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Appeal No: CA-2024-002798

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
Mr Justice Nicklin
[2024] EWHC 2969 (KB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/8/2025

Before:

SIR GEOFFREY VOS, MASTER OF THE ROLLS
LORD JUSTICE WARBY
and
LADY JUSTICE WHIPPLE

BETWEEN:

PMC (a child by his mother and litigation friend FLR)	**Claimant/ Appellant**
- and –	
A LOCAL HEALTH BOARD	**Defendant/ Respondent**

Robert Weir KC and Robert Oldham (instructed by **Hugh James**) for **PMC** (the Claimant)
Jeremy Hyam KC (of **NHS Wales Shared Services Partnership**) for **A Local Health Board** (the Defendant)
Luke Browne for **the British Broadcasting Corporation** (the BBC)
Anya Proops KC, Stephen Cottrell and Hannah Ready (instructed by **Simpson Millar LLP**) on behalf of **Personal Injuries Bar Association**
Nicola Greaney KC appointed by **the Attorney General** as the **Advocate to the Court**
Fiona Paterson KC (instructed by **the Official Solicitor**) for **the Official Solicitor**

Hearing dates: 25 February and 22 and 23 July 2025

JUDGMENT

This judgment was handed down remotely at 10:00am on 28 August 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

SIR GEOFFREY VOS, MASTER OF THE ROLLS:

Introduction

1. This appeal raises important issues as to the jurisdictional foundation for the principle of open justice and derogations from that principle. The context is the grant of anonymisation orders and reporting restriction orders in clinical negligence cases brought by children and protected parties and in proceedings brought to seek the court's approval of settlements in such cases.

2. The terminology for the orders sought in these cases has not always been clear. I shall use the terms in the following fashion: An order sought within court proceedings to withhold or anonymise the names of a party or a witness, including withholding information that would identify that person, will be referred to as a **withholding order** (WO). An order sought within court proceedings which has the effect of restricting the reporting of material disclosed during those proceedings whether in open court or by the public availability of court documents will be referred to as a **reporting restrictions order** (RRO). An order made within court proceedings which has the effect of both withholding or anonymising the names of a party or a witness and restricting the reporting of material disclosed during those proceedings whether in open court or by the public availability of documents will be referred to as an **anonymity order** (AO).

3. Mr Justice Nicklin (the judge) refused the AO sought by the claimant on the basis that there was no statutory foundation for making an RRO in the absence of a WO (see section 11 of the Contempt of Court Act 1981 (section 11)), and that the evidence did not support a WO being made in this case, because material concerning the claimant and his claim was already in the public domain. Derogation from the principle of open justice was not, according to the judge, necessary in this case.

4. The judge reached the following two important conclusions that were questioned on the appeal.

5. First, the judge concluded, in essence, at [52] and [106] that he should follow the *dictum* of Lord Sumption at [18] in *Khuja v. Times Newspapers Limited* [2017] UKSC 44, [2019] AC 161 (*Khuja*) to the effect that: "[t]he inherent power of the court at common law to sit in private or anonymise material deployed in open court has never extended to imposing reporting restrictions on what happens in open court". He followed *Khuja* in preference to following Lord Reed's view expressed in several places in *A v. British Broadcasting Corporation* [2014] UKSC 25, [2015] AC 588 (*A v. BBC*) at [32]-[41], [55], [57], [59] and [75], to the effect that there was a common law power in the court to derogate from the open justice principle where it was in the interests of justice to do so.

6. Secondly, the judge held at [94]-[112] that he should not follow parts of the Court of Appeal's decision in *JX MX v. Dartford and Gravesham NHS Trust* [2015] EWCA Civ 96, [2015] 1 WLR 3647 (*Dartford*), because (a) *Dartford* had not identified the jurisdiction to make an RRO ([105]-[107]), (b) several passages in *Dartford* were not consistent or conflicted with the "very clearly established principles of open justice" ([109]-[110] and [113]), and (c) *Dartford* did not deal with the situation (which arises in this case) of an application for an AO after the name of the claimant had already been publicised ([114]). *Dartford* set out the process that was to be followed where an AO

was sought in the context of an application for the court to approve compromise of a claim by a child or a protected party under CPR Part 21.10. It may be noted at this stage that the decision in *Dartford* was later reflected in form PF10, which was approved by the Civil Procedure Rule Committee for use in relation to applications for AOs in connection with approval applications under CPR Part 21.10. Part 4(2) of the CPR provides that such forms "must be used in the cases to which they apply".

7. The claimant appeals the judge's approach to all these points. The defendant Health Authority is neutral on the appeal. The Official Solicitor supports the appeal, and the Personal Injuries Bar Association supports aspects of the claimant's case. The BBC supported most aspects of the judge's judgment. We are much indebted to the Advocate to the Court, who has very helpfully filled in some important historical background.

8. In outline, I have determined the jurisdictional questions as follows. The authorities demonstrate that there is a limited common law power to derogate from the principle of open justice in civil or family court proceedings by making, within court proceedings, both a WO and an RRO. This kind of RRO takes effect as an order preventing publication of specified material disclosed during proceedings whether in open court or in documents placed before the court. It is not, however, in the same category as an equitable injunction granted against the world, generally in relation to matters occurring outside court proceedings, preventing the identification of people or information, and now founded on section 37 of the Senior Courts Act 1981. Section 11 was enacted because there was uncertainty about the common law power to grant an RRO. Its enactment did not, however, resolve that common law question in itself. It simply established that RROs may be granted in the specific cases to which the restricted terms of section 11 apply.

9. Secondly, I have determined that, in large part, *Dartford* remains good law, and is binding on us. But *Dartford* dealt only with AOs made in approval applications under CPR Part 21.10, which is not this case. It was, however, a case where proceedings had been started before the application for approval was made. The same principles apply, as explained below, to applications for AOs in personal injury actions brought by children or protected parties.

10. Thirdly, I would respectfully disagree with the *dictum* of Lord Judge CJ at [14] in *In Re Press Association* [2012] EWCA Crim 2434, [2013] 1 WLR 1979 (*Press Association*) to the effect that it was a "pre-condition to the making of the order on the basis of section 11 that the name of the defendant should have been withheld throughout the proceedings". I see no reason, as a matter of jurisdiction, why an AO should not be made, relying on either the common law power or section 11, even if a WO was not made at the beginning of the proceedings.

11. Fourthly, I have decided that in this case, which is an application for an AO in a personal injury claim brought by a severely injured child through their litigation friend, the judge was wrong to refuse that AO. The terms of the AO can, however, only be prospective, not retrospective, because of the previous publicity that the case has attracted.

12. I shall deal in this judgment with the following matters in the following order.

    i) First, the essential factual background. This judgment is open as I have not found it necessary to refer to any of the material that has been agreed to be

confidential. That confidential material concerned mostly the details of the pre-existing publicity about the case and the personal medical details of the claimant and details about the claimant's family and circumstances.

ii) Secondly, the judge's judgment.

iii) Thirdly, a chronological treatment of the authorities on the power to make WOs and RROs. The development of the common law concerning derogation from the open justice principle becomes much clearer when the authorities are considered in strictly chronological order. I have included in the chronology *Dartford* and the materials concerning the approval of settlements for children and protected parties under CPR Part 21.10.

iv) Fourthly, a summary of the applicable legal principles derived from the authorities in three sections: (i) the power to make an RRO, (ii) the meaning and effect of section 11, (iii) the application of *Dartford* to AOs made in personal injury actions brought by children and protected parties.

v) Fifthly, the application of those principles to the claimant's application for an AO in this case.

vi) Sixthly, my conclusions.

13. I will be forgiven, I hope, if I do not refer to every argument advanced by every one of the interveners. As it seems to me, once properly understood, this is not quite as difficult a case as it first appeared. That is, perhaps, evidenced by the considerable measure of common ground that was finally achieved between the parties and the interveners. The case is, however, important, and I hope that this judgment will bring much-needed clarity.

The essential factual background

14. This summary of the factual background is largely taken from [3]-[25] of the judge's judgment.

15. The claimant was born in 2012 at one of the defendant's hospitals. He is now 13. After his birth, he developed a large intraventricular haemorrhage as a result of asphyxia prior to birth and during labour. The haemorrhage led to cerebral palsy. The claimant is profoundly damaged and reliant on others for his care and day to day needs.

16. A letter claiming damages was sent in October 2013. In 2016, liability for negligence in the care of the claimant and his mother was admitted. It was also admitted, that, but for such negligence, the claimant would not have developed the haemorrhage. The defendant made large interim payments, even before the claim form (issued through his mother as litigation friend) for more than £10 million in damages was issued in March 2023. The interim payments have been managed by a professional property and affairs deputy appointed by the Court of Protection. A liability judgment was entered by consent in November 2023. Directions have been made by consent for a trial of quantum fixed for 10 days in December 2025. There have, thus far, been no substantive court hearings in the claim.

17. In November 2024, the claimant issued an application for an AO in the standard form of PF10, on the basis that: (a) he was unlikely to have capacity to conduct proceedings or manage his affairs on reaching adulthood, and (b) publication of the circumstances giving rise to the claim, the interim payments and any ultimate settlement sum would be unjust and would infringe his article 8 rights.

18. The evidence in support of the application for an AO explained that there had already been (at least) two media articles about the claimant's case published in 2020 and 2021, which arose from his mother's engagement with a media outlet (the media organisation). The media coverage commented on the claimant's injuries, his difficulties, how well he was doing in the circumstances, and the support that the family said it had received, without mentioning this litigation. The mother said she did not wish to engage further with the media. The evidence stated that the claimant was vulnerable to exploitation.

19. The claimant's application for an AO sought immediate without notice interim relief, which the judge refused on the basis of section 12 of the Human Rights Act 1998 and the rights of the media under article 10 of the European Convention on Human Rights (the ECHR). Instead, he ordered: (a) an urgent substantive hearing of the request for an AO, (b) service of the existing evidence on the media organisation, and (c) the claimant to file further evidence about media coverage and any open court hearings that had occurred. That further evidence identified more media coverage from the media organisation and others expressing concern about the standard of maternity care at the defendant's hospitals. The claimant's solicitor had given a media interview referring to compensation payments in negligence claims that could run into substantial sums for the cost of ongoing care. The leader of the local council was reported as saying that it was a scandal that nobody from the defendant's hospital had been held accountable for the failings in the defendant's maternity services. The judge said this at [23] about the coverage identified:

> The Claimant has featured prominently in all the media publications, indeed, for most of them he has been the focus. These were not passing references in articles having a wholly different focus. As a result of this media coverage, the Claimant is likely to be readily identifiable, particularly in his local area, as a very high-profile victim of medical negligence.

20. The media organisation did not oppose an order that protected the identity of the claimant and his family, but did object, on public interest grounds, to an order preventing reporting of the name of the hospital in future phases of the litigation or any ultimate settlement in the claim.

21. The order sought before the judge was substantively to the following effect: (i) the identity of the claimant as a party to the proceedings was confidential and was not to be published, (ii) under CPR Part 39.2(4), the name or address of the claimant, the claimant's Litigation Friend or other immediate family members, or details that could lead to the claimant's identification were not to be disclosed in any media report, and (iii) under CPR Parts 5.4C and 5.4D, non-parties could not obtain copies of non-anonymised statements of case, judgments or orders from the Court records.

22. The judge heard the application on 6 November 2024 and delivered his 45-page judgment on 24 November 2024.

23. The claimant sought two alternative orders before us. The first was the same as that sought from the judge and summarised at [21] above. The alternative (fallback) was different in that the prohibition on disclosing identification details of the claimant, his Litigation Friend or other immediate family members in any media report was qualified by the words "from the date of this order". Mr Robert Weir KC, leading counsel for the claimant, submitted that these words had been inserted in his fallback order to make clear that the AO sought was **prospective** rather than **retrospective**. In other words, the media were not to be required to remove previous articles about the claimant from their websites or the internet more generally.

The judge's judgment

24. I do not intend to recite the details of the judgment, save to say that it is a comprehensive exposition of the law by a judge whose expertise in this area is widely acknowledged. The fact that we are disagreeing with aspects of his ultimate conclusions does not lessen my respect for his insightful treatment of the issues with which he was faced.

25. It is also fair to note that, since the judge's judgment, the important decision of the Supreme Court emerged in *Abbasi v. Newcastle upon Tyne Hospitals NHS Foundation Trust* [2025] UKSC 15, [2025] 2 WLR 815 (*Abbasi SC*) providing different reasoning from the decision in the same case in the Court of Appeal ([2023] EWCA Civ 331, [2023] Fam 287) (*Abbasi CA*), which was available to the judge. As will appear, *Abbasi SC*, in my judgment, explained and confirmed the development of the common law that had begun in *A v. BBC* and had been taken forward in *Wolverhampton City Council v. London Gypsies and Travellers* [2023] UKSC 47, [2024] AC 983 (*Wolverhampton*).

A chronological treatment of the authorities on the power to make WOs and RROs.

Scott v. Scott

26. The judgments of the House of Lords in *Scott v. Scott* [1913] AC 417 still provide the rock upon which the principles of open justice stand. *Scott v. Scott* held that the court had no power to hear a nullity case in private in the interests of public decency. The overriding principle was that cases had to be heard in public unless there was a "strict necessity" to depart from that rule. The strict necessity exceptions were not to depend on any discretion of the judge (see Earl Loreburn at 445). As Viscount Haldane LC put it at 437: "the exceptions are themselves the outcome of a yet more fundamental principle that the chief object of Courts of justice must be to secure that justice is done". He had in mind exceptions where the court was exercising its *parens patriae* jurisdiction to protect children and those with mental health problems (described as lunatics in those days), and exceptions where a process that was, of necessity, secret would be revealed if the hearing were held in the open. In those cases, the person seeking privacy had to make out his case of necessity strictly (see 438).

27. Lord Atkinson explained at 463 why there was no power to hear the specific nullity case in private on grounds of public decency: "The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses ... but all this is tolerated and endured because ... in public trial is to be found, on the whole, the best security for the pure, impartial and efficient administration of justice, the best means of winning for it confidence and respect" (see also Earl Loreburn at 447).

28. Thus, as it seems to me, *Scott v. Scott* acknowledged a very limited non-discretionary derogation from the common law principle of open justice only in circumstances of strict necessity for the purpose of achieving justice in the proceedings. There was discussion in *Scott v. Scott* as to the distinction between sitting in private and preventing publication of the proceedings thereafter, on pain of contempt, but it is hard to divine a clear conclusion on these points, because the judgments were unanimous about the lack of a power to allow the nullity proceedings in issue there to be heard in private in the first place (see Earl Loreburn at 447-8 and Lord Shaw at 476 and 482-3).

Socialist Worker

29. In *Regina v. Socialist Worker Printers and Publishers Limited* [1975] 1 QB 637, Lord Widgery CJ (and Milmo and Ackner JJ) approved the practice of anonymising witnesses in a criminal blackmail trial. The Divisional Court held the Socialist Worker in contempt of court by publishing the names of the witnesses so anonymised, on the grounds that there was an affront to the authority of the court and an act calculated to interfere with the course of justice (see 652G). Lord Widgery drew an analogy at 651 with the hearing of cases about secret processes in private (referring to Earl Loreburn's statement in *Scott v. Scott* at 445 that any other course would be a denial of justice). Lord Widgery thought at 651-2 that the anonymisation of the witnesses was a far lesser and more justifiable interference with the principle of open justice than hearing the whole trial in private.

Section 11

30. Section 11 of the Contempt of Court Act 1981 was entitled "Publication of matters exempted from disclosure in court". It provided as follows:

> 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.

Independent Publishing Co

31. *Independent Publishing Co Ltd v. Attorney General for Trinidad and Tobago* [2004] UKPC 26, [2005] AC 190 was another criminal case. The Privy Council held that a court had no common law power to order that publication of a report of proceedings that had already taken place in open court should be postponed. Such a power could only be conferred by legislation. The Privy Council did, however, approve the decision in *Socialist Worker* on the basis that it was a contempt to publish material likely to prejudice the fair administration of justice.

32. Lord Brown at [21]-[24] cited Lord Diplock in *Attorney General v. The Leveller Magazine Ltd* [1979] AC 440 (also a criminal case) (*The Leveller Magazine*) where he had said the following about derogation from the principle of open justice:

> The application of the general rule in its entirety would frustrate or render impracticable the administration of justice or would damage some other public interest for whose protection Parliament has made some statutory derogation from

> the rule. Apart from statutory exceptions, however, where a court in the exercise of its inherent power to control the conduct of proceedings before it departs in any way from the general rule, the departure is justified to the extent and to no more than the extent that the court reasonably believes it to be necessary in order to serve the ends of justice.

33. The Privy Council then considered at [26]ff cases where the court wanted to "guard against press publicity which may imperil the fairness of those [or other] proceedings". It referred at [51] to the new powers introduced by sections 4(2) and 11 of the Contempt of Court Act 1981, and concluded at [66]-[67] as follows:

> 66. The Phillimore Committee included at [page 60] of their 1974 report a footnote written before the court's decision in [*Socialist Worker*] but after the publication of the blackmail victims' names:
>
> > "We incline to the view that **the important question of what the press may publish concerning proceedings in open court** should no longer be left to judicial requests (which may be disregarded) **nor to judicial directions (which, if given, may have doubtful legal authority)** but that legislation … should provide for these specific circumstances in which a court shall be empowered to prohibit, in the public interest, the publication of names or of other matters arising at a trial."
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> 67. **Their Lordships likewise conclude that if the court is to have the power to make orders against the public at large it must be conferred by legislation; it cannot be found in the common law**. It is not for the Board to say whether or not such legislation is desirable. [Emphasis added.]

Re S

34. In *In re S (A Child) (Identification: Restrictions on Publication)* [2004] UKHL 47, [2005] 1 AC 593, the judge had prohibited any identification or publication of a 5-year-old child's name or school and other identifying material, when these details were likely to be mentioned in his mother's trial for the murder of his brother. The judge varied the order so as to allow mother and brother, but not the 5-year-old child, to be identified. Lord Steyn (with whom Lords Bingham, Nicholls, Hoffmann and Carswell agreed) upheld the Court of Appeal's decision to maintain the varied order in place. The importance of the case relates to two passages at [17] and [23] of Lord Steyn's speech. The passages changed the approach to the jurisdictional foundation for RROs. As will be seen, however, later cases culminating in *Abbasi SC* have rather changed that approach again. Lord Steyn said this:

> 17. The interplay between articles 8 and 10 has been illuminated by the opinions in the House of Lords in *Campbell v. MGN Ltd* [2004] 2 AC 457 [*Campbell*]. … What does, however, emerge clearly from the opinions are four propositions. First, neither article has *as such* precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For

> convenience I will call this the ultimate balancing test. This is how I will approach the present case. …
>
> 23. The House unanimously takes the view that since the 1998 Act came into force in October 2000, the earlier case law about the existence and scope of inherent jurisdiction need not be considered in this case or in similar cases. The foundation of the jurisdiction to restrain publicity in a case such as the present is now derived from Convention rights under the ECHR. This is the simple and direct way to approach such cases. In this case the jurisdiction is not in doubt. This is not to say that the case law on the inherent jurisdiction of the High Court is wholly irrelevant. On the contrary, it may remain of some interest in regard to the ultimate balancing exercise to be carried out under the ECHR provisions. …

Guardian News and Media

35. In *In re Guardian News and Media Ltd* [2010] UKSC 1, [2010] 2 AC 697, a number of persons brought proceedings to challenge directions under the Terrorism (United Nations Measures) Order 2006 and the Al-Qaida and Taliban (United Nations Measures) Order 2006. They obtained AOs within the proceedings. Ultimately, at Supreme Court level, certain media organisations applied to discharge the AOs on article 10 grounds. The applications were resisted on article 8 grounds. The Supreme Court discharged the AOs, whilst holding that the court had power to make AOs in order to fulfil a positive obligation under article 8. Lord Rodger, giving the judgment of the Court (including also Lords Phillips, Hope, Baroness Hale, and Lords Walker, Brown and Kerr), explained at [30]-[31] the recent history of the jurisdiction to make anonymity orders, making it clear that section 11 was not the source of the power to make RROs. In the famous passage at [63] Lord Rodger explained the importance of the media being able to publish the real names of persons involved in news stories.

36. At [52] in *Guardian News and Media*, Lord Rodger identified the test that needed to be applied (and was applied at [76]) as follows. He had previously cited the European Court of Human Rights in *Von Hannover v. Germany (No 2)* 40 EHRR 1 (*Von Hannover*), Lord Hoffmann at [55]-[56] in *Campbell v MGN Ltd* [2004] 2AC 457, and Lord Hope at [17] in *In re British Broadcasting Corpn* [2010] 1 AC 145:

> 52. In the present case M's private and family life are interests which must be respected. On the other side, publication of a report of the proceedings, including a report identifying M, is a matter of general, public interest. Applying Lord Hoffmann's formulation, **the question for the court accordingly is whether there is sufficient general, public interest in publishing a report of the proceedings which identifies M to justify any resulting curtailment of his right and his family's right to respect for their private and family life**. [Empasis added]

JIH v. News Group

37. In *JIH v. News Group Newspapers Ltd* [2011] EWCA Civ 42, [2011] 1 WLR 1645, the Court of Appeal laid down the approach to an application for an order prohibiting the publication of private information, balancing the individual's article 8 rights against the article 10 right to freedom of expression, to ensure that the circumstances of the case were sufficiently strong to justify encroaching, to the minimum necessary extent, on

the cardinal rule of open justice. Lord Neuberger MR (with whom Maurice Kay and Smith LJJ agreed) said this at [21]-[22]:

> 21. … (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.
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> 22. Where, as here, the basis for any claimed restriction on publication ultimately rests on a judicial assessment, it is therefore essential that (a) the judge is first satisfied that the facts and circumstances of the case are sufficiently strong to justify encroaching on the open justice rule by restricting the extent to which the proceedings can be reported, and (b) if so, the judge ensures that the restrictions on publication are fashioned so as to satisfy the need for the encroachment in a way which minimises the extent of any restrictions.

Practice Guidance (Interim Non-disclosure Orders)

38. Lord Neuberger MR issued the *Practice Guidance (Interim Non-disclosure Orders)* [2012] 1 WLR 1003 shortly after *JIH v. News Group*. It referred expressly at [13] to the guidance at [37] above, and to *Re S* at [17]. It explains the application of section 12 of the Human Rights Act 1998 to applications for interim non-disclosure orders.

39. In this connection, it is perhaps worth noting the provisions of CPR Part 39.2 (4) and (5) as follows:

> (4) The court must order that the identity of any person shall not be disclosed if, and only if, it considers non-disclosure necessary to secure the proper administration of justice and in order to protect the interests of that person.
>
> (5) Unless and to the extent that the court otherwise directs, where the court acts under paragraph (3) or (4), a copy of the court's order shall be published on the website of the Judiciary of England and Wales (which may be found at www.judiciary.uk). Any person who is not a party to the proceedings may apply to attend the hearing and make submissions, or apply to set aside or vary the order.

Press Association

40. The decision of the Criminal Division of the Court of Appeal in *Press Association* concerned an order indefinitely postponing, purportedly under section 4(2), the publication of material that might lead to identification of the victim at the end of a rape prosecution. The court decided that section 4(2) was inapplicable because, at the end of the case, the requirement that such an order might be made "to avoid a substantial risk of prejudice to the administration of justice in those proceedings" could not be satisfied.

41. Although section 11 had not been relied upon and could not have been relied upon in those proceedings, Lord Judge CJ said this at [14]:

> When making his ruling the judge made no reference to [section 11] and, for completeness, it is plain that this section could not have been relied on as the foundation for the initial order. Section 11 does not arise for consideration unless the court, having the power to do so, withholds the name or other matter from the public in the proceedings before it: see *R v Arundel Justices, Ex p Westminster Press Ltd* [1985] 1WLR 708 and in *In re Trinity Mirror plc (A intervening)* [2008] QB 770. **It was therefore a pre-condition to the making of the order on the basis of section 11 that the name of the defendant should have been withheld throughout the proceedings**. [Emphasis added]

A v. BBC

42. *A v. BBC* concerned an AO made on the application of a person who was to be deported. The AO allowed the applicant's name and address to be replaced by initials and prohibited under section 11 the publication or broadcast of his name or other identifying details.

43. The Supreme Court dismissed an appeal by the BBC, holding that the open justice principle was an aspect of the rule of law in a democracy and was a constitutional principle to be found in the common law. The freedom of the media to report on court proceedings was inextricably linked to the principle of open justice, but the courts had an inherent power to make exceptions to the principle by withholding certain information, including the identity of parties or witnesses, from public disclosure where that was necessary in the interests of justice. The Supreme Court held that a derogation depended on the facts of the case. A fact-specific balancing exercise was necessary, taking into account the purpose of the open justice principle, the potential value of the

information in question in advancing that purpose, and any risk of harm which its disclosure might cause to the maintenance of an effective judicial process or to the legitimate interests of others.

44. In dealing with "Exceptions to the principle of open justice" at [27]-[41], Lord Reed (with whom Baroness Hale, and Lords Wilson, Hughes and Hodge agreed), made it clear at [27] that the courts had an inherent jurisdiction to determine how the principle of open justice should be applied.

45. Having referred in detail to *Scott v. Scott, In Re K (infants)* [1965] AC 201, *The Leveller Magazine*, and *Bank Mellat v. HM Treasury (Liberty intervening) (Nos 1 and 2)* [2014] AC 700, Lord Reed said at [32] that:

> It has also been recognised in the English case law, consistently with Lord Neuberger PSC's requirement of the degree of privacy being kept to a minimum, that where the interests of justice require some qualification of the principle of open justice, it may not be necessary to exclude the public or the press from the hearing: it may suffice that particular information is withheld.

46. Lord Reed continued at [38]-[41] to express the general principle as follows:

> 38. As I have explained, it has long been recognised that the courts have the power to permit the identity of a party or a witness to be withheld from public disclosure where that is necessary in the interests of justice. The Lord President [(Gill) at [38] of [2013] SC 533 in *A v. BBC*] was plainly right to approach the matter on the basis that the interests of justice are not confined to the court's reaching a just decision on the issue in dispute between the parties. It is necessary in the first place to recognise that the administration of justice is a continuing process: see, for example, *Attorney General v Butterworth* [1963] 1 QB 696, 725, per Donovan LJ. The court can therefore take steps in current proceedings in order to ensure that the interests of justice will not be defeated in the future. …
>
> 39. Other cases may raise different considerations. In some cases, for example, anonymity may be necessary in view of risks to the safety of a party or a witness. … In other cases the health of a vulnerable person may be at risk. An example is *HM Advocate v M* [2007] SLT 462, where the court made a section 11 order to prevent the publication of the identity of a woman who was due to be the principal witness at the trial of a person charged with having recklessly infected her with HIV. …
>
> 40. Some of these examples may arguably go beyond the categories envisaged in some of the older authorities. As Earl Loreburn observed however in [*Scott v. Scott* at 446], it would be impossible to enumerate or anticipate all possible contingencies. Furthermore, in this area as in others the common law is capable of development. The application of the principle of open justice may change in response to changes in society and in the administration of justice.
>
> 41. The examples given by the Lord President of a party or witness whose safety may be endangered or who may suffer commercial ruin if his identity becomes known, or that of the female pursuer where the decision turns on intimate medical evidence, are all capable of raising issues which could warrant a qualification of

> the principle of open justice, applying the approach which I have explained. In relation to the last example, which was the subject of particular criticism by counsel for the BBC, I agree with the Lord President that it would be in the interests of justice to protect a party to proceedings from the painful and humiliating disclosure of personal information about her where there was no public interest in its being publicised. Whether a departure from the principle of open justice was justified in any particular case would depend on the facts of that case. As Lord Toulson JSC observed in *Kennedy v Information Comr (Secretary of State for Justice intervening)* [2015] AC 455, 525, para 113, the court has to carry out a balancing exercise which will be fact-specific. Central to the court's evaluation will be the purpose of the open justice principle, the potential value of the information in question in advancing that purpose and, conversely, any risk of harm which its disclosure may cause to the maintenance of an effective judicial process or to the legitimate interests of others.

47. At [48] in *A v. BBC*, Lord Reed referred to the approach that should be adopted in balancing ECHR rights as having been "considered in detail" in *Re S* and in *Guardian News and Media*. At [55]-[57] in *A v. BBC*, Lord Reed explained the relationship between the common law and rights under the ECHR, referring to Lord Steyn at [23] in *Re S*, and Lord Rodger at [30] in *In re Guardian News and Media Ltd* [2010] 2 AC 697. He made clear that "these dicta were not … concerned with the conduct of court proceedings". They concerned, instead, what he described as a "different issue" namely "the jurisdiction of the English courts to make orders *contra mundum* restraining publicity relating to court proceedings, and in particular the publication of information identifying persons involved in those proceedings". It is apparent from later cases (*Wolverhampton* and *Abbasi SC*) that Lord Reed was alluding, in part at least in this passage, to the (different) equitable jurisdiction to grant an injunction, now reflected in section 37 of the Senior Courts Act 1981. Lord Reed said that recent Supreme Court authority showed that "the common law principle of open justice [remained] in vigour, even when Convention rights [were] also applicable". That approach did not diminish the importance of section 6 of the Human Rights Act 1998. The starting point was, however, the domestic principle of open justice: "with its qualifications under both common law and statute". The ECHR and domestic law in this area "walk in step". These comments seem to me to have been taken further in *Abbasi SC*.

Dartford

48. In *Dartford*, the Court of Appeal (Moore-Bick, Black and Lewison LJJ) decided the approach to be followed where a child or protected party applied for approval under CPR Part 21.10 of the settlement of a claim for damages for personal injury and sought an AO. CPR Part 21.10(1) provides that "[w]here a claim is made … by or on behalf of a child or protected party … no settlement, compromise or payment … shall be valid … without the approval of the court".

49. In *Dartford*, there had been pre-existing personal injury proceedings before the approval application and the associated application for an AO was made (see [4] of Moore-Bick LJ's judgment). Moore-Bick LJ held that, even though the court was performing a protective function, it had to consider whether any derogation from the principle of open justice and the right to freedom of expression was, on an objective test, strictly necessary and, if so, the minimum derogation required in order to achieve the ultimate purpose of doing justice in the case.

50. Moore-Bick LJ dealt at [5]-[18] with almost all the authorities that I have already cited on the principle of open justice. He recognised at [13]-[15] that the court's protective jurisdiction was no longer confined to the classes recognised in *Scott v. Scott* and that statute now covered wider categories of cases involving children and vulnerable adults. Those cases would be subject to the open justice principle. They would often call for a measure of privacy to avoid injustice. He then stated at [25] and [27], correctly I would say, the issue that the court had to decide. He said that the question was whether an indefinite AO in derogation from the open justice principle was necessary to enable the court to do justice in that case.

51. At [28]-[32] of *Dartford*, Moore-Bick LJ explained the principles he was applying. He said that the judge below ought to have concentrated more on the invasion of the family's privacy which a report identifying the infant claimant would involve, and less on the existence of specific risks of tangible harm to the claimant and her family. He said that statements of the fears of invasion of privacy were likely to appear formulaic, but that did not mean that the importance of maintaining the family's privacy should be underestimated. Whilst applying the open justice principle and acknowledging that approval hearings should be in public, the court should be willing to recognise the need to protect the privacy of children and protected parties in what are hearings of an essentially protective nature, by analogy with the Family Procedure Rules and the Court of Protection Rules: "[t]he court is concerned not so much with the direct administration of justice as with ensuring that through the offices of those who act on his or her behalf the claimant receives proper compensation for his or her injuries". Moore-Bick LJ thought that the public interest might usually be served without the need for disclosure of the claimant's identity. Withholding the name of the claimant mitigated the inevitable discrimination between children and protected parties (who had to come to court to seek approval) and capacitous adult claimants who did not.

52. Moore-Bick LJ concluded at [31] by saying that:

> … ultimately we have been persuaded that, although each application will have to be considered individually, a limited derogation from the principle of open justice will normally be necessary in relation to approval hearings to enable the court to do justice to the claimant and his or her family by ensuring respect for their family and private lives. In some cases it may be possible to identify specific risks against which the claimant needs to be protected and if so, that will provide an additional reason for derogating from the principle of open justice, but we do not think that it is necessary to identify specific risks in order to establish a need for protection. The circumstances giving rise to the settlement will inevitably differ from case to case, but the interference with the right to private and family life will be essentially the same in almost all cases. It is sufficient in our view that the publication of the circumstances giving rise to the settlement would, in the absence of relief, involve injustice in the form of an interference with the article 8 rights of the claimant and his or her family.

53. In relation to deciding what order it was appropriate to make, Moore-Bick LJ said at [32] that the task was to decide what form of order would "provide the necessary protection while at the same time ensuring that the derogation from the principle of open justice [was] kept to a minimum". An order for the child's anonymity under section 39 of the Children and Young Persons Act 1933 was not adequate because it lapsed on their majority. An AO prohibiting the publication of the claimant's name and

address and a restriction on access by non-parties to documents in the court records provided a reasonable degree of protection against unwarranted invasions of privacy and interference with article 8 rights.

54. Moore-Bick LJ concluded by giving the guidance to first instance judges that has been followed ever since. He said at [34] that the court should, in the interests of consistency, "normally make an anonymity order in favour of the claimant without the need for any formal application, unless for some reason it is satisfied that it is unnecessary or inappropriate to do so". He also said that: "[i]f the press or any other party wishes to contend that an anonymity order should not be made, it will normally be necessary for it to file and serve on the claimant a statement setting out the nature of its case". At [35] Moore-Bick LJ said that the following principles should apply:

> (i) the hearing should be listed for hearing in public under the name in which the proceedings were issued, unless by the time of the hearing an anonymity order has already been made;
>
> (ii) because the hearing will be held in open court the press and members of the public will have a right to be present and to observe the proceedings;
>
> (iii) the press will be free to report the proceedings, subject only to any order made by the judge restricting publication of the name and address of the claimant, his or her litigation friend (and, if different, the names and addresses of his or her parents) and restricting access by non-parties to documents in the court record other than those which have been anonymised (an "anonymity order");
>
> (iv) the judge should invite submissions from the parties and the press before making an anonymity order;
>
> (v) unless satisfied after hearing argument that it is not necessary to do so, the judge should make an anonymity order for the protection of the claimant and his or her family;
>
> (vi) if the judge concludes that it is unnecessary to make an anonymity order, he should give a short judgment setting out his reasons for coming to that conclusion;
>
> (vii) the judge should normally give a brief judgment on the application (taking into account any anonymity order) explaining the circumstances giving rise to the claim and the reasons for his decision to grant or withhold approval and should make a copy available to the press on request as soon as possible after the hearing.

55. The judge in this case at [110]-[113] doubted the validity of the guidance I have summarised at [52] above. He said that the guidance conflicted with principle in a number of respects. First, the guidance wrongly reversed the burden of proof. Secondly, the guidance wrongly gave presumptive priority to anonymity (contrary to Lord Steyn's classic statement of the balancing exercise in *Re S* at [17]). Thirdly, the guidance wrongly suggested that the issue should be determined on the basis of rival generalities as opposed to an intense focus on the individual facts (contrary to authorities such as *R (Marandi) v. Westminster Magistrates Court* [2023] 2 Cr App R 15 at [16], [17] and [43(6)], and *Griffiths v. Tickle* [2022] EMLR 11). I will consider these objections, amongst others raised by the judge to Moore-Bick LJ's entire approach, in due course.

Khuja

56. In *Khuja*, the claimant sought an anonymity order in respect of evidence that had been heard identifying him in a sexual assault trial. Khuja had been arrested alongside the defendants in that trial, but was never charged with any offence. During the trial he was protected by an order postponing publication made under section 4(2) of the Contempt of Court Act 1981 to avoid "a substantial risk of prejudice to the administration of justice in those proceedings". The judge and the Court of Appeal balanced Khuja's article 8 rights against article 10, and refused to grant him an injunction in the form of an AO. Lord Sumption (with whom Lord Neuberger, Baroness Hale, and Lords Clarke and Reed agreed) upheld that decision. Lords Kerr and Wilson dissented.

57. Lord Sumption reviewed the law on open justice, anonymity orders, the ECHR and privacy at [12]-[30]. Those passages should be read in their entirety. It should be noted that Lord Reed, who gave the judgments in the more recent cases on which reliance is placed by the parties before us, agreed with Lord Sumption's summary of the law. It may also be noted that at [28] Lord Sumption cited *A v. BBC*, saying that it had been submitted that it marked a change of approach. He said that, in *A v. BBC*: "Lord Reed JSC was prepared to accept, at [41], that a lesser interest such as serious commercial damage would be enough to justify an order in a case where there was no public interest in publication" (see [46] above).

58. At [12]-[14], Lord Sumption began by setting out the open justice principle and the limited historical derogations allowed from it. At [15], he noted that the two modern factors of national security and the ECHR (particularly article 8) had combined to broaden the scope of the exceptions to the open justice rule. At [16], Lord Sumption cited Lord Diplock at 450 in *The Leveller Magazine* as explaining that open justice had two distinct aspects. First, proceedings were held in public, and secondly, that nothing should be done to discourage fair and accurate reporting of such proceedings. *Khuja* was "concerned with the question whether matters exposed at a public criminal trial may be reported in the media". Press reporting of legal proceedings was an extension of the concept of open justice, and was inseparable from it. Lord Sumption said that "restrictions on the reporting of what has happened in open court [gave] rise to additional considerations over and above those which arise when it is sought to receive material in private or to conceal it behind initials or pseudonyms in the course of an open trial". Arrangements for the conduct of the hearing itself fell within the court's general power to control its own proceedings, and might result in some information not being available to be reported. Reporting restrictions, he said, were different: "[t]he material is there to be seen and heard, but may not be reported. This is direct press censorship". The limits on permissible reporting of public legal proceedings were, according to Lord Sumption, set by the law of contempt, the law of defamation and the law protecting ECHR rights. Importantly he said that *Khuja* turned on the law protecting ECHR rights, but that he would deal with the law of contempt and the law of defamation first.

59. It was, therefore, in the context of the law of contempt that Lord Sumption said at [18] the following, which was so heavily relied upon by the judge:

> The inherent power of the court at common law to sit in private or anonymise material deployed in open court has never extended to imposing reporting restrictions on what happens in open court. Any power to do that must be found in

> legislation [see *Independent Publishing*]. There is a substantial number of statutory restrictions on the reporting of court proceedings. With very limited exceptions, all of them are concerned either (i) to protect the administration of justice itself by preventing the reporting of matters likely to prejudice the fairness of proceedings or to deter parties, witnesses or victims of crime from participating in them; or (ii) protecting children and young persons or other particularly vulnerable groups. … The dependence of this area of law on statute and the extent of statutory intervention mean that it is fair to speak of a statutory scheme occupying the ground to the exclusion of discretions arising from the common law or the court's inherent powers. Lord Steyn made this point … in [*Re S* at [20]]: "Given the number of statutory exceptions, it needs to be said clearly and unambiguously that the court has no power to create by a process of analogy, except in the most compelling circumstances, further exceptions to the general principle of open justice".

60. It must, I think, be accepted that this *obiter* passage (set out at [59] above) does, fairly read, suggest that there is no "inherent power of the court at common law" to "impose reporting restrictions on what happens in open court". Since *Dartford* did envisage the anonymisation application and the subsequent approval application being heard in open court, the order made in *Dartford* did impose reporting restrictions on what happened in open court. Moore-Bick LJ did not found his decision on the admitted power to impose reporting restrictions under section 11.

61. At [19] in *Khuja*, Lord Sumption dealt with the law of defamation, and at [20]-[30], he dealt with the ECHR. His reference to *A v. BBC* at [28] was in connection with articles 2 and 3 of the ECHR.

62. At [34(1)] in *Khuja*, Lord Sumption explained why it was too late for the injunction sought as follows:

> [Khuja's] application is not that the trial should be conducted so as to withhold his identity. If it had been, the considerations urged by Lord Kerr and Lord Wilson JJSC in their judgments in this case, might have had considerable force. But it is now too late for that. [Khuja's] application is to prohibit the reporting, however fair or accurate, of certain matters which were discussed at a public trial. These are not matters in respect of which [Khuja] can have had any reasonable expectation of privacy.

PQ v. Royal Free

63. In *PQ (A Child proceeding by her father and litigation friend RS) v. Royal Free London NHS Foundation Trust* [2020] EWHC 1662 (QB), Martin Spencer J examined *Dartford* in the context of an application for an AO before a trial of liability in a personal injury claim by a seriously injured child. He acknowledged at [2] that *Dartford* was confined in its *ratio* to approval hearings. He said at [3] that *Dartford* had endorsed three reasons for the normal position being in approval hearings that AOs were made "without the need to persuade the court on each occasion that such an order is necessary": (i) the court's function when approving settlements was essentially protective, not determinative, (ii) the publication of highly personal information about the claimant's medical condition involved a serious invasion of privacy rights, (iii) unlike adults, children and protected parties had no choice but to seek the court's approval of their

settlements. Only the second reason applied to AOs in the context of liability trials. It was engaged in *PQ v. Royal Free*. Martin Spencer J said this at [8]

> … the demand for necessity is met in a case such as the present. In the event that the claimant is successful, then the reporting of the subsequent proceedings for recovery of damages, which would necessarily need to be approved by a court for the reasons set out in [*Dartford*], would be severely restricted because of the so-called "jigsaw effect": if the liability trial has been reported in full - including the name of the claimant - then the ability of the court to protect the interests of the child at the settlement hearing would be severely constrained because the public would be able to associate any report of the subsequent settlement proceedings with the previous liability proceedings. However, it seems to me that it is in the interests of open justice that the press should be free to report settlement proceedings to the fullest ability that they can without trespassing upon the rights of the child and for the family by identifying their names.

64. I shall come on to consider whether the privacy rights protected in both *Dartford* and *PQ v. Royal Free* are indeed sufficient to allow a common law derogation from the open justice principle.

Wolverhampton

65. Lord Reed explained at [7] of *Abbasi* SC what the court had been doing in *Wolverhampton*. He said that the Supreme Court had, in *Wolverhampton*, "conducted a fundamental review of the court's power to grant injunctive relief, albeit largely outside the human rights context". The context was, in fact, applications for *contra mundum* (against the world) injunctions against unknown persons occupying land. The Supreme Court upheld the Court of Appeal in holding that such injunctions, whether interim or final, could be granted. It held that, despite section 37 of the Senior Courts Act 1981, the court's power to grant an injunction continued to be an unlimited type of equitable remedy that was to be exercised in accordance with the equitable principles from which injunctions were derived, but did allow new kinds of injunction to be formulated in response to the emergence of particular problems. Lords Reed, Briggs and Kitchin gave a single judgment (with which Lords Hodge and Lloyd-Jones agreed).

66. The Supreme Court dealt with the legal background to the grant of injunctions in different kinds of case at [14]-[56]. At [24]-[42], the Supreme Court dealt with injunctions against non-parties. At [26], the Supreme Court explained that, whilst the ordinary rule was that injunctions would not be granted against non-parties, that was not an absolute rule. What followed dealt with the established categories of injunctions against non-parties (into which it was held at [144] the "newcomer" injunctions in *Wolverhampton* itself did not fall). The Supreme Court dealt with representative proceedings, wardship proceedings, injunctions to protect human rights, reporting restrictions, embargoes on draft judgments, and the effect of such injunctions on non-parties. The Supreme Court dealt with injunctions granted to prevent the reporting of the real name of a child criminal (as in *Venables v. News Group Newspapers Ltd* [2001] Fam 430) under the heading of injunctions to protect human rights, as they protected the safety of that individual. They said this about reporting restrictions:

> Reporting restrictions are prohibitions on the publication of information about court proceedings, directed at the world at large. They are not injunctions in the

> same sense as the orders which are our primary concern, but they are relevant as further examples of orders granted by courts restraining conduct by the world at large. Such orders may be made under common law powers or may have a statutory basis. They generally prohibit the publication of information about the proceedings in which they are made (e.g. as to the identity of a witness). A person will commit a contempt of court if, knowing of the order, he frustrates its purpose by publishing the information in question: see, for example, [*In re F (A Minor) (Publication of Information)*] [1977] Fam 58 and [*The Leveller Magazine*]

67. Under the heading of "embargoes on draft judgments", the Supreme Court said that neither reporting restriction orders nor embargoes on draft judgments were equitable injunctions.

Abbasi SC

68. The issue in *Abbasi SC* concerned the court's jurisdiction to continue injunctions protecting clinicians from publicity after the death of the child they had been treating. The injunctions were originally granted in cases brought by NHS trusts seeking declarations that it was in the best interests of seriously ill children for life-sustaining treatment to be withdrawn. The parents sought the discharge of the injunctions. The President of the Family Division refused to do so, but the Court of Appeal acceded to the parents' applications on the grounds that article 10 outweighed article 8 in the circumstances of these cases.

69. Lords Reed and Briggs (with whom Lords Hodge and Stephens agreed, and with whom Lord Sales wrote a concurring judgment) referred at [3] to the practice of granting injunctions in end-of-life cases, prohibiting anyone from revealing the identities of clinicians, the hospital and others. They said that "[s]uch injunctions have been described as reporting restriction orders, but unlike reporting restriction orders as ordinarily understood, the effect of the injunctions was not solely or primarily (if at all) to restrict the reporting of information which has emerged in open court". Their effect went beyond what had been mentioned in open court. At [7], Lords Reed and Briggs explained that resolution of the issues had led the court into "the need to review from first principles the practice of the making and continuation of injunctions of this kind". It was, as I have said, in that context that they referred to the fundamental review of injunctions that had been undertaken in *Wolverhampton*.

70. At [38]-[52], Lords Reed and Briggs dealt with the context, nature and purposes of the orders sought. At [38]-[40], it was explained that the proceedings were not normal adversarial litigation, but were an exercise of the court's inherent jurisdiction as *parens patriae*: "that is, it is performing the Crown's residual function of protecting those who stand in need of protection" (referring to Viscount Haldane's judgment in *Scott v. Scott* at 437). At [48]-[51], Lords Reed and Briggs said that the orders were against the world at large, and were designed to restrain the publication of information about events occurring outside court, not (as in normal RROs) in public proceedings in which they were made: "it appears to us to be confusing and potentially misleading to describe these injunctions as reporting restriction orders".

71. At [53]-[124], Lords Reed and Briggs dealt with the law, jurisdiction and standing relating to the orders made in *Abbasi CA*. At [53], they said they needed to deal with the submission that such orders made after the proceedings had ended were

incompatible with the open justice principle. They dealt with the *parens patriae* jurisdiction at [56]–[66], the so-called *Broadmoor* jurisdiction (established in *Broadmoor Special Hospital Authority v. Robinson* [2000] QB 775 referring to the court's power to grant injunctions on the application of public bodies acting under statutory or common law powers) at [67]-[78], and the clinicians' causes of action in tort at [79]-[82].

72. The Supreme Court referred extensively at [58]-[61] to *In re C (A Minor) (Wardship: Medical Treatment) (No 2)* [1990] Fam 39, where the High Court had given directions in relation to the care of a terminally ill child and granted a *contra mundum* injunction restricting publicity. They concluded by saying that: "the court's power to prohibit the publication of information about the child's carers, as derived from its *parens patriae* jurisdiction or alternatively from its jurisdiction to ensure the effectiveness of its orders in respect of the child's treatment, is based on the need to prevent interferences with the ability of the carers to care for the child". In the context of the clinician's causes of action at [80], Lords Reed and Briggs referred to *Khuja*, though not so as to distinguish anything that was said in that case.

73. At [83], Lords Reed and Briggs explained the breadth of the equitable jurisdiction to grant injunctions as follows:

> As was explained in [*Wolverhampton* at [16]-[22] and [145]-[148]], the court possesses an inherent and unlimited equitable power to grant injunctions, subject to any statutory constraints. That power is confirmed and restated in section 37(1) of the Senior Courts Act. It is possible, in particular, for injunctions to be granted against non-parties, and to be granted *contra mundum*, as was explained in [*Wolverhampton* at [23]-[26]. However, although the equitable jurisdiction is theoretically unlimited, the court exercises the power to grant an injunction in accordance with recognised principles and with any restrictions established by judicial precedent and rules of court.

74. At [85]-[87], Lords Reed and Briggs said that section 6(1) of the Human Rights Act 1998 did not confer any power on the court which it did not otherwise possess. Rather, it applied within the ambit of the powers which the court otherwise did possess. It was prohibitory rather than enabling. The court's inherent equitable jurisdiction was in principle sufficiently wide to enable it to grant an injunction when its failure to do so would be incompatible with ECHR rights. Domestic causes of action were the means by which compliance with ECHR rights, including those protected by article 8, was normally secured. The function of the Convention was generally to set a boundary which domestic law could not go beyond without contravening international obligations. At [91], Lords Reed and Briggs referred again to *Khuja* in the context of Lord Sumption's treatment of ECHR rights at [23]. At [93]-[94], Lords Reed and Briggs explained the exceptional nature of the reasoning in *Re S*, concluding that it reflected the absence from English law at that time of any general cause of action for invasion of privacy, and that the law had moved on since *Re S*. At [98]-[99], Lords Reed and Briggs concluded that, whilst the equitable jurisdiction was in principle unlimited subject to any statutory restrictions, there might be circumstances where the court could exercise its broader equitable jurisdiction so as to ensure that the protection afforded to ECHR rights was practical and effective rather than theoretical and illusory.

75. The following sections of the judgment in *Abbasi SC* dealt with the jurisdiction to grant injunctions after the proceedings ended. At [115]-[124], Lords Reed and Briggs dealt with open justice. They repeated that the injunctions granted in those cases were not made for the purpose of restricting the reporting of proceedings in court. At [121]-[124], Lords Reed and Briggs made it clear that, even if the *Abbasi* case had been in public, the injunction would not necessarily have impinged unlawfully on the open justice principle (see *The Leveller Magazine*). Moreover, they rejected the submission that article 6 of the ECHR prevented the court lawfully derogating from the principle of open justice for the benefit of non-parties or witnesses. They relied on the proviso to article 6(1) to the effect that the media and public may be excluded from all or part of the trial "in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice". At [128]-[130], Lords Reed and Briggs explained the correct structured approach to balancing convention rights. They said this:

> The proper application of the Convention requires a more structured approach than the concept of "balancing" rights might suggest. In assessing whether there has been a breach of article 10 (or, mutatis mutandis, a breach of article 8), the court begins by asking whether there was an interference prescribed by the law. The next question is whether it pursued a legitimate aim, i.e. an aim which can be justified with reference to one or more of the matters mentioned in article 10(2) (or article 8(2), as the case may be). The remaining question is whether the interference was necessary in a democratic society. It is at that stage that the court may be required to strike a fair balance when protecting two values guaranteed by the Convention which may come into conflict with each other: [*Axel Springer AG v. Germany* (2012) 55EHRR 6 at [84]]. …

76. The Grand Chamber has also said on many occasions that where the national authorities have weighed up the competing rights in compliance with the criteria laid down in the court's case law, strong reasons are required if it is to substitute its view for that of the domestic courts: see [*Von Hannover v. Germany (No 2)*, at [107], *Axel Springer AG v. Germany* at [88], and *Couderc v. France* [2016] EMLR 19 at [92]]. The factors identified by the European court should be taken into account by our domestic courts, so far as relevant, when considering the balancing of competing rights under articles 8 and 10.

77. At [138], Lords Reed and Briggs mentioned the need for the court to estimate the risks attendant upon publicity. They alluded to the possibility that there may already have been some publicity, and the reaction to that publicity would be material. But the fact that the risk lay entirely in the future might mean that there would have to be reliance on generic evidence based on the adverse effects of publicity in earlier comparable cases. They summarised their principal conclusions at [182].

A summary of the applicable legal principles derived from the authorities

78. As I have said, I shall divide this section of my judgment into three: (i) the power to make an RRO, (ii) the meaning and effect of section 11, (iii) the application of *Dartford* to AOs made in personal injury actions brought by children and protected parties.

The power to make an RRO

79. It will already be clear, in my judgment, that the law in this area has moved on considerably in the first 25 years of this century. Lord Reed made clear at [40] in *A v. BBC* that the common law was capable of development, and that the application of the principle of open justice could change in response to changes in society and in the administration of justice. Lord Sumption in *Khuja* at [15] pointed to the changes brought about by developments in relation to national security and the ECHR. Lord Reed explained at [7] in *Abbasi SC* that the Supreme Court had conducted a fundamental review of the court's power to grant injunctive relief in *Wolverhampton*.

80. Against this background, we have to decide whether the judge was right at [52], [96], [106] and [117] to follow Lord Sumption's statement at [18] in *Khuja* that "the inherent power of the court at common law to sit in private or anonymise material deployed in open court has never extended to imposing reporting restrictions on what happens in open court". Lord Sumption had previously referred to the distinction drawn by Lord Diplock at 450 in *The Leveller Magazine* between proceedings being held in public and doing nothing to discourage fair and accurate reporting of such proceedings.

81. In my judgment, there are three reasons why the judge was wrong to prefer the *dictum* in *Khuja* to other authority.

82. First, *Khuja* was not a case like this. It was a case where material concerning Khuja had already been deployed in the open court trial before an application was made for the order (despite the limited general protection of postponement of publication under section 4(2)). What is sought here is, first, a WO allowing the claimant to be anonymised in these proceedings, and, secondly, an order preventing reporting of material that will mostly not be referred to in open court in the future, because of that WO. Even if the order sought prevents material that may be referred to in open court in the future being published, it is not in the same category of case as was being dealt with in *Khuja*. This case involves a classic situation in which the court is being asked to protect the integrity of its own process in the interests of justice.

83. Secondly, it is clear from *Scott v. Scott*, *A v. BBC*, *Wolverhampton* and *Abbasi SC* (acknowledging that *Abbasi* SC came after the judge's decision) and other authorities that there is an inherent power in the court derived from the common law to derogate from the principle of open justice in civil or family court proceedings by making, within court proceedings, both a WO and an RRO, where such an order is strictly necessary in the interests of justice.

84. In *Scott v. Scott*, the overriding principle was that cases had to be heard in public unless there was a strict necessity to depart from that rule. As Earl Loreburn put the matter at 446 in relation to excluding the public from proceedings where they would otherwise be rendered impracticable: "It would be impossible to enumerate or anticipate all possible contingencies".

85. In *A v. BBC*, Lord Reed made clear at [38] that it had long been recognised that the courts had the power to permit the identity of a party or a witness to be withheld from public disclosure where that is necessary in the interests of justice (a WO). The court could also take steps in current proceedings in order to ensure that the interests of justice would not be defeated in the future. At [40], Lord Reed acknowledged (by reference to

Earl Loreburn in *Scott v. Scott* at 446) that examples went beyond the categories envisaged in the older authorities. The application of the principle of open justice had to change to respond to changes in society and in the administration of justice. It was in the interests of justice to protect a party from the painful disclosure of personal information about her where there was no public interest in its being publicised. The court had to evaluate the purpose of the open justice principle, the potential value of the information in question in advancing that purpose and, conversely, any risk of harm which its disclosure may cause to the maintenance of an effective judicial process or to the legitimate interests of others.

86. In *Wolverhampton*, Lord Reed said expressly at [34] that RROs were examples of orders granted by courts restraining conduct by the world at large, made under common law powers (or under statutory powers). RROs, said Lord Reed, generally prohibit the publication of information about the proceedings in which they are made. These statements are clear as to the common law power to derogate from the open justice principle by granting an RRO.

87. In *Abbasi*, the Supreme Court confirmed at [58]-[61] that the High Court had jurisdiction to grant injunctions protecting the identities of clinicians so long as that was necessary to protect the interests under the court's *parens patriae* jurisdiction **and** under its inherent jurisdiction to protect the administration of justice. *Abbasi* confirmed *Wolverhampton*.

88. Thirdly, there are clear indications in the authorities that the common law power to derogate from the open justice principle in the course of proceedings can be deployed to protect the interests of vulnerable parties. I have already referred to Lord Reed's formulation at [41] of *A v. BBC*, where he said that it would be in the interests of justice to protect a party to proceedings from the painful disclosure of personal information about her where there was no public interest in its being publicised, and referred to the court needing to consider "any risk of harm which … disclosure may cause to the maintenance of an effective judicial process or to the legitimate interests of others". CPR Part 39.1(4) reflects that power by providing that the court "must order that the identity of any person shall not be disclosed if, and only if, it considers non-disclosure necessary to secure the proper administration of justice and in order to protect the interests of any person".

89. Moreover, it is now clear from the authorities I have cited that there is a clear distinction to be drawn between the common law power to derogate from the open justice principle in the context of court proceedings and the equitable power to grant an injunction restricting publication of material outside court proceedings against all the world (as in *Abbasi*). The balancing of article 8 and article 10 rights is now to be undertaken in accordance with the structured approach explained in *Abbasi SC* (see [75] above). Open justice remains a cardinal principle. The provisions of article 10 concerning freedom of expression remain crucial, but *Abbasi* requires a domestic law starting point.

90. In the latter context, it is worth making two further points.

91. First, in *Tickle v. BBC* [2025] EWCA Civ 42, [2025] 2 WLR 714, at [49], I approved what the judge had said in this case at [41] about open justice. Even though what he said needs to be adjusted insofar as it refers to *Re S* for the reasons I have given, I would endorse this formulation in relation to the assessment of a derogation from the common

law principle of open justice: The Court must start from the position that very substantial weight must be accorded to open justice. The balance starts with a very clear presumption in favour of open justice unless and until that is displaced and outweighed by a sufficiently countervailing justification.

92. Secondly, in *Re HMP* [2025] EWCA Civ 824, the Lady Chief Justice, King and Warby LJJ emphasised the purpose of the open justice principle. At [22] the Lady Chief Justice made clear that the open justice principle did not extend to "affording third parties access to such information for reasons unconnected with examining the work of the courts and tribunals and the judges who sit in them". This provided important up-to-date context to my analysis of the basis for granting AOs within court proceedings.

The meaning and effect of section 11

93. I repeat the terms of section 11 for ease of reference. The heading is important since it emphasises that section 11 is about "[p]ublication of matters **exempted** from disclosure in court" (emphasis added).

94. The pre-condition to section 11's application is: "[i]n 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". That pre-condition makes clear that the court must (i) have power to make a WO, **and** (ii) actually make a WO, in proceedings before the court.

95. Once the pre-condition is satisfied, section 11 says that: "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". This is quite a limited power because it only allows RROs to be made under it where it is "necessary for the purpose for which [the name or other matter] was … withheld". The WO and the RRO need, therefore, to go hand-in-hand. There needs, obviously, to be a common law power to make a WO in the first place (something pointed out by the judge at [48], who referred to *Khuja* at [16] in that regard).

96. The next question is whether section 11 requires the WO to have been made at the start of the proceedings. It will be recalled that Lord Judge CJ said *obiter* at [14] *Press Association* (see [41] above) that it was a "pre-condition to the making of the order on the basis of section 11 that the name of the defendant should have been withheld throughout the proceedings". I cannot see anything in section 11 that mandates that view. It is true that the court has first to have had the power to make and has to have actually made a WO, but I cannot see why that WO is required to be made at the beginning of the proceedings. If it were the case, it would be unclear what "throughout the proceedings" should be taken to mean. The issue as to whether pre-existing publicity might lead to an AO being denied is a separate one that I will deal with under the next two headings.

The application of Dartford to AOs made in personal injury actions brought by children and protected parties

97. As I said in adjourning this appeal on 25 February 2025 ([2025] EWCA Civ 176), first instance judges remained bound by the decision in *Dartford* until that decision was either departed from by the Court of Appeal or overruled by the Supreme Court. We

have now heard detailed argument about *Dartford.* As it seems to me, there are three issues: (i) whether the judge was right to criticise *Dartford* in the ways that he did, (ii) whether the guidance given in *Dartford* is applicable to applications for anonymity made by children and protected parties in personal injury claims, and (iii) the process to be followed where applications like this are made in the future.

Was the judge right to criticise Dartford?

98. It will already be apparent that I think that, in granting the AO in *Dartford*, Moore-Bick LJ correctly identified the essentially protective nature of approval hearings under CPR Part 21.10, similar to, if not an aspect of, the *parens patriae* jurisdiction exercised on behalf of the Crown. Insofar as the judge treated applications under CPR Part 21.10 to approve a child's settlement as identical to other applications for anonymity, he was, in my judgment, wrong. Quite different factors apply when the court is exercising a protective jurisdiction as the authorities I have mentioned make clear. That said, even the exercise of a protective jurisdiction of this kind does involve a derogation from the principle of open justice and requires to be treated as such.

99. The first thing that I would respectfully suggest should be changed about Moore-Bick LJ's guidance is the suggestion [at 35(i)] that the application for an AO at an approval hearing should be listed under the name of the child or protected party. It seems to me that it would be better to avoid publicity being given to the name before the application for an AO is determined. The application can and should be listed either as "an application under CPR Part 21.10" (or similar formulation) or by reference to a three-letter pseudonym suggested in the application. The latter course has the advantage of giving the case a nearly unique identity. By listing the case anonymously, the name and identifying details of the claimant would not be mentioned in open court unless the application was dismissed. I entirely accept that the application under CPR Part 21.10 itself should be heard in open court.

100. Secondly, I would be inclined to clarify the process suggested by Moore-Bick LJ. The judge suggested that Moore-Bick LJ was introducing an inappropriate presumptive priority for anonymity over open justice and reversing the burden of proof. I think he was doing no such thing. What he was doing, however, was seeking to introduce a simple and effective way of resolving the many applications for anonymity that are made in the context of approval applications under CPR Part 21.10. Moore-Bick LJ said at [34] that the court should normally make an AO in favour of the claimant without the need for any formal application, and that the press should file and serve on the claimant a statement setting out the nature of its case if it wanted to oppose such an order. Moore-Bick LJ was not saying that the applicant did not have to apply for an order, or that the order sought would be made automatically. He had already made it clear at [17] and [27] of his judgment that any derogation from the open justice principle had to be justified on grounds of strict necessity. What Moore-Bick LJ was trying to do, I think, was to streamline the process for cases where it was likely that the court would consider such a derogation strictly necessary.

101. Thirdly, the evidence that needs to be adduced in support of an application for an AO in an approval context depends, in my view, on the case. The essential circumstances of the case must, of course, be set out in the evidence. There are no presumptions about the outcome of the application and no special rules exempting the applicant from producing the best available evidence in support of the application. The circumstances

of the case may be sufficient to make it clear where the balance lies, and the minimum steps that are strictly necessary to protect the claimant in the interests of justice. I do not think, however, that the evidence needs to speculate as to future specific risks to the claimant. As Lords Reed and Briggs said at [138] in *Abbasi SC*, the fact that the risks to the party in question lay entirely in the future might mean that there would have to be reliance on generic evidence based on the adverse effects of publicity in earlier comparable cases (see [77] above). I do not think that Moore-Bick LJ was encouraging the determination of these applications on the basis of rival generalities as the judge suggested.

102. With the exception, therefore, of [35(i)] of *Dartford* (concerning the listing of the application – see [99] above), I endorse the guidance in that paragraph. I agree that, in a case where the parties are aware that the media or other non-parties have published information about the case or have shown a specific interest in doing so, those non-parties ought to be notified of the court's consideration of the application so they can be heard if they wish. Where the media are present at an approval hearing, they should be afforded an opportunity to be heard on anonymity questions (see [35(iv] in *Dartford*). I cannot, however, see why, in cases where no third party is known to have an existing interest in the case, the media needs to be notified in advance of an anonymity application being made. The media will become aware immediately after an AO is made because of the provisions of CPR Part 39.1(5) requiring a copy of the court's order to be published on the Judiciary's website (see [39] above). The media can then apply speedily, if they wish, to set aside the AO.

Is the guidance in Dartford applicable to applications for anonymity made by children and protected parties in personal injury claims?

103. It needs to be clearly understood, as I have said, that an application for an AO in a personal injury claim by a child or protected party is made under the inherent common law jurisdiction of the court to protect the integrity of its proceedings in the interests of justice. It is not made under either the *parens patriae* protective jurisdiction or under an essentially protective Court process. Nor will it normally be necessary to invoke the equitable jurisdiction of the court or section 37 of the Senior Courts Act 1981. It will be possible, in cases to which section 11 applies, to rely also on that section. Despite what I have said about jurisdiction, children and protected party claimants are generally vulnerable and are persons whom the court should look to protect.

104. The judge was particularly concerned about either a WO or an RRO being made after the name of the claimant was in the public domain (see [55]-[59] of his judgment, relying on *Khuja* at [34(1)]). I do not think that the fact that there has been previous publicity is an automatic bar to the making of either a WO or an RRO in these types of case. It is, of course, an important factor for the court to take into account. The circumstances of previous publicity will vary greatly. It is impossible and undesirable to lay down a general rule. Lord Mance explained at [1]-[3] in *PJS v. News Group Newspapers Ltd* [2016] UKSC 26, [2016] AC 1081 (*PJS*), albeit in a different context, that injunctions restraining publicity could be made, even in the face of significant existing press and social media attention. *Khuja* was a very different kind of case.

105. In this case, the fallback order that is now sought (as explained at [21] and [23] above) is forward-looking and does not seek to require media organisations to remove material that has already been published about this case. In my view, it is right to say that, in this

type of case, anonymising the name of a claimant and restricting publication of their name and identifying material is generally likely to be a more desirable derogation from the open justice principle than holding the proceedings in private. Again, though, it is undesirable to generalise too much. All these cases and any strictly necessary derogation from the open justice principle that may be appropriate in them will be entirely dependent on their particular facts. It is worth mentioning, however, that those making applications for an AO would be well advised to do so as early as reasonably practicable in the litigation process.

106. Subject, therefore, to a clear understanding of the different jurisdictional foundation for the application in this case, and subject to the caveats to *Dartford* that I have suggested at [97]-[100], I do think that the guidance in that case is broadly applicable in cases where an application for a WO is made (with or without an RRO) in a personal injury claim by a child or protected party under the inherent common law jurisdiction of the court to protect the integrity of its proceedings in the interests of justice.

What process should be followed where applications like this are made in the future?

107. I have sought to explain above how the jurisdictional foundation to AOs operates in relation to both approval applications and to personal injury claims brought by children and protected parties. Whilst I have made clear that the judge went wrong in rejecting the common law power to grant an RRO and in doubting the Court of Appeal's decision in *Dartford*, the judge was right to emphasise the critical importance of the common law principle of open justice and its applicability in both the situations under discussion in this case. He was also right to make clear that the principle of open justice, even in these situations, should only be departed from where it is strictly necessary to do so in the interests of justice.

108. The starting point for the process that should be followed, accepting the guidance from *Dartford*, is to be found, I think in [38]-[41] of Lord Reed's judgment in *A v. BBC* (see [46] above). In those passages, Lord Reed made the following important points about the process:

i) First, the interests of justice are not confined to the court's reaching a just decision on the issue in dispute between the parties.

ii) Secondly, the administration of justice is a continuing process.

iii) Thirdly, the court can, therefore, take steps in current proceedings in order to ensure that the interests of justice will not be defeated in the future.

iv) Fourthly, anonymity may be necessary in view of the risks posed in the circumstances of the case. Those identified in the case law to date include: (i) risks to the safety of a party or a witness, (ii) risks to the health of a vulnerable person, and (iii) risks of a person suffering commercial ruin. AOs may also be made to protect a party to proceedings from the painful and humiliating disclosure of personal information about them where there was no public interest in its being publicised. Not all categories can be envisaged in advance.

v) Fifthly, the application of the principle of open justice may change in response to changes in society and in the administration of justice.

vi) Sixthly, the court has to carry out a fact-specific balancing exercise. Central to the court's evaluation will be the purpose of the open justice principle, the potential value of the information in question in advancing that purpose and, conversely, any risk of harm which its disclosure may cause to the maintenance of an effective judicial process or to the legitimate interests of others.

The application of the principles to the claimant's application for an AO in this case

109. Applying the principles that I have explained, I have reached the clear conclusion that an AO drafted in prospective terms (though not exactly in the form suggested as the claimant's fallback alternative order, and not as originally sought from the judge) is strictly necessary in this case in the interests of justice. It will be noted that a 10-day quantum trial is fixed to take place imminently in December 2025. The claim may settle before the trial. If that happens, an approval hearing under CPR Part 21.10 will be required. If it goes to trial, private details about the claimant and his family will inevitably be mentioned in open court. Either way, documents will be filed at court containing private information which will, without protection, be open to public inspection. The prospective AO will not prevent the media reporting on the matters of public interest arising in the litigation, such as the events that led to the claimant's injuries and the conduct of the hospital in dealing with them. Nor will the order prevent reporting of the amount of any damages agreed or awarded. Instead, it will prevent the claimant and his family from being further identified in the media as the claimant in the case.

110. As I have said, the fact that there has been previous publicity does not disqualify an application of this kind, any more than it would disqualify an AO being made at an approval hearing under CPR Part 21.10. Previous media coverage may, however, be a pointer against making an AO or towards making only a forward-looking RRO. The original order sought from the judge is neither necessary nor appropriate in the light of the existing media coverage in which the claimant's representatives participated. The main features making it strictly necessary here to make a prospective WO and an RRO, in the interests of justice, are (i) the extreme vulnerability of the claimant, and (ii) the serious infringement upon the claimant's private and family life in relation to medical details, family circumstances and financial matters that this litigation will involve, if the details were reported in the media alongside the claimant's name. This is a very serious case. It is one where an AO is, as I have said, clearly and strictly necessary. All the factors I have mentioned are present here in high degree and in combination. It should not be assumed that a derogation from the open justice principle will be held to be strictly necessary in a case where the evidence did not cover all these factors and was less compelling. Again, as I have said, each case will need to be considered on its own facts.

111. I have had regard to the confidential material in the papers that we have been shown to satisfy myself of the details of the features I have mentioned in the last paragraph. I do not think it is necessary or helpful either to elaborate on the details in this open judgment or to deliver an additional private judgment, since no party has contested the grant of an AO on the facts.

112. A prospective AO will not totally prevent the possibility of jigsaw identification, since there are already several media articles in the public domain, but, in my judgment (as

in cases like *PJS*), that is not a reason to refuse the claimant a modicum of protection at this crucial stage of his personal injury claim.

113. I would invite submissions from counsel as to the precise form of order that is appropriate in the light of the guidance provided in this judgment. I would caution, though, that the fallback order sought (see [23] above) is, in my view, drafted in unnecessarily broad terms. Without attempting any drafting, an appropriate prospective AO: (i) should, in the WO part, identify precisely the material that has, after the date of the order, to be withheld from the public: for example, the name and address of the claimant, his litigation friend, and other specified immediate family members, and other material obtained from the proceedings that would be likely to lead to the identification of those persons as connected to the proceedings, (ii) should, in the RRO part, prohibit reports, after the date of the order, of or concerning the proceedings which include any information which is the subject of the WO. The AO to be made in this case must contain a proviso that makes clear that existing media coverage of the proceedings are not covered by the order. It is undesirable to put provisions that are critical to the effectiveness of an AO in the recitals.

114. Finally, I do not understand that there is any continuing attempt to anonymise the name of the defendant hospital board. I would, therefore, amend the title of this judgment to show its full name.

Conclusions

115. For the reasons I have given I would allow the appeal.

116. We did not hear detailed argument on the precise terms of PF10 (which, of course, applies only to approval applications), but there are elements of that form that seem inappropriate in the light of this judgment. I would invite the Civil Procedure Rule Committee to consider how it should now be revised.

Lord Justice Warby:

117. I agree.

Lady Justice Whipple:

118. I also agree.