted and the accountability of those procedures". Permitting the claimant to report fully on both sets of proceedings, including Mr Cooke's name, in its role as public watchdog, is consistent with the tribunal's conclusion that his conduct was so serious that nothing short of immediate dismissal "would be sufficient to maintain public confidence in the police service and uphold the reputation of the police service and the high standards that are reasonably expected of police officers by the public."

16) It is further said that the above issues do not exist in a vacuum; the following being their significant context:

a) the heightened concern about the trust which women, and the public generally, have in the police forces which serve in their communities. That is said to form critical context to Mr Cooke's conduct and to the manner in which he has sought to prevent reporting of the Misconduct Proceedings; and

b) according to the claimant, between 2016 and 2020 a third of disciplinary proceedings concerning police officers in Hampshire, excluding the Misconduct Proceedings, have been heard in private. The source of that information is said to be material provided by Hampshire Police in response to a request made under the Freedom of Information Act 2000 and its accuracy has not been contested in these proceedings by the third interested party. It is said that such a high number of private hearings does not appear consistent with the presumption in favour of open justice and transparency and that the issues highlighted in this case about (i) the exclusion of the IOPC and (ii) the inadequate approach of Hampshire Police to promoting the open justice principle appear emblematic of broader issues, meriting further scrutiny and public debate.

17) Finally, on this issue, the claimant submits that it is significant that, by letter dated 20 September 2021, the IOPC has stated that its Director General is content with the proposed use

by the claimant of the relevant documentation to further the open justice principle, provided that the claimant does not seek the release of information relating to Mr Cooke's parents.

Costs

18) The claimant contends that the core principles by reference to which the appropriate order for costs in claims which do not proceed to a final determination should be determined are set out in *R(M) v. Croydon London Borough Council* [2021] 1 WLR 2607 and *R (Tesfay) v. Home Secretary* [2016] 1 WLR 4853:

    a) In *R(M)*, at [59], Lord Neuberger held that, where a claimant

> "obtains all the relief which he seeks, whether by consent or after a contested hearing, he is undoubtedly the successful party who is entitled to all his costs unless there is a good reason to the contrary. However, where the claimant obtains only some of the relief which he is seeking, either by consent or after a contested trial … there may be argument as to which party was more 'successful' in light of the relief which was sought and not obtained or, even if the claimant is accepted to be the successful party, there may be an argument as to the importance of the issue or costs relating to the issue on which he failed."

    b) In *Tesfay*, at [57], Lloyd-Jones LJ (as he then was) emphasised, in public law proceedings, that,

> "to achieve an order for reconsideration will often be a substantial achievement. Success in public law proceedings must be assessed not only by reference to what was sought and the basis on which it was sought and on which it was opposed, but also by reference to what was achievable."

19) The claimant also observes that, ordinarily, costs orders will not be made against a court or a tribunal unless it has behaved improperly or unreasonably, or taken an active part in the proceedings (*R (Gourlay) v. Parole Board* [2017] 1 WLR 4107 [31]). That is because there is usually a more appropriate target for a costs order. That will likely be the interested party who has contributed to the making of the decision of the court or tribunal which is the subject of challenge (*Gourlay* [27]).

20) The claimant submits that the court's discretion to order costs on the indemnity, rather than the standard, basis is a wide one, to be exercised in light of all of the circumstances of the case, however, to justify an order for indemnity costs, there must be something which takes the case out of the norm. It is not necessary that a party should be guilty of dishonest behaviour; unreasonableness in the conduct of proceedings and/or the manner in which the particular points are raised may suffice (*Balmoral Group v. Borialis AS* [2006] EWHC 2531 (Comm.) at [1]), per Christopher Clarke J (as he then was). Where proceedings are commenced as a result of culpable breaches of the duty of candour on the part of an interested party, including subsequent deliberate non-disclosure of obviously relevant documents which lead to a significant waste of court time and resources, that will justify an award of costs on the indemnity basis (*R (Kay) v Scan-Thors (UK) Ltd and Ors* [2018] 6 Costs LR 1317).

21) Having regard to those principles, it is the claimant's position that Mr Cooke should pay its costs of these proceedings, assessed on the indemnity basis, because:

a) it has been substantively successful; it brought judicial review proceedings to challenge the purported anonymity decision on which Mr Cooke relied to support his threatened claim for misuse of private information. Those proceedings have revealed that no such direction was ever made;

b) it had been Mr Cooke's repeated false representations, through his solicitors, to the effect that an anonymity direction had been made, which had led to proceedings being instituted on an entirely false premise;

c) those representations had been coupled with confident assertions about the process conducted by the defendant when, in fact, it is clear that the solicitors making those assertions on behalf of Mr Cooke had never seen the evidence, submissions or process conducted by him;

d) moreover, Mr Cooke had refused to provide the evidence and submissions on which he relied, or the defendant's decisions and reasons, when the claimant had requested them. He had stated that their provision was neither necessary nor proportionate. Were he to have provided the available documentation, the falsity of his statements would have been apparent. Mr Cooke's approach had been directly contrary to his duty of candour;

e) Mr Cooke had had available to him the documentation necessary to correct his mistaken impression. Unlike the claimant, he also knew which applications he had instructed his lawyers to make in the Misconduct Proceedings, none of which had included an application for anonymity. Yet, at no stage had he sought actively to assist the claimant or defendant in resolving the issues in dispute. He had not engaged substantively with any of the claimant's correspondence with the defendant in June/July 2021, despite the fact that all of it had been copied to him as the key interested party. Even now, he asserts that he is "no more responsible — indeed he is less responsible — for the claimant's misapprehension that there had been an anonymity direction than any other party". That, unsustainable, assertion, the claimant submits, is consistent with his continued failure to take responsibility for his own actions;

f) Mr Cooke had sought to discourage the claimant from writing to the defendant to seek the materials in question;

g) Mr Cooke has failed to provide the court with a clear and candid explanation for what has taken place. He has chosen not to put in any witness statement. He has chosen not to rebut, in evidence, the claimant's assertion that he misled it, whether deliberately or reckless as to the true position. In this regard, the claimant notes that, in the Misconduct Proceedings, Mr Cooke claimed to have been unaware of the detail of the prohibitions relating to pursuing relationships with vulnerable women, a case which the tribunal had rejected, at paragraph 15 of the notice of outcome;

h) it is Mr Cooke, not the defendant, who is the *de facto* defendant in these proceedings. It is his position which has been their focus; the defendant is a neutral tribunal; and

i) Mr Cooke has refused to pay any of the claimant's costs, even on the standard basis, as the claimant had offered in order to resolve matters, by letter dated 15 September 2021.

22) All of the above is said to constitute unreasonable conduct well outside of the norm. In so acting, and, it is said, as intended, Mr Cooke has hindered the claimant in the performance of its proper role in the public interest, as public watchdog. It is submitted that there is no merit in Mr Cooke' position that the claimant should not recover some or all of its costs because the

anonymity direction was only one of four decisions challenged in these proceedings. That position is said to be misconceived for four main reasons:

a) It does not reflect the substance of the claimant's claim and the challenges brought; the purported anonymity direction had been central to each of the three grounds of judicial review;

b) The purported anonymity direction had been central to the claimant's purpose in bringing proceedings. There was no merit in continuing with the other challenges which are, now, in practical terms, academic. It would be wasteful, for example, for the claimant to maintain its challenge to the defendant's refusal to allow it to apply to vary an anonymity direction which he had never made;

c) The first ground of judicial review, which sought to challenge the defendant's refusal to provide the requested documentation relating to his purported decisions and to allow the claimant to seek to set those decisions aside, had only arisen because Mr Cooke had himself previously, and wrongly, refused to provide the same documentation. Mr Cooke should not benefit from his own conduct;

d) As the facts and grounds of judicial review show, the challenge to the defendant's decision to hold the hearing in private was entirely co-extensive with the challenge to the anonymity direction. No submissions were addressed to the direction for a hearing in private, which did not also relate to the purported anonymity direction, and no additional costs were incurred as a result of that challenge;

23) For the same reasons, the claimant does not support Mr Cooke's alternative position that the defendant should pay its costs. The claimant maintains that it is Mr Cooke who is responsible for the position in which he finds himself. Whilst the defendant, at the least, should (i) have corrected the position regarding the anonymity direction far earlier than he did; and (ii) not have asked repeatedly for undertakings which the claimant had provided in its first letter, it is submitted that that does not absolve Mr Cooke of responsibility for his own actions and their costs consequences.

Mr Cooke's submissions in response to the claimant's applications

Withdrawal

24) As stated above, there is no resistance to withdrawal of the claim, *per se*, though the costs order sought is resisted (see below).

Use of disclosed documents

25) Acknowledging that the matter is ultimately one for the court, Mr Cooke opposes the claimant's application for permission to use the specified documents, to a large extent on the basis of the submissions made in support of his application for an anonymity order (see below). It is said that there are compelling reasons why, in the particular circumstances of this case, he should be protected from being identified in connection with these proceedings and, by extension, the claimant should not be entitled to refer publicly to documents disclosed in these proceedings which identify him. Otherwise, the bringing of proceedings for judicial review would have served to entitle the claimant to publish information which it would not otherwise have been entitled to publish.

26) Whilst it is said that Mr Cooke has no objection, in principle, to the use of documents disclosed in these proceedings, insofar as they do not identify him, the nature of the relevant

documentation is such that it does not seem practicable for the court to make orders requiring the claimant to draw fine distinctions as to how it might deploy particular documents in a way which does not identify him. On that basis, the court is invited to refuse the application outright.

Costs

27) Mr Cooke submits that the claimant seeks an unusual costs order, to the effect that an interested party, who is not a defendant and who has taken no active role in the proceedings, should pay its full costs of proceedings which it now wishes to discontinue.

28) Having regard to the contemporaneous correspondence prior to proceedings, Mr Cooke's primary submission is that there should be no order as to costs. The defendant is a court/tribunal and so benefits from the general principle that it should not bear the costs of judicial review proceedings unless it has chosen to defend them (*R* (*Gourlay)*). Yet, an order that an interested party, who has played no active role in proceedings, should pay the claimant's costs is no less exceptional (see *R(Gourlay)*, at [27]). Only two examples have been put forward of cases in which such an order has been made (*R(K)*, in which the interested party had brought a private prosecution in the course of which he had acted in breach of his duty of candour in failing to have brought relevant matters to the attention of the magistrates' court, the later decision of which then became the subject of judicial review; and *R(Faqiri) v. Upper Tribunal (Immigration & Asylum Chamber*) *and SSHD (Interested Party)* [2019] EWCA (Civ.) 151, in which the interested party had himself been responsible for the underlying public law decision or act.

29) Mr Cooke contends that he has taken no active role in defending the proceedings. Indeed, he is the only interested party not to have filed an acknowledgement of service. His solicitors' letter of 1 September 2021 was, it is said, a model of clarity and candour. Prior to that and the issue of these proceedings, he had adopted an open stance in correspondence with the defendant, albeit not copied to the claimant, as to the claimant's request that the defendant disclose certain documentation. By contrast, both the defendant and Hampshire Police continued to obfuscate. Accordingly, it is said, there is even less justification for awarding costs against Mr Cooke than for awarding them against the defendant and such an outcome would be neither unfair nor contrary to the claimant's reasonable expectations. The claimant is a commercial organisation which brought judicial review proceedings against the defendant, presumably knowing that (i) the defendant did not intend to take part in the proceedings; and so, (ii) even if the claimant were to succeed, the usual order would be that no costs would be awarded against him. It had no reason to assume that Mr Cooke, or any other interested party, would take an active part in the proceedings. Moreover, the claimant has not succeeded in its judicial review claim, or even been granted permission to advance it. Instead, it seeks to withdraw the claim because one element of it proceeds on the mistaken premise that an anonymity direction had been made in the Misconduct Proceedings. That mistaken understanding had been shared by Mr Cooke and all other interested parties in these proceedings.

30) In Mr Cooke's submission, the claimant's only reason for asking the court to depart from the general principles governing the award of costs in judicial review proceedings is that Mr Cooke, mistakenly, had informed the claimant that he had been the subject of an anonymity direction in the Misconduct Proceedings, leading to the claimant's challenge to a decision which had not, in fact, been made, as well as to three other decisions which the defendant had made. The claimant's decision to focus its application for costs explicitly on Mr Cooke was curious, because the more natural respondent to an application for costs, if any, would be the defendant, as the person responsible for the decisions challenged. The defendant's emails of 28 April

2021, soon after his decisions had been made, had given the clear impression, to Mr Cooke and others, that he (the defendant) had made an order preventing Mr Cooke from being identified. The defendant had had plenty of opportunity to correct the claimant's misunderstanding as to the nature of his directions (for example, after receiving the pre-action protocol letter), but had not done so. Further, Mr Cooke had been no more responsible for the claimant's misunderstanding than had the other interested parties. The second and third interested parties had published statements shortly after the conclusion of the Misconduct Proceedings stating that the defendant had ordered that Mr Cooke could not be identified; a position maintained by the third interested party in its acknowledgement of service in these proceedings.

31) In any event, submits Mr Cooke, the mere fact that he had misunderstood the defendant's decision does not mean that he should be liable for any of the claimant's costs in these proceedings, for the following reasons:

a) His mistake had been genuine. Insofar as the claimant seeks to suggest that he has been dishonest, there is no basis for doing so. His conduct in these proceedings, including his transparent explanation of the position, via his solicitors' letter to the court dated 1 September 2021, demonstrates that he had made (and then, ultimately, corrected) a mistake;

b) His misunderstanding had been understandable given: (i) the defendant's description of his own decision, in his email of 28 April 2021; (ii) the defendant's reasons for his decision, which had made clear that he fully accepted the claimant's concerns regarding publicity, in light of the threats to his health and safety; and (iii) the second and third interested parties' public statements, in early May 2021, to the effect that an anonymity order had been made;

c) He has conducted himself appropriately since the instant proceedings began and, unlike the defendant and the other interested parties, taken pro-active steps to ascertain and confirm the true position for the court;

d) His main point has been consistently (and remains) that, irrespective of the defendant's directions, the claimant would be acting unlawfully if it published details about his case which identified him, given, for example, his Article 8 ECHR rights. The claimant has not succeeded in establishing anything to the contrary.

32) Even if, contrary to the above submissions, the court were minded to make an order for costs against Mr Cooke: (i) the claimant should have its costs only of that part of its claim which challenged the supposed "anonymity direction". As the claimant had challenged three other decisions, two of which remained intact and the other of which had been superseded by the defendant's decision to disclose certain documents to the claimant, that would result in an order for no more than 25 per cent of the claimant's costs; and (ii) any order for costs should be made jointly against the defendant and the other two interested parties. It would make no sense for Mr Cooke alone to be liable for the claimant's costs when three other parties are equally, if not more, responsible for the claimant's misunderstanding as to the anonymity direction.

Mr Cooke's application for anonymity

33) Mr Cooke's formal application was made at 12.45 p.m. on the day before the hearing. It asserts that such an order "is necessary to secure the proper administration of justice so that the bringing of judicial review proceedings does not operate to prevent the IP1 seeking relief as necessary in the appropriate form to stop attempts by the claimant to publish stories identifying him and to protect the interests of IP1 in light of ongoing threats to his personal safety arising from the actions of a hostile member of his community and in light of the very poor state of his

mental health." The evidence on which reliance is placed in support of that application is that of Mr Cooke's legal representative, an associate director of Pennington Manches Cooper LLP, set out in full below:

> "1. The Applicant was the subject of police misconduct proceedings which culminated in a decision, made by the Defendant on 27 April 2021, to uphold the allegations of misconduct against him. The Applicant was subsequently placed on the police barred list, though his name does not appear on the public list. The Applicant understands that an application was made by Hampshire Constabulary's Professional Standards Department to the College of Policing to request that his name not be published on the public list, in view of directions that had been made by the Defendant within the Applicant's police misconduct proceedings, as well as concerns raised as to the risk posed to the Applicant and his mental health should his name appear on the public list.
>
> 2. The Applicant's representatives have consistently sought to protect his identity from being made public in light of serious concerns relating to his personal safety and his mental health. In the course of the police misconduct proceedings, the Defendant made orders to protect the Applicant's privacy, including an order to the effect that the police misconduct hearing would take place in private, and a decision that the Applicant's name would not be published either in the notice made public ahead of the hearing, or in the notice of decision published after the hearing. The Defendant made those orders on the basis of submissions made on behalf of the Applicant together with medical evidence relating to the state of his mental health. The orders were unsuccessfully opposed by the appropriate authority in the police misconduct case.
>
> 3. Following the conclusion of the police misconduct proceedings, the Claimant indicated that it wished to publish a story identifying the Applicant in connection with the proceedings. The Applicant's solicitors repeatedly expressed objection to this on the grounds of the significant danger to his personal safety and to his health. The Claimant and the Applicant agreed in correspondence that the Claimant would not publish any story without giving the Applicant sufficient notice to allow him to seek injunctive relief in the High Court if so advised.
>
> 4. The Claimant subsequently brought the present judicial review proceedings challenging various decisions made by the Defendant in the course of the Applicant's police misconduct case. The Applicant has taken no active part in the proceedings and did not file an Acknowledgment of Service or otherwise seek to defend the proceedings. However, following clarification that the Defendant did not make an express anonymity order (contrary to the Claimant's prior understanding), the Claimant now seeks to withdraw these claims at the pre-permission stage. A hearing is listed on 25 January 2022 to deal with the disposal of these proceedings.
>
> 5. The Applicant seeks an order protecting his identity in connection with these proceedings on the basis of three issues.
>
> 6. First, these proceedings are not an appropriate forum to address the question of whether the Claimant should be entitled to publish stories identifying the Applicant in connection with his police misconduct case. That question requires detailed consideration and there are strong grounds for the Applicant to be granted anonymity. However, as the Claimant and the Applicant previously agreed, if that question is to come to Court, this should happen in the normal

way (with the Applicant given notice of a proposed publication and being able then to apply for an injunction if so advised). The open justice principle should not mean that, merely by bringing claims in open court, the Claimant can bypass the safeguards and procedural norms associated with questions as to publication of identities in cases raising Article 8 ECHR issues.

7. Second, the Applicant has been the subject of a sustained harassment campaign by a member of his community, Jeremy Bailey, who has posted extremely hostile and threatening material about the Applicant online, including encouraging violence against the Applicant. This has led to a police investigation and to the installation by police of panic alarms at the Applicant's home. If publicity is given to these proceedings in a way which identifies the Applicant there is good reason to believe that the harassment campaign against the Applicant will intensify.

8. Third, the Applicant is in a very poor state of mental health. A professional psychotherapist has assessed that there is a serious risk that the Applicant will harm or try to kill himself if publicly identified in connection with these proceedings (see appended report of Philip Giles).

9. The Applicant respectfully suggests that the Court determine this application before or at the same time as the issues listed to be addressed at the hearing on 25 January 2022."

34) Mr Cooke points to CPR 39.2(4), requiring (not simply permitting) the court to order that the identity of a party to proceedings shall not be disclosed "if and only if it considers non-disclosure necessary to secure the proper administration of justice and in order to protect the interests of that party or witness." He submits that the principles to be applied are as reiterated by the Court of Appeal in *XXX v. Camden London Borough Council* [2020] 4 WLR 165, at [17] to [21] and [24]. The court should have regard, in particular, to the familiar principles established in the case law, including, on the one hand, the principle of open justice and, on the other, the Article 8 ECHR rights of the individual and his subjective fears as to the consequences of being named, and carry out a balancing exercise of relevant interests to decide whether non-disclosure is necessary. It is said that, whilst the principle of open justice provides a starting point, the interests supported by that principle are outweighed, on the facts of this case, by the other factors to be weighed in the balance.

35) Mr Cooke submits that the administration of justice requires the grant of anonymity. The claimant's claim, as pleaded, challenges directions made by the defendant with a view to protecting the claimant's identity in view of his exceptional personal circumstances, which include not only his severe mental health difficulties but well-established threats to his personal safety from a hostile individual living in his community. It would make a mockery of such concerns if the claimant could overcome those directions simply by bringing a claim for judicial review to challenge them (without obtaining any judicial determination in its favour). Underpinning this case is the question of whether it is lawful for the claimant to publish Mr Cooke's identity. If the claimant wishes to publish articles naming Mr Cooke, it should do so in accordance with ordinary journalistic practice. Instead, the claimant seeks to pursue the "bootstraps" option of bringing a claim, relying on the existence of which to justify naming Mr Cooke. In ordinary course, it is submitted, Mr Cooke would be given some notice of intended publication and its content, which would be the focus of proceedings in the Queen's Bench Division in the event of an urgent application for injunctive relief. Were an interim injunction

to be granted, a return date and/or trial would then be listed, in connection with which directions would be given for the exchange, or sequential service, of witness statements. It is that process which would enable full consideration of the second limb of CPR 49.2(4) and would also bring into play the balancing exercise between the parties' competing rights under Articles 8 and 10 ECHR, which is not engaged in this forum. In these proceedings, the focus is on the importance attached to the reporting of court proceedings. The claimant should not be able to benefit from a more favourable test as to publication. The usual route would enable Mr Cooke to put together compelling evidence, including a detailed witness statement, for instance referring to the panic alarm which has been installed in his property (see below). Without waiving privilege, there were different considerations applicable to Police Federation funding of legal representation, according to the nature of the proceedings, and there was "an ongoing issue" as to funding in these proceedings. In Mr Cooke's submission, whilst the Administrative Court has jurisdiction to determine an application for anonymity, it does not typically receive live evidence and, here, it is being asked to deal with satellite issues in the course of proceedings for judicial review which are to be withdrawn. The court should protect the integrity of its own processes. For those reasons, only matters the subject of the first limb of CPR 39.2(4) should inform the outcome of Mr Cooke's application for anonymity, as well as the claimant's application for collateral use of disclosure. The former application ought to be granted because to refuse it would be to allow publication of his name in connection with the misconduct proceedings "by the back door". In essence, the application should succeed because there is a more appropriate forum in which to resolve the underlying substantive issues, by reference to a more stringent test.

36) In any event, Mr Cooke submits, his interests justify the grant of an anonymity order in these proceedings. His personal circumstances are exceptional in two highly-material respects. He is the victim of a long running and vicious harassment campaign by a member of his community; Mr Bailey. That fact had constituted a prominent part of the defendant's reasons for seeking to protect Mr Cooke's identity in the Misconduct Proceedings. Mr Bailey is said to have published false stories to the effect that Mr Cooke is a paedophile; has called for his execution; and has posted inflammatory material about him online, some of which has since been deleted. The Police have judged the risk to him to be sufficient to instal a panic alarm at his house and to have investigated Mr Bailey with a view to considering criminal charges. The danger posed by Mr Bailey, and, potentially, by others who might follow his instructions, has caused deep disruption to Mr Cooke's life. For example, he tends to avoid public local places and has stopped going to the gym. There is every reason to believe that, if his identity and association with these proceedings becomes public knowledge, Mr Bailey's harassment will worsen (his earlier posts having been made shortly after the Misconduct Hearing) and may become more sinister. Secondly, and linked to that harassment, it is said that Mr Cooke is suffering from very poor mental health. The report of Mr Giles, a psychotherapist who has worked with him on multiple occasions in the course of the past few years, dated 31 August 2021, explains that Mr Cooke's mental health has seriously deteriorated even compared with its concerning presentation two years earlier. Mr Giles has concluded that there is a real risk that identifying Mr Cooke would create "a real possibility of self-harm or even suicide". That goes far beyond the distress commonly associated with concerns over publication.

37) Mr Cooke submits that, in the above circumstances, the general importance of the open justice principle cannot justify his identification in these proceedings, nor should the extent of the interference with that principle be overstated by the claimant. The claim for judicial review is to be withdrawn before it has reached any preliminary or substantive hearing addressing its merits and before permission has been granted. Moreover, media organisations and members of the public will still be able to report on the proceedings, the issues raised, the fact that the case relates to a police officer found guilty of misconduct and so on. They, simply, will not be able to know, or report, the officer's name, or anything else which identifies him. In circumstances in which Mr Cooke was "an ordinary police constable with no particular public reputation or

profile", of low rank, who has not been the subject of criminal proceedings, the story can be told perfectly well without naming him. That is, it is submitted, a proportionate interference with the principle of open justice. As is clear from *Khuja v Times Newspapers Ltd* [2019] AC 161, at [30], the identification of Mr Cooke by name is not necessarily integral to that principle, where its relevance is marginal. The balancing exercise should come down in favour of Mr Cooke's Article 8 ECHR rights.

The claimant's reply to Mr Cooke's application

38) In reply to that application, the claimant submits that:

a) an application for anonymity is a derogation from open justice and an interference with the Article 10 rights of the public (*Moss v. Information Commissioner* [2020] EWCA Civ. 580, at [22(3]);

b) any derogation from open justice is exceptional. It requires clear justification and must be established by clear and cogent evidence. It should be imposed only where strictly necessary and must be no more than is necessary to achieve the aim (*R*(*Rai) v. Crown Court at Winchester* [2021] EWHC 339 (Admin.), [47] to [48]). The identification of the relevant individual is an integral part of open justice [41] to [43];

c) When considering an application under CPR 39.2(4), it is not helpful for the court to consider a two-stage test (i) as to whether the grant of anonymity is necessary, and, if so, (ii) balancing the interests of the parties and the public interest in open justice. The court should consider all relevant interests, the principles of open justice, any ECHR rights engaged and carry out the balancing exercise of the respective rights to determine "whether non-disclosure is necessary to secure the proper administration of justice and in order to protect the interests of that party or witness" (*XXX*, at [23] to [24]);

d) An individual's rights under Article 8 ECHR (the right to private and family life) are only engaged where that individual has a reasonable expectation of privacy (*Re JR38* [2016] AC 1131). The scope of Article 8 ECHR in circumstances of serious professional wrongdoing is, therefore, very limited:

   i) In *Axon v. Ministry of Defence* [2016] EMLR 20, at [64(e)], Nicol J found that serious unethical conduct in the workplace, even though it fell short of a criminal or disciplinary offence, did not attract the protection of Article 8 ECHR;

   ii) In *Yeo v. Times Newspapers Ltd* [2015] EWHC 3375 QB. Warby J, as he then was, held, at [147], that,

> "The claimant was a serving MP and a Committee chair. The articles related wholly and exclusively to his conduct in those public roles, and not in any way to his private or personal life. I do not consider that the nature of the information is such as to engage Article 8 … In summary, this was a disclosure that related to his public roles, not his private life.";

   iii) In *Axel Springer AG v. Germany* [2012] EMLR 15, at [83], the European Court of Human Rights ruled that

> "Article 8 cannot be relied on to complain at the loss of reputation, which is the foreseeable consequence of one's own actions, such as, for example, the commission of a criminal offence.";

e) In this case, the ability to identify Mr Cooke by name would enable it fully to explain the circumstances and context of the case, including the fact that Mr Cooke had been a highly-experienced police officer, who, at the same time as receiving a commendation from the chief constable for services to the community, had been committing acts of serious misconduct. Furthermore, *In Re S* [2005] 1 AC 593, at [34] and *In Re Guardian News and Media Limited* [2010] UKSC 1, at [63] are authority for the proposition that a requirement to report stories in some austere abstract form, devoid of much of their human interest, could mean that the report would not be read and the information not passed on. Informed debate will suffer. In any event, the claimant submits, it is not for it to justify adherence to the principle of open justice, but for Mr Cooke to justify derogation from it. It is said to be telling that his objection to use of the documentation which the defendant has disclosed is that it would not be possible to make use of it without identifying him. In any event, Mr Bailey has already identified Mr Cooke as the police officer in question and no proceedings have been brought against him for misuse of private information;

f) Mr Cooke has no right to have the issue determined in the Queen's Bench Division, nor is there any legal requirement that notice of intended publication be given. The instant proceedings had been born of Mr Cooke's false representations and refusal to provide relevant material and the applications to be determined are properly made in these proceedings. In any event, the considerations in determining any application for injunctive relief would be no different and the suggestion that further evidence would be produced by Mr Cooke is untenable; in the Misconduct Proceedings, in correspondence and in these proceedings, he has consistently relied upon the same matters;

g) Nothing in Mr Cooke's application relies upon his private or family life. He relies upon the acts of Mr Bailey, without establishing an evidence base for the asserted causal link between publication of his (Cooke's) name by the claimant and further activity by Mr Bailey. The evidence from Philip Giles is five months out of date and does not focus on the correct issue. It is also clear that he has been reliant upon the picture as relayed by Mr Cooke, who has not presented him with the full story. Mr Giles had recommended primary care intervention and yet there is no evidence as to whether that recommendation was followed by Mr Cooke and, if so, with what effect;

h) In any event, it is not open to Mr Cooke to rely upon Article 8 ECHR in order to prevent the entirely foreseeable distress which occurs when people commit acts of serious wrongdoing and thereby come to the public's attention (*R(Rai)*). Were it otherwise, the principle of open justice would be undermined.

The defendant's submissions

39) In his admirably concise submissions for the defendant, Mr Price asserts that:

a) This court should have regard both to the submissions advanced by leading counsel for Mr Cooke, which gave rise to the defendant's ruling in the Misconduct Proceedings, and to the ruling itself, from which it is apparent that an order for Mr Cooke's anonymity had been neither sought nor granted. The orders made had matched those sought, such that Mr Cooke could have been under no misapprehension. The defendant's covering e-mail had clearly summarised the orders which he had made;

b) In reply to initial contact from the claimant, the defendant had declined to hold another hearing and suggested that further correspondence be directed to Hampshire Police, or the IOPC. That course had been entirely proper as, by then, the defendant had been *functus* and his reasons were available for the parties to read. It was not for the defendant to intercede in

the event of any misunderstanding at that stage. In so far as it might be said that the position was unclear, provision of the documents themselves was the most sensible approach;

c) The time available thereafter had been restricted by the limitation period applicable to proceedings for judicial review and it could not be said that delay by the defendant had necessitated the issue of those proceedings;

d) There was no reason to displace the default position as to costs, which follows the discontinuation of proceedings; (*R(Gourlay)* applied.

40) In answer to a question from me, Mr Price stated his understanding that the usual position would be that the findings of a police misconduct tribunal, and the identity of the officer concerned, would be in the public domain.

Discussion and conclusions

Anonymity

41) It is convenient to deal with Mr Cooke's application first. It is a curious feature of this case that all parties now accept that no anonymity order was made in the Misconduct Proceedings, such that there is no order precluding Mr Cooke from being referred to by name in the reporting of those proceedings. The order made by the defendant, so far as material for current purposes, simply provided that the hearing itself should take place in private. Thus, the application for anonymity relates only to the instant proceedings for judicial review and, in order to be granted, must satisfy the conjunctive requirements of CPR 39.2(4) and the principles outlined in the associated caselaw.

42) There are three bases upon which the application is advanced. First, it is said that judicial review proceedings are not the appropriate context, nor is the Administrative Court the appropriate forum, in which to determine whether the claimant should be entitled to publish stories identifying Mr Cooke in connection with the Misconduct Proceedings. The question is said to require detailed consideration in the context of any application for injunctive relief made in the Queen's Bench Division. I reject the underlying premise of that submission. The issue before me is whether Mr Cooke should be granted anonymity in these proceedings; a matter which, as he accepts, I am obliged to determine, having regard to all relevant facts and matters and the applicable legal principles. Whether or not this application has come about in unusual circumstances, Mr Cooke has been in a position to advance all of the evidence upon which he relies in support of his application, which would not change according to the forum or proceedings in which they were aired. In any event, I do not accept that the considerations which inform my decision materially differ from those which would inform the decision on an application for injunctive relief to restrain publication. As was held by Dingemans LJ in *XXX*, at [24],

> " … when confronted with an application for anonymity pursuant to CPR 39.2(4), the Court should have regard to the relevant principles set out in the authorities referred to in paragraphs 17 to 21 above, and carry out the balancing exercise of the relevant interests under CPR 39.2 …"

The paragraphs to which that citation refers include those relating to the balance of competing rights under Articles 8 and 10 ECHR. In any event, the fact that Mr Cooke has been obliged to make an application for anonymity in proceedings which have been

generated by his inaccurate assertions to the claimant of the orders which had been made by the defendant in the Misconduct Proceedings cannot be laid at the claimant's door.

43) Furthermore, the funding arrangements for Mr Cooke's legal representation do not serve to explain why it is that he, personally, could not have been the deponent to the evidence on which he relies in support of his application, nor how it might be said that further material of value could have been provided in any such witness statement. Having pressed Mr Hutcheon to explain the further information which might have been provided in support of an application for injunctive relief, he identified only the prospect of greater detail surrounding the installation of a panic alarm in Mr Cooke's home. As the claimant observes, Mr Cooke has consistently relied upon the same matters, including in proceedings in which he was represented by leading counsel, and I regard as fanciful the suggestion that additional material of relevance, or greater impact, would become available. The suggestion that Mr Cooke ought not to be deprived of a return date or trial is similarly misconceived. The claimant's case is not that I should reject the evidence on which Mr Cooke relies, or prefer the evidence of a different witness; rather that, taken at its highest, his evidence is inadequate to its purpose and does not outweigh the interest in open justice. That is a matter for legal argument and the competing contentions have been advanced before me.

44) Secondly, it is asserted that there are, in any event, strong grounds for granting the order sought, on the basis of Mr Cooke's Article 8 ECHR rights. I reject that submission, too. The grounds on which reliance is placed are, first, a prior campaign of harassment by an individual who knows Mr Cooke's identity and has already referred to him by name, online. Beyond speculation, there is nothing to indicate that his activities will intensify and/or that others will follow suit were Mr Cooke's name to be published in connection with proceedings for judicial review. There is no evidence of the latter in connection with Mr Bailey's activities to date. Secondly, reliance is placed upon Mr Cooke's poor state of mental health, said to derive from the harassment by Mr Bailey. In that connection, I consider the claimant's criticisms of Mr Giles' report, dated 31 August 2021, to be well founded. In particular, the report was prepared five months ago and there is no current evidence before the court. It does not relate the ill-health which it details to the identification of Mr Cooke in connection with proceedings, and relies exclusively upon Mr Cooke's account of the circumstances which led to the misconduct investigation and outcome; it records Mr Giles' suggestion that Mr Cooke seek urgent primary care intervention, yet there is no evidence before the court as to whether he did so, or, if so, with what effect on his mental health; in particular, there is no current evidence as to whether the real possibility of self-harm and suicide which Mr Giles identified in August 2021 continues to exist and I note that no reliance is placed by Mr Cooke upon Article 2 of the ECHR.

45) Applying the principles summarised in *R(Rai)*, at [37] to [52], I am satisfied that neither Mr Bailey's prospective activities nor Mr Cooke's state of health, whether considered in isolation or in tandem, warrant the grant of anonymity in these proceedings. In short:

a) and as all parties accept, open justice is a fundamental principle of the common law. Its justification is the "value of public scrutiny as the guarantor of the quality of justice" and "its significance has, if anything, increased in an age which attaches growing importance to the public accountability of public officers and institutions and to the availability of information about the performance of their functions." (*Khuja*, at [13]);

b) a summary of the principles is set out in *R(Rai)*, per Nicklin J, at [37] to [43], including recognition of the role which the media performs as "public watchdog", imparting information on matters of public interest to the public, which has the right to receive such information;

c) the open justice principles apply to disciplinary proceedings of the statutorily regulated professions (*Spector,* at [26]). Free reporting of proceedings includes the ability to identify the persons involved. At [21], the Divisional Court summarised the relevant principles:

> "Free reporting of court proceedings includes being able to identify the persons involved, whether as parties or witnesses. In *In Re Guardian News and Media Ltd* [2010] 2 AC 697 at [63] Lord Rodger of Earlsferry said,
>
> > 'What's in a name? 'A lot', the press would answer. This is because stories about particular individuals are simply much more attractive to readers than stories about unidentified people. It is just human nature.'
>
> But the importance of being able to identify those involved in court proceedings is not confined to the writers and readers of human interest stories. Take the present context. Any report of the present tribunal would lose much of its force if it has to be neutered by anonymity. As Cranston J. said in *Yassin v General Medical Council* [2015] EWHC 2955 (Admin) at [59]:
>
> > 'There is a general interest in the public being able to know the identities of those who have been subject to disciplinary proceedings.'";

d) in *L v. Law Society* [2008] EWCA Civ. 811, at [41], in the context of the regulation of solicitors, the Court of Appeal emphasised that

> "Public confidence in the profession and its reputation is to my mind protected by hearings such as this being held in public. It not only ensures that matters are open to proper scrutiny such that the proper administration of justice in this domestic setting is done, but it enables the public to see what steps are taken to ensure that only those who it can properly be said have a suitable character are admitted into the profession.";

e) media reports of legal proceedings are an extension of the concept of open justice (*In Re (BBC)* [2018] 1WLR 6023 [29]);

f) any derogation from open justice must be established by clear and cogent evidence (*Scott v. Scott* [1913] AC 417);

g) the anonymised reporting of issues of legitimate public concern is less likely to interest the public and, therefore, to provoke discussion (*Khuja*). In this case, Mr Cooke's identity is not wholly marginal or peripheral to the public interest in reporting proceedings. I accept the claimant's submissions that, in particular in circumstances in which an officer has been publicly commended for other aspects of his work and has been a serving officer in his community for approximately 20 years, there is a sufficient public interest in identifying him which is not outweighed by the public interest in the administration of justice;

h) in essence, Mr Cooke's submissions amount to little more than those which were rejected in *R (Rai),* to the effect that the court should carry out a simple balancing exercise between the limited harm which would be occasioned by an anonymity order and the harm which he submits will be caused to him if such reports are permitted. I have already indicated the qualitative difficulties with the evidence on which he relies for those purposes, but, in any event, the submission does not accord with the principle that derogations from open justice are exceptional, require clear justification and should be made only when strictly necessary to secure the proper administration of justice;

i) for the sake of completeness, in relation to acts of serious misconduct committed in the context of his professional activities, I find that Mr Cooke has no reasonable expectation of privacy. I did not understand Mr Hutcheon to contend to the contrary. His focus was on the prospective conduct of Mr Bailey and its related effect on Mr Cooke's mental health, combined with a contention that Mr Cooke's identity was of marginal significance;

j) in the absence of any order barring Mr Cooke's identification in connection with the Misconduct Proceedings (or application by Mr Cooke therefor, in those proceedings), there can be no sensible suggestion that (a) any practical purpose would be served by the grant of any anonymity order in these proceedings, or, (b) that it is specifically the publication of his name in connection with the reporting of these proceedings which would promote any further activity by Mr Bailey and/or related risk to Mr Cooke's mental health and consequential behaviour.

46) Accordingly, I refuse the application for anonymity in these proceedings.

Use of disclosed documents

47) The documents of which the claimant wishes to make collateral use are exhibited as items 1 to 24 of Exhibit KRF2 to the second witness statement of Ms Katie French, former Editor of the *Basingstoke Gazette,* dated 11 October 2021. In broad summary, they comprise: submissions, respectively, on behalf of Hampshire Police and Mr Cooke as to whether there should be public notice of the Misconduct Hearing and whether the latter should be heard in private; the defendant's ruling on those matters, dated 19 April 2021; related correspondence in connection with that ruling; further submissions on behalf of the claimant, dated 23 April 2021, asserting that the effect of the defendant's original ruling was to require that no notice of the hearing be given in any form; the allegations the subject of the Misconduct Hearing, the tribunal's findings in relation to them and the outcome of the hearing, dated 27 April 2021; and an e-mail to the defendant from the Head of Standards and Compliance at the Office of the Police and Crime Commissioner for Hampshire, dated 16 June 2021, informing the defendant of the claimant's concerns.

48) There is no dispute as to the legal principles applicable to the court's exercise of its discretion under CPR 31.22(1)(b). In *Skeene*, at [40], it was held that the discretion should be exercised in the interests of justice and having regard to all the circumstances of the case. Some good reason should be shown for permitting collateral use, but that does not mean that permission should be exceptional, or rare, if a proper purpose is shown. The court must be satisfied that there is no

injustice to the party compelled to give disclosure. In *Tchenguiz*, at [66], per Jackson LJ, it was said that the collateral purpose rule existed for sound and long-established policy reasons and that the court will only grant permission "if there are special circumstances which constitute a cogent reason for permitting collateral use." Whether the public interest "warrants releasing a party from the collateral purpose rule depends upon the particular circumstances of the case. Those circumstances require careful examination". In *Smithkline Beecham PLC*, the Court of Appeal emphasised that "simple assertions of confidentiality and the damage that will be done by publication, even if supported by both parties, should not prevail. The court will require specific reasons why a party would be damaged by the publication of a document."

49) In this case, the reasons advanced for the application made are themselves founded upon the principle of open justice to enable these proceedings to be reported in their proper context. To date, following an anonymised Press release by the IOPC, dated 12 May 2021, regarding the Misconduct Proceedings and their outcome, the claimant has published only a similarly anonymised article, in relatively general terms and at a time when it was understood that an anonymity order had been made in those proceedings.

50) Balancing the principle of open justice, as explained in *Khuja* and in *Spector* (see above) against any risk of harm which use of the report might cause to the maintenance of an effective judicial process, or to the legitimate interests of others, I am satisfied that permitting the use of the specified documents is in the interests of justice in all the circumstances.

51) Having regard to the applicable legal principles, I am satisfied that it is appropriate for the documents obtained through disclosure in these proceedings to which this application relates to be used for the proposed collateral purposes, with the qualification that the names of all individuals who were the subject of an anonymity order in the Misconduct Proceedings shall be redacted from all documents and no reference is to be made which could serve to identify any of them. With that qualification, I accept that the use of the relevant documents for the purpose of reporting on these proceedings and on the Misconduct Proceedings furthers the principle of open justice, as explained in *Khuja* and *Spector,* in enabling the full context to be reported; the decisions of the tribunal and the material and submissions on which they were based to be subject to proper scrutiny; and the tribunal to be held to account for them, in particular in the absence of any anonymity order made in those proceedings relating to Mr Cooke. It is in the interests of justice that decisions of the tribunal in this case be capable of being reported, together with the respective positions of the parties in relation to them. I have considered the legitimate interests of Mr Cooke when addressing his application for an anonymity order. It is those same interests on which he relies for resisting the application now being addressed.

52) For all of the reasons which the claimant advances, as summarised at paragraphs 13 to 16 above, I am satisfied that there are special circumstances in this case which constitute a cogent reason for permitting collateral use of the relevant documentation and that it is appropriate for the order sought to be made. In my judgment, the absence of any involvement by the IOPC prior to the defendant's ruling on whether the Misconduct Hearing should take place in private; the stance adopted by Hampshire Police in that connection; the subsequent anonymisation of the tribunal's report and of the IOPC's press release, notwithstanding the absence of any anonymity order; and the public interest in understanding the full context of these proceedings for judicial review, all justify the order sought. Whilst not determinative of my decision, it is not without significance that the IOPC is of the view that the claimant's proposed use of the documentation is in furtherance of the principle of open justice. With the exception of Mr Cooke, no other party to the proceedings asserts that any injustice would be caused.

53) The objections raised by Mr Cooke essentially are founded on the matters which he prays in aid of his application for anonymity, which, for reasons previously set out, I have rejected. Having done so, the fact that he is identifiable from the documents in question does not itself serve to

indicate that he would be damaged by their publication. Leaving aside the inadequacy of the evidence upon which Mr Cooke relies, I am satisfied that it is in the interests of justice that collateral use of the specified documents, as sought by the claimant, be permitted.

Costs

54) The claimant will be discontinuing proceedings at a time when the issue of permission has not been considered. Nevertheless, the threshold for granting for permission is low and, in particular, absent a contention by any party that the claim is unarguable with a realistic prospect of success, it is likely that permission would have been granted, had the disclosure given not revealed the absence of any anonymity order and rendered the claim academic. I accept the claimant's submission that the meat of its challenge is to the purported anonymity order. Once it was clear that no such order had been made and the documents which the claimant had sought had been provided through disclosure, the balance of the challenge became otiose. For all practical purposes, the claimant has achieved its purpose.

55) Whilst Mr Cooke is right to observe that a costs order against an interested party is unusual in proceedings for judicial review, the circumstances of this claim are unusual. It is, undoubtedly, the case that Mr Cooke asserted that an anonymity order had been made by the defendant in the Misconduct Proceedings (see his solicitors' letters dated 11 and 18 June 2021) and that the existence of that order precluded the claimant from publishing his identity. In the absence of his provision of copies of the relevant material at a point which would have avoided the need for these proceedings, the claimant was not in a position to consider for itself the orders in fact made. It corresponded appropriately with Mr Cooke and the defendant prior to commencing proceedings, with a view to avoiding the need to do so. As is clear from the documents subsequently disclosed by the defendant, Mr Cooke had at no stage applied for an anonymity order, as he must have known, irrespective of any misapprehension by the other interested parties in these proceedings. Whilst he asserts, through counsel, that he was labouring under a general misapprehension, once again, there is no witness statement to that effect which explains how that misapprehension is said to have come about in those circumstances. Nothing in any of the contemporaneous correspondence by the defendant suggests that he considered that he had made an anonymity order. By the time that Mr Cooke's solicitors had indicated the true position, by letter dated 1 September 2021, these proceedings were well underway. Irrespective of whether Mr Cooke continues to consider that the claimant would be acting unlawfully if it were to publish details which identify him, that is not what these proceedings are about. These proceedings concern the lawfulness of the decisions actually, or purportedly, made by the defendant to: (i) conduct the Misconduct Hearing in private; (ii) grant anonymity to Mr Cooke; (iii) refuse to provide related documentation; and/or (iv) refuse to convene a further hearing at which the claimant could apply to set aside his earlier orders.

56) Whilst it is regrettable that the defendant did not consider himself able to disclose the relevant documentation at an earlier stage, I accept that, as the Chair of a neutral tribunal, by now *functus*, it was not for him to descend into the ring, particularly in circumstances in which Mr Cooke was aware of the orders for which he had applied and the ruling which had been made. Once proceedings for judicial review had been commenced, he complied with his disclosure obligations. Viewed in the round, I conclude that the defendant did not behave improperly or unreasonably, nor has he taken an active part in these proceedings. Accordingly, having regard to the principles in *R (Gourlay)*, I am satisfied that it is not appropriate to make a costs order against the defendant.

57) In my judgment, for the reasons set out above, I consider that Mr Cooke has behaved unreasonably and that these proceedings have come about by reason of that unreasonable behaviour, which takes this case out of the norm. As is observed at paragraph 23.3.6 of The

Administrative Court Judicial Review Guide 2021, an application to displace the order for costs which would usually apply on discontinuance "…must demonstrate a good reason for departing from the general rule. A good reason will normally exist if the defendant has behaved unreasonably." The discretion to order costs on the indemnity, rather than the standard, basis is a wide one in light of all the circumstances of the case. In the circumstances summarised above, I am satisfied that it is appropriate to depart from the usual rule as to costs on discontinuance and that an order that the claimant's costs be payable by Mr Cooke on the indemnity basis, to be assessed if not agreed, is appropriate. I shall hear counsel on the amount of any interim payment.

58) I do not accept Mr Cooke's submission that any costs order should be limited to 25 per cent of the claimant's costs on the basis that the anonymity order was one of only four acts challenged. That is to ignore the issues at the heart of this case, being anonymity and the provision of documentation which, ordinarily, would be in the public domain. The remaining decisions of the defendant were ancillary and, in any event, it is artificial to allocate costs by reference simply to the number of decisions challenged.

Conclusion

59) For the reasons set out above:

a) I refuse Mr Cooke's application for anonymity in these proceedings;

b) I grant the claimant's application for permission to make collateral use of the specified documentation disclosed by the defendant in these proceedings; and

c) I consider it appropriate to depart from the general rule as to costs on discontinuance and permit the claimant to discontinue proceedings on terms that Mr Cooke pay its costs, to be assessed on the indemnity basis, if not agreed.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

Transcribed by ***Opus 2 International Limited***
Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
CACD.ACO@opus2.digital

This transcript has been approved by the Judge.