**[2022 Gib LR 355]**

# AB v. LINE TRUST CORPORATION LIMITED, WHITE, FINSBURY TRUST LIMITED, LEVY and BB

# BB v. LINE TRUST CORPORATION LIMITED, WHITE, LEVY and AB

SUPREME COURT (Dudley, C.J.): August 30th, 2019
[anonymized and made public on January 14th, 2022]

*Civil Procedure—parties—anonymity—court refused to impose privacy or anonymization regime in proceedings between high profile businessmen involving family trusts—possible adverse impact of proceedings, including publicity, on one party's minor children did not render anonymization necessary*

Proceedings were commenced in respect of certain trusts.

BB and AB were successful businessmen and close relations. A dispute had arisen between them which also involved the trustees and the protector of multiple family trusts. A Part 7 claim was issued in 2016 and a Part 8 claim was issued in 2018.

The question before the court was whether both proceedings should be anonymized such that AB, BB, the trusts and the underlying assets and businesses were not capable of identification.

BB contended *inter alia* that the dispute concerned private family trusts the potential beneficiaries of which included his minor children, X and Y, who both suffered from a mental disorder and whose interests required protection. BB's evidence was that X and Y were not aware of the actual wealth from which they stood to benefit or that they were beneficiaries of the trusts. BB was concerned as to the detrimental impact on X and Y of knowledge of the wealth and of publicity surrounding the litigation.

The trustees' position in relation to privacy had been essentially the same as that adopted by BB. Their submissions were primarily based on s.8(10)(a) of the Constitution. Their concerns were twofold: a potential detrimental effect on the business which was the principal asset held under the trusts and the likely impact on minor beneficiaries. The welfare and private lives of X and Y should be respected and safeguarded. The protector supported the anonymization regime sought by BB but did not file any evidence.

AB opposed the imposition of a privacy regime.

**Held,** ruling as follows:

In both actions, the principles of open justice and identification of BB and AB were inextricably linked because they were both high profile businessmen heading a very substantial commercial enterprise. Their identity and the fact that they were the principals of a significant commercial enterprise made the reporting of the litigation in which they were involved significant, not least to business partners, lenders and competitors. Anonymization of the main protagonists and the underlying business interests would render any such reporting hollow. It was likely that the litigation would be covered by specialist press but unlikely that it would be of much interest to mainstream media. Against the principle of open justice must be balanced X and Y's right to privacy. Specifically their mental wellbeing which was the aspect of their private life which could be adversely affected by publicity. Although ultimately the litigation arose because of disputes between BB and AB, who were closely related, it was a commercial dispute. Any media coverage of the litigation would not be about X and Y or intimate personal family affairs. The court did not minimize the importance of mental health, particularly in adolescents, or the serious impact that a mental disorder could have. However the evidence before the court, even when taken at its highest, was that X and Y suffered from a low level condition. Exposure to litigation, especially if there was an element of publicity, was always liable to cause distress and thereby affect the wellbeing of individuals involved in or related to the litigation. However the possible impact that the present litigation could have on X and Y was, particularly in the context of a family with potential access to huge wealth, part and parcel of the stresses of the life they had been born into. The impact it might have on them did not come near to it being necessary to order the anonymization of the parties. Moreover, if the court were wrong in this analysis and X and Y did fall within the concept of persons concerned in the proceedings, the adverse impact which publicity of the litigation might have upon them was also insufficient to make it expedient to order anonymization. To rule otherwise would set the bar so low that a privacy regime could be obtained whenever publicity could negatively affect the mental wellbeing of individuals very tangentially affected by litigation. The court would therefore not impose a privacy or anonymization regime in either action (paras. 53–57).

**Cases cited:**

(1) *Bank Mellat* v. *H.M. Treasury*, [2013] UKSC 38; [2014] A.C. 700; [2013] 4 All E.R. 495; [2013] Lloyd's Rep. F.C. 557, considered.

(2) *Bensaid* v. *United Kingdom*, 2001 ECHR 82; (2001), 33 EHRR 10; 11 BHRC 297; [2001] INLR 325; [2001] MHLR 287, referred to.

(3) *Campbell* v. *MGN Ltd*., [2004] UKHL 22; [2004] 2 A.C. 457; [2004] 2 W.L.R. 1232; [2004] 2 All E.R. 995; [2004] EMLR 15; [2004] HRLR 24; [2004] UKHRR 648, considered.

(4) *Clibbery* v. *Allan*, [2002] EWCA Civ 45; [2002] Fam. 261; [2002] 2 W.L.R. 1511; [2002] 1 All E.R. 865; [2002] 1 F.C.R. 385; [2002] 1 FLR 565; [2002] UKHRR 697, considered.
(5) *Delphi Trust Ltd.*, *Re*, 2014 MLR 51; (2014), 16 ITELR 885, considered.
(6) *H* v. *News Group Newspapers Ltd.*, [2011] EWCA Civ 42; [2011] 1 W.L.R. 1645; [2011] 2 All E.R. 324; [2011] 2 F.C.R. 95; [2011] C.P. Rep. 17; [2011] EMLR 15, considered.
(7) *Julius Baer Trust Co. (Channel Islands) Ltd.* v. *AB*, 2018 (2) CILR 1, considered.
(8) *Public Trustee* v. *Cooper*, [2001] W.T.L.R. 901, referred to.
(9) *Scott* v. *Scott*, [1913] A.C. 417; [1912] P. 241; (1912), 29 TLR 520; [1911–13] All E.R. 1, considered.
(10) *X* v. *Dartford & Gravesham NHS Trust*, [2015] EWCA Civ 96; [2015] 1 W.L.R. 3647; [2015] C.P. Rep. 22; [2015] EMLR 14; [2015] Med. L.R. 103; (2015), 143 BMLR 166, considered.

**Legislation construed:**
Children Act 2009, s.148(2): The relevant terms of this subsection are set out at para. 45.

English Law (Application) Act 1962, s.2(1): The relevant terms of this subsection are set out at para. 30.

Gibraltar Constitution Order 2006 (Unnumbered S.I. 2006, p.11503), s.7: The relevant terms of this section are set out at para. 37.
s.8: The relevant terms of this section are set out at para. 37.

European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, November 4th, 1950; Treaty Series 71 (1953)) (Cmd. 8969), art. 6: The relevant terms of this article are set out at para. 38.

*A. Steinfeld*, *Q.C.* with *E. Phillips* and with *C. Gomez* for AB;
*K. Azopardi*, *Q.C.* with *K. Power* and with *J. Wahnon* for BB;
*A. Holden* with *M. Levy* for Line Trust Corp. Ltd. and White;
*Sir Peter Caruana*, *KCMG*, *Q.C.* for Levy;
*K. Navas* for Finsbury Trust Ltd.

1 **DUDLEY, C.J.:** [BB] and [AB] are by any measure exceptionally successful businessmen [*redacted*]. That wealth has not prevented a dispute arising between them which has spilt over and also become a dispute with Line Trust Corp. Ltd. ("LTC") and Christopher White who are the trustees ("the trustees") of multiple [B] family trusts ("the trusts") and James Levy who is the protector of those trusts ("the protector"). Finsbury Trust Ltd. was, together with the trustees, a trustee of the [Z] Trust, which is but one of the many trusts caught up in the dispute, but pursuant to a *Tomlin* order the claim against it has been stayed.

2 At this juncture, the issue before me is whether both proceedings should be anonymized such that AB, BB, the trusts and the underlying assets and businesses are not capable of identification.

**2016/Ord/100**

3 At present 2016/Ord/100 is the primary action encapsulating the dispute. It is a Part 7 claim issued as far back as December 23rd, 2016, although other than for an interlocutory application in relation to the admissibility of certain without prejudice material which BB sought to rely upon for the purposes of a strike out application, it has not materially progressed. Indeed the strike out application was compromised and by virtue of an order entered by consent on May 23rd, 2019 it was dismissed and AB was given permission to file and serve amended particulars of claim ("APoC").

4 For present purposes I only set out a thumbnail summary of the case advanced in the APoC.

5 Essentially it is asserted by AB that the trusts involved are some 18 discretionary trusts in respect of which it was intended that he and BB would be the principal beneficiaries (but with their children and remoter issue also being members of the discretionary class of beneficiaries) and that AB's and BB's beneficial entitlements in the assets held under these trusts would as between them be equal. It is also averred that the principal asset held under the trusts is ["the business"].

6 It is further said that in November 2011 discussions took place between AB, BB, the trustees, the protector and the tax advisors to the trustees as to a possible restructuring. The objective of this was the division of the assets held by the trusts on an equal basis, to be held by two separate trusts for the benefit of the respective families and their future generations. Although it is said that the agreement reached did not constitute a legally binding agreement, in the APoC it is referred to as "the division agreement." It is said that there was then a further agreement which is referred to as "the Elliot agreement" as to how the trusts and [the business] would operate following implementation of the division agreement and which included the use of an aeroplane held by one of the trusts; the role and remuneration of BB and AB in [the business] and how future investment opportunities would be handled.

7 It is AB's case that notwithstanding the agreement reached [*redacted*] [certain actions by the trustees amounted to] wilful breach of trust. It is further averred by AB that the trustees and the protector have acted in breach of trust in a manner which calls for their removal. In particular it is said that the trustees and the protector have placed themselves in a position of conflict of interests because the five executive directors of LTC are, together with Mr. White, all partners or consultants of Hassans and by

retaining Hassans to provide legal services to the trusts, the trustees have placed themselves in a position where their duties to the beneficiaries conflict with their interests to maximize the income of Hassans.

8 As regards the trustees it is also averred that they have:

(i) failed to keep a proper record of their dealings with the trust fund and have mismanaged the trusts, essentially it is said that various transactions have been documented after the event and other transactions undertaken without the benefit of proper tax advice;

(ii) from time to time been unable to properly identify the beneficiaries of the trusts, whereby they could not have properly exercised their duty to consider whether or not to make distributions;

(iii) breached their duty of confidentiality by discussing the affairs of the trusts and seeking the views as to distributions from a senior administrator of [the business];

(iv) failed to disclose information regarding the trusts to AB; and

(v) improperly preferred the interests of BB, [*redacted*].

As regards the division agreement it is said by AB that the trustees have improperly failed and refused to exercise their powers so as to give effect to it. The claim against the protector is that notwithstanding his awareness of the trustees' conduct he has failed to consider removing and replacing the trustees and consequently has failed to do so. Premised upon the foregoing AB *inter alia* seeks the removal and replacement of the trustees and protector; an order directing the trustees or their replacement to give effect to the division agreement and damages or equitable compensation.

9 A narrow case is advanced against BB by which it is said that in breach of the Elliot agreement, and with the acquiescence and/or connivance of the trustees, BB has excluded AB from the management of [the business], albeit the relief sought is a direction that the trustees or any replacement trustees exercise their powers as ultimate shareholders of [the business] to remove BB from his management role within the business.

**2018/Ord/048**

10 2018/Ord/048 is a CPR Part 8 Claim which was issued on August 3rd, 2018 in which BB seeks relief in relation to five trusts, namely [*redacted*] which are collectively described in the claim form as "the BB family Trusts." BB essentially seeks declaratory relief to the effect that (notwithstanding that AB is a named beneficiary or is within the class of discretionary beneficiaries) the trustees hold and should continue to hold the trust assets for the exclusive benefit of BB and his children and remoter issue.

11 Adopting the language of Robert Walker, J. in an unreported judgment later quoted in *Public Trustee* v. *Cooper* (8) ([2001] WTLR at 922H), it is evident that both these actions are "hostile litigation."

**Procedural background leading to the privacy/anonymity hearing**

12 On March 9th, 2017 BB filed an application in 2016/Ord/100 seeking an order for the strike out/summary judgment in respect of certain claims being advanced in the original particulars of claim. However, the application was also for:

> "(1) An Order pursuant to CPR Part 39.2(3) that [the] application and the proceedings generally be held in private as the matter concerns personal financial/private family trust matters of a confidential nature and publicity would damage that confidentiality and the private hearing is necessary to protect the interests of minors;
>
> (2) Orders pursuant to CPR Part 5.4C that the court restrict access to statements of case, judgments or orders filed or granted in this action except on such terms specified in the attached draft Order."

BB also sought orders for the anonymization in any judgment handed in public, of his identity and that of AB, the settlor, beneficiaries or the companies forming part of the trust funds. By an order dated July 11th, 2017 the hearing of the application in 2016/Ord/100 was adjourned, to be relisted on application not before the end of July 2017. However, without the benefit of argument and with the order reflecting that it was made without prejudice to the respective parties' position I ordered that:

> "Until further Order, no third party shall have access to or be allowed to copy the Claim Form and Particulars of Claim in this action without permission of this Court and without the parties being put on notice of such application."

13 On August 3rd, 2018 AB issued 2018/Ord/048 and simultaneously filed an application for a parallel privacy regime. A preliminary procedural hearing in relation to the filing of evidence was fixed for August 31st, 2018 and as I understand it, as a result of discussions between AB and BB the latter agreed to withdraw his privacy application on the basis that each would bear their respective costs of and occasioned by that application. However, on that day I went on to hear an application in that action by AB, in which he sought an order permitting him to defer the filing of his evidence pending a further claim which it was anticipated the trustees would be bringing in relation to the future administration of the trusts. Having reserved judgment, on September 24th, 2018 I dismissed the application but adjourned the issue of costs and asked the parties to consider whether in view of the limited existing privacy regime in 2016/Ord/100 my

ruling in 2018/Ord/048 should be handed down in private, redacted or anonymized.

14 The matter then came before me on February 11th, 2019 when on behalf of BB it was said that an anonymization regime should be put in place in respect of both proceedings. Of my own motion I ordered a hearing in both actions to determine:

> "i. whether or not it is in the interests of justice for these proceedings to be heard in private; and /or
>
> ii. whether the identity of any of the parties, the trusts and the companies underlying the trusts should not be disclosed; and/or
>
> iii. whether access to the Court file by non parties should be restricted by derogation of the principle of open justice and to CPR r. 5.4C."

Subject to the imposition of certain time limits, I also allowed parties to file and serve evidence they wished to rely upon.

15 Witness statements were filed on behalf of the trustees, BB and AB. As regards BB although seeking to rely upon a witness statement dated April 27th, 2019, by application notice dated May 13th, 2019 he sought orders for AB to only receive a redacted version of that witness statement or in the alternative for an order that AB's counsel be provided with an unredacted copy, without it being disclosed to AB. In short the basis for that application was that disclosure of certain information touching upon BB's two minor sons could be detrimental to their wellbeing. At the hearing, pending my determination on the issue of privacy/anonymity I ordered that the hearing would take place in private, but I dismissed the application by BB and directed that if BB wanted to rely upon his witness statement it had to be made available in unredacted form to AB. An unredacted copy was then made available.

16 Although as aforesaid witness statements have been specifically filed for the purposes of determining the privacy/anonymity issue there is merit in setting out the position adopted by the parties over time.

**BB's evolving position**

17 Since the inception of the first claim BB has wanted the proceedings to proceed in private. In his first witness statement dated March 7th, 2017 filed in 2016/Ord/100 he identified his concerns as being twofold. That the dispute concerned private family trusts whose potential beneficiaries include minors whose interests required protection, and that the underlying assets of the trusts concerned [the business]. As regards the latter as he put it: "It is vital that the proceedings remain confidential as any publicity of them would damage the public profile of [the business]." BB's evidence in

relation to the then extant privacy application was then developed in his second witness statement of May 12th, 2017, which can be briefly summarized as follows:

(i) surprise by BB at AB opposing the application given AB's general attitude in relation to his private affairs and those of the trusts;

(ii) compliance with a promise to [*redacted*] that they would do all they could to prevent their dispute coming into the public domain, and that publicity of the dispute would cause [*redacted*] and elderly family members extreme distress;

(iii) the dynastic nature of the trusts which are also intended to benefit the extended [B] family and that family members resident in [*redacted*] were at least at that stage not aware of the dispute;

(iv) that BB's minor children (at the time aged [*redacted*]) whilst possibly aware of the disagreement between him and AB were not aware of the detail of it, knowledge of which could impact upon the their relationship with [*redacted*] AB; and

(v) that public knowledge of the dispute could potentially have a significant impact on the public profile of [the business] and negatively impact upon the confidence of actual and potential joint venture partners and market confidence. That this could ultimately destabilize the group and cause significant loss of value in the event of a sale of business assets.

18 In BB's second witness statement dated September 7th, 2018 filed in 2018/Ord/048 he adopted a similar position in relation to privacy, reiterating the need to "protect the public profile and reputation of [the business]" and that of another business group held through one of the trusts. In relation to his minor children, at para. 17 of that witness statement the position was stated as follows:

> "My sons are both minors and a Privacy and Confidentiality Order would go hand in hand with the objective of representing their interests in these proceedings, ultimately in order to safeguard their interests."

It is not immediately apparent whether that is a reference to their emotional well-being or their financial interests as part of the class of potential beneficiaries.

19 The evidence now relied upon in relation to BB's proposition that there should be anonymization of the names of the beneficiary parties, beneficiaries, trusts and companies underlying the trusts in the interests of the minors is to be found in BB's witness statement of April 27th, 2019 in which at para. 7 there is an implicit acceptance of the change of position, which is said to have arisen in part, as a result of his having reflected upon the medical condition affecting both his sons.

20 According to BB his two minor children "X" who is [*redacted*] years old and "Y" who is [*redacted*] years old, are beneficiaries of some of the trusts which are the subject matter of the litigation. It is BB's evidence that although the children are aware that he is a successful businessman they are not aware of the actual wealth they stand to benefit from or even that they are beneficiaries of the trusts. BB expresses his concern as to the detrimental impact that knowledge of the wealth that they stand to benefit from could have upon their motivation and drive to succeed academically and in pursuing future careers. As had previously been said in an earlier witness statement, BB is also concerned by the potential negative impact that knowledge of the dispute between BB and AB could have upon X and Y, their relationship with [*redacted*] AB and his side of the family, with those concerns being exacerbated by reason of the medical condition they suffer from.

21–25 [*Originally redacted*.]

**The trustees' position**

26 Throughout the proceedings the trustees' position in relation to privacy has essentially been the same as that adopted by BB. Moshe Anahory is a director of LTC, and in a witness statement by him dated May 19th, 2017 (in the context of the privacy application made by BB at the time) he identified the trustees' concerns for the hearing to be held in public as twofold, a potential detrimental effect on [the business], and consequently the value of its shares and the likely impact on minor, and young beneficiaries. As regards the former he stated:

> "[AB and BB] are well known in [*redacted*]. As part of the Group's normal course of business, refinancing is often required through banks or other lenders. I am concerned that if news of a court dispute between the two [*redacted*] enters the public domain, there will be negative market speculation about the stability of [the business]. That may well lead to difficulties in obtaining funds for any required refinancing."

Mr. Anahory then went on to identify his concerns in relation to the impact that an absence of a privacy order could have on the minor and young beneficiaries, namely, that knowledge that they are discretionary beneficiaries of the settlements or what the settlements are worth could potentially be harmful to their development and he also identified potential family rifts that could arise. As an added weight Mr. Anahory also suggested that publicity of the dispute between the [*redacted*] [AB and BB] would upset [*redacted*] [an elderly close relative].

27 By the time that the privacy issue came up for determination, the trustees' focus also narrowed and the stated concern is that the welfare and private lives of X and Y should be respected and safeguarded, with reliance

placed upon the medical evidence placed before the court by BB and what is said to be irreparable damage that familial discord would cause them.

28 The protector supports the anonymization regime sought by BB but has not filed any evidence.

**AB's position**

29 AB has consistently opposed the imposition of a privacy regime. In his June 23rd, 2017 witness statement AB pointed out that his claim was not merely against BB but also against the trustees and protector, and that in view of their prominent position in Gibraltar and the rigorous regulatory framework in which they operate, there was a public interest in the proceedings being held in public. At this stage the answer to that is that the anonymization being sought does not extend to them. AB also asserts that BB and the trustees have already publicized the existence and substance of the proceedings to family, friends and third parties, including business partners, none of whom could be bound by court orders. Moreover, at para. 5.4 he expresses a principled objection in reply to BB's assertion as to the negative impact that publicity could have upon [the business], on the following terms:

> "Taking their argument to its logical conclusion, it would appear that they believe that any proceedings involving a dispute between directors or senior managers at a prominent company should be held in private, so as to protect the position of that company. This appears to me to be a clearly untenable position to take."

In his May 10th, 2019 witness statement AB, having only been provided with a redacted copy of BB's witness statement setting out what is said to be X and Y's medical condition, was evidently unable to deal with the substance of the assertions and opinions found in the letters exhibited thereto. AB's position is that he had not previously been aware that his [*redacted*] [X and Y] suffered from any medical condition, however in relation to their knowledge of the actual wealth that they stand to benefit from, he identifies public sources estimating his and BB's wealth and further asserts that the children lead a lavish lifestyle, including use of private jet; use of a private super yacht and that they have their own properties in [*redacted*]. He goes on to say that it is therefore inconceivable that X and Y and their peers are unaware of BB's wealth or that X and Y are unaware that they are likely to benefit from it. In relation to BB's concern about the impact that knowledge of the differences between BB and AB could have upon X and Y, it is AB's evidence that the dispute has been openly discussed amongst immediate family and friends and that it is clear to them, including X and Y that the relationship between BB and AB is fractious and that both sides of the family have not socialized for several years at social functions or during [*redacted*] holidays or celebrations.

**The law**

30 Section 2(1) of the English Law (Application) Act provides:

> "2.(1) The common law and the rules of equity from time to time in force in England shall be in force in Gibraltar, so far as they may be applicable to the circumstances of Gibraltar and subject to such modifications thereto as such circumstances may require, save to the extent to which the common law or any rule of equity may from time to time be modified or excluded by—
>
> (a) any Order of Her Majesty in Council which applies to Gibraltar; or
>
> (b) any Act of the Parliament at Westminster which applies to Gibraltar, whether by express provision or by necessary implication; or
>
> (c) any Act."

To the limitations found in that subsection must also be added the fundamental rights and freedoms protected by the Constitution of Gibraltar ("the Constitution") established by the Gibraltar Constitution Order 2006.

31 Whereas in the United Kingdom the Human Rights Act incorporates the rights contained in the Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") into United Kingdom law, this is done to the extent that all United Kingdom law is to be interpreted, as far as may be possible, in a way that is compliant with that Act. The English courts are able to declare legislation incompatible, but any such declaration does not affect its validity or operation. The constitutional position in Gibraltar is somewhat different, in that we operate under the principle of constitutional supremacy, with the provisions of the Constitution being superior to any other law applicable in Gibraltar, including the common law.

**The common law and open justice and its interplay with the ECHR**

32 The principle of open justice has a long common law lineage. In the English Court of Appeal in *Clibbery* v. *Allan* (4) Dame Butler-Sloss said ([2002] Fam. 261, at para. 16):

> "The starting point must be the importance of the principle of open justice. This has been a thread to be discerned throughout the common law systems: 'Publicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity. It keeps the judge himself, while trying, under trial': see Benthamania, or Select Extracts from the Works of Jeremy Bentham (1843), p115. Consequently . . . the exclusion of the public from proceedings has objectively to be justified."

The reference to Bentham harks back to the decision of the House of Lords in whom Lord Shaw of Dunfermline also quoted *Scott* v. *Scott* (9) ([1913] A.C. at 477). *Scott* establishes the principle of open justice as a cornerstone of English common law with the reasoning for the principle succinctly summarized by Lord Atkinson (*ibid.*, at 463):

> "The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses, and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trial is to be found, on the whole, the best security for the pure, impartial and efficient administration of justice, the best means for winning for it public confidence and respect."

However, the principle of open justice is not absolute, there are of course statutory derogations, but also common law derogations, as Viscount Haldane, L.C. said (*ibid.*, at 437):

> "While the broad principle is that the Courts of this country must, as between parties, administer justice in public, this principle is subject to apparent exceptions . . . But 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. In the two cases of wards of Court and of lunatics the Court is really sitting primarily to guard the interests of the ward or the lunatic. Its jurisdiction is in this respect parental and administrative, and the disposal of controverted questions is an incident only in the jurisdiction. It may often be necessary, in order to attain its primary object, that the Court should exclude the public. The broad principle which ordinarily governs it therefore yields to the paramount duty, which is the care of the ward or the lunatic. The other case referred to, that of litigation as to a secret process, where the effect of publicity would be to destroy the subject-matter, illustrates a class which stands on a different footing. There it may well be that justice could not be done at all if it had to be done in public. As the paramount object must always be to do justice, the general rule as to publicity, after all only the means to an end, must accordingly yield. But the burden lies on those seeking to displace its application in the particular case to make out that the ordinary rule must as of necessity be superseded by this paramount consideration. The question is by no means one which, consistently with the spirit of our jurisprudence, can be dealt with by the judge as resting in his mere discretion as to what is expedient. The latter must treat it as one of principle, and as turning, not on convenience, but on necessity."

It is clear from the foregoing that in derogating from the principle of open justice, the English common law establishes a test of necessity rather than expediency.

33 More recently in *Bank Mellat* v. *H.M. Treasury* (1), Lord Neuberger, P.S.C. ([2014] A.C. 700, at para. 2) reiterated the fundamental importance of the principle of open justice and the approach to be taken when derogating from it, and said:

> "it has long been accepted that, in rare cases, a court has inherent power to receive evidence and argument in a hearing from which the public and the press are excluded, and that it can even give a judgment which is only available to the parties. Such a course may only be taken (i) if it is strictly necessary to have a private hearing in order to achieve justice between the parties, and, (ii) if the degree of privacy is kept to an absolute minimum . . . Examples of such cases include litigation where children are involved, where threatened breaches of privacy are being alleged, and where commercially valuable secret information is in issue."

34 In *X* v. *Dartford & Gravesham NHS Trust* (10) the English Court of Appeal considered the principles to be applied when considering an anonymity application in the context of an application for approval under CPR r.21.10 of a settlement of a claim for damages for personal injury where the claimant was a child. Of some relevance given the scope of the relief sought by BB, is the passage to be found in the judgment of the court handed down by Moore-Bick, L.J. ([2015] 1 W.L.R. 3647, at para. 17):

> "The identities of the parties are an integral part of civil proceedings and the principle of open justice requires that they be available to anyone who may wish to attend the proceedings or who wishes to provide or receive a report of them. Inevitably, therefore, any order which prevents or restricts publication of a party's name or other information which may enable him to be identified involves a derogation from the principle of open justice and the right to freedom of expression. Whenever the court is asked to make an order of that kind, therefore, it is necessary to consider carefully whether a derogation of any kind is strictly necessary, and if so what is the minimum required for that purpose. The approach is the same whether the question be viewed through the lens of the common law or that of the Convention for the Protection of Human Rights and Fundamental Freedoms, in particular articles 6, 8 and 10. As to the latter, see *In re Guardian News and Media Ltd* [2010] 2 AC 697, paras 43–52."

It is evident from the foregoing that the identity of the parties is a fundamental aspect of the principle of open justice and that for the purposes of English law, when considering an application for anonymity the approach is the same whether viewed from a common law or ECHR

perspective. Put another way, the English common law principle of open justice and the test that is to be applied when derogating from it, is ECHR compliant.

35 In the *Gravesham* case the Court of Appeal went on to reiterate the guidance provided by Lord Neuberger, M.R. in *H* v. *News Group Newspapers Ltd.* (6) ([2011] 1 W.L.R. 1645, at para. 21). Lord Neuberger, M.R. identified and summarized the principles to be applied when an anonymity order or other restraint on publication is required. Of relevance in the present case are the following:

(a) the general rule is that the names of parties are included in orders and judgments;

(b) no general exception for cases where private matters are in issue;

(c) anonymization is a derogation of the principle of open justice and an interference with ECHR art. 10 rights;

(d) the court should only make an anonymization order after close scrutiny and if a degree of restraint on publication is required, consider whether less restrictive alternatives are viable;

(e) no special treatment should be afforded to public figures.

Of particular significance for present purposes is the principle numbered (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." [Emphasis added.]

**The Gibraltar Constitution**

36 An issue that arises in this case is whether because of our constitutional provisions, Gibraltar law is different to English law. In undertaking the analysis it is necessary to compare s.7 and s.8 of the Constitution with the equivalent ECHR provisions, namely art. 8 and art. 6 respectively. Section 10 of the Constitution which protects freedom of expression is also engaged. However, in argument there was very limited focus in relation to that right, for that omission I have to acknowledge responsibility as contrary to the procedure envisaged in *Gravesham* (10) ([2015] 1 W.L.R. 3647, at para. 34) I failed to give the press an opportunity to make submissions. I could of course have afforded it that opportunity before the handing down of this judgment and the making of orders flowing from it, but for reasons that will become apparent that exercise is unnecessary.

37 The relevant parts of s.7 and s.8 provide:

"**Protection for privacy of home and other property**

**7.**—(1) Every person has the right to respect for his private and family life, his home and his correspondence.

. . .

(3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision—

. . .

(b) for the purpose of protecting the rights or freedoms of other persons;

. . .

except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society."

**Provisions to secure protection of law**

**8.**—. . .

(9) Except with the agreement of all the parties thereto, all proceedings of every court and proceedings for the determination of the existence or extent of any civil right or obligation before any other authority, including the announcement of the decision of the court or other authority, shall be held in public.

(10) Nothing in subsection (9) shall prevent the court or other authority from excluding from the proceedings (except the announcement of the decision of the court or other authority) persons other than the parties thereto and their legal representatives to such extent as the court or other authority—

(a) may by law be empowered to do so and may consider *necessary or expedient* either in circumstances where publicity would prejudice the interest of justice, or in interlocutory proceedings, or in the interests of public morality, the welfare of minors as prescribed by law or the 15 protection of the private lives of persons concerned in the proceedings . . ." [Emphasis added.]

As regards s.7 and art. 8 both of which protect the right to respect for private and family life, for present purposes they are materially the same, having a carve out for the protection and freedom of others, as reasonably

justifiable/necessary in a democratic society. A more detailed analysis is required of s.8 and art. 6.

38 Article 6 which protects the right to a fair trial provides at art. 6(1):

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press 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."

The default position in both s.8 and art. 6 is that court proceedings should take place in public with both provisions *inter alia*, having a carve out to protect the welfare of minors and the right for private life. However, there are three material differences.

39 In s.8(9) the following introductory words are to be found: "[e]xcept with the agreement of all the parties thereto." Those words could be interpreted as affording parties who agree the option to have proceedings dealt with in private. However, as I construe them, what is intended is to strengthen the principle of open justice such that other than in circumstances in which the derogations in s.8(10) are engaged, a party to litigation can rely upon his constitutional right to open justice. In any event the point does not have to be decided given that AB opposes the imposition of any privacy regime.

40 A distinction which in the context of the present case is of some significance, is that s.8(10) specifically provides for a "necessary or expedient" test. In contrast the language in art. 6 is that of exclusion of the public being permissible if it is required to protect private life or otherwise strictly necessary so as not to prejudice the interests of justice, which is redolent of the English common law test of necessity.

41 The third difference is that whilst the s.8 private life carve out extends to "persons concerned in the proceedings," art. 6 restricts the private life derogation to the *parties* to the proceedings.

**Submissions and discussion**

42 Although BB's request for anonymization is supported by the trustees and the protector, each of them deploy submissions on the law which are somewhat different.

**Section 8(10) of the Constitution**

43 Mr. Holden's submissions on behalf of the trustees is primarily premised upon the application of s.8(10) with some emphasis on the word "expedient" and the difference that use of that word imports into the application of the English common law test. In effect that "expedient" lowers the threshold allowing for a privacy regime. Mr. Holden relies upon *In re a Settlement dated 16 December 2009* (reported *sub nom. Julius Baer Trust Co. (Channel Islands) Ltd.* v. *AB* (7)) a judgment of Kawaley, J. of the Grand Court of the Cayman Islands in which he considered s.7 of the Cayman Islands Constitution which is materially the same as our s.8 and in particular the "necessary or expedient" test to conduct private hearings for the "protection of . . . the private lives of persons concerned in the proceedings." In that case trustees sought the court's blessing of certain decisions and proposed actions, together with a confidentiality order which was premised upon the constitutional right to privacy. Kawaley, J. stated (2018 (2) CILR 1, at para. 15):

> "I incline to the view that s.7(10) [equivalent to our s.8(10)] of the Constitution is the most reliable guide as to the basic grounds upon which the open justice principle may be limited, taking into account the allied rights to receive information under s.11 [equivalent to our s.10] of the Constitution and of privacy under s.9 [equivalent to our s.7], because these grounds are formulated as exceptions to the general rule that civil hearings should be heard in public. Embedded, implicitly, in s.7(10) is an acknowledgment of the fact that a judicial assessment must be made of the conflicting elements of open justice . . . and privacy rights . . ."

I respectfully agree with Kawaley, J. that the Cayman Constitution s.7(10)/ the Gibraltar Constitution s.8(10) provides as he puts it: "the most reliable guide as to the basic grounds upon which the open justice principle may be limited." That said, for reasons I shall turn to later, it is not the only constitutional route which can be relied upon to limit the principle of open justice.

44 Section 8(10)(a) allows the court, to the extent that it is empowered by law, if it is necessary or expedient, to impose a privacy regime in circumstances in which:

(i) publicity would prejudice the interest of justice; or

(ii) they are interlocutory proceedings; or

(iii) the interests of public morality; or

(iv) welfare of minors as prescribed by law; or

(v) protection of private lives of persons concerned in the proceedings.

45 As regards (i) and (iii), it evident that this is not a case in which publicity would prejudice the interests of justice or public morality. As regards (ii), it is evident that neither of the claims is ready for trial and therefore at this stage all proceedings are interlocutory. Section 8(10)(a) is premised upon the court being empowered by law to impose a privacy regime. For the purposes of the principle of open justice the English common law does not draw a distinction between interlocutory proceedings and final hearings (*Julius Baer Trust Co.* v. *AB* (7) (2018 (2) CILR 1, at para. 17)), therefore that hearings at his stage relate to interlocutory applications is not a basis upon which to impose a privacy regime, nor is it relied upon. I turn to (iv). X and Y are minors but protection of their welfare is only engaged if prescribed by law. I was referred to s.148(2) of the Children Act, it provides:

> "(2) No person shall publish any material which is intended, or likely, to identify−
>
> (a) any child as being involved in any proceedings before a court in which any power under this Act may be exercised by the court with respect to that or any other child; or
>
> (b) an address or school as being that of a child involved in any such proceedings."

In neither action is the court being invited to exercise any of its powers under the Children Act, and therefore the welfare of minors provision in s.8(10)(a) is not engaged.

46 The limb potentially engaged is (v). The protection of private lives of persons concerned in the proceedings. In my judgment, on the basis of the evidence before me it is self-evident that issues of personal development which could arise on account of the minors becoming aware of their potential entitlement to benefit from the wealth held by the trusts does not arise, because the fact that X and Y's father benefits from exceptional wealth is a matter which can easily be ascertained through open sources and online searches. However, undoubtedly private life encompasses mental health and "the preservation of mental stability" (*Bensaid* v. *United Kingdom* (2) ([2001] ECHR 82, at para. 47)) and it is in that context that the evidence of BB together with the supporting material falls to be considered.

47 I shall consider the evidence in relation to the impact that publicity could have upon X and Y's mental health in a different context, but in relation to the s.8(10) argument the submission fails because X and Y cannot be said to be "concerned" in the proceedings. They are not parties; I have not been taken to any part of the pleadings or affidavits (other than those dealing with privacy) in which they are mentioned and it has not been suggested that they may be witnesses. Section 8(10) being a derogation

from the primary right protecting the principle of open justice, "concerned" is to be construed narrowly. As part of the class of beneficiaries X and Y may of course be affected by the outcome of the proceedings but they are not "concerned" in the sense of being involved in the proceedings.

**Finance centre considerations**

48 Sir Peter's short submission was essentially that the court when determining the appropriateness of imposing a privacy regime, should take account of the significant role played by the finance centre to Gibraltar's prosperity and regard that should be had towards the legitimate desire for privacy of the settlors and beneficiaries of private Gibraltar trusts.

49 In *Julius Baer Trust Co.* v. *AB* (7), Kawaley, J. considered the issue and stated (2018 (2) CILR 1, at para. 18):

> "Where an offshore jurisdiction promotes the establishment of trusts as an effective mechanism for legitimately conserving and protecting settlors' wealth, the host courts must to my mind be at least sympathetic to confidentiality applications such as the one made in the present case. The trustee is effectively asking the court to protect the welfare of minor beneficiaries and the privacy of beneficiaries generally so that the trust can be administered in a way which does not prejudice the rights of those potentially interested in it. The public interest in the Cayman Islands on confidentiality applications may, in terms of an initial knee-jerk judicial response at least, be somewhat less cynical about confidentiality than might be the case elsewhere. Were a local version of the English *Practice Guidance (Interim Non-disclosure Orders)* . . . to be developed, the volume of the open justice theme might well be toned down from 'fortissimo' to 'mezzo fortissimo.'"

In *Re Delphi Trust Ltd.* (5) (Isle of Man) Deemster Doyle stated (16 ITELR 885, at para. 139):

> "In the Isle of Man we accord great importance to the fundamental principle of open justice. We also accord great importance to our vibrant trust industry and the need to protect the confidentiality of private trusts and the privacy concerns of settlors and beneficiaries in non-contentious matters, as indeed they do in Jersey and Guernsey . . ."

Undoubtedly in comparable jurisdictions, in the context of trust actions a more nuanced approach has been taken to the principle of open justice than may be the case in England and Wales. In the context of Gibraltar such an approach is permissible by virtue of the rider in s.2(1) of the English Law (Application) Act applying English common law "so far as they may be

applicable to the circumstances of Gibraltar and subject to such modifications thereto as such circumstances may require . . ."

50 In my judgment the importance of trust work in Gibraltar affords a good policy consideration which allows for the modification of the English common law principle of open justice. But it is instructive to note that the cases in comparable jurisdictions that I have been referred to all involve non-contentious matters. In my judgment any modification of the common law is to be so limited and cannot extend to contentious litigation.

**Balancing the competing constitutional rights**

51 In his skeleton argument Mr. Azopardi identified the principles enunciated by Lord Neuberger of Abbotsbury, M.R. in *H* v. *News Group Newspapers Ltd*. (6). However, he also relied upon a passage in the judgment of Lord Hoffmann in *Campbell* v. *MGN Ltd.* (3), the case involving the celebrated fashion model Naomi Campbell, in which art. 8 and art. 10 of the ECHR were engaged. Lord Hoffmann stated ([2002] 2 A.C. 457, at para. 55):

> "I shall first consider the relationship between the freedom of the press and the common law right of the individual to protect personal information. Both reflect important civilised values, but, as often happens, neither can be given effect in full measure without restricting the other. How are they to be reconciled in a particular case? There is in my view no question of automatic priority. Nor is there a presumption in favour of one rather than the other. The question is rather the extent to which it is *necessary* to qualify the one right in order to protect the underlying value which is protected by the other. And the extent of the qualification must be proportionate to the need . . ." [Emphasis in original.]

Reliance upon *Campbell* and the principle that there is no presumption in favour of one right over another foreshadowed Mr. Azopardi's oral submissions. As I understood them, his submissions are to the effect that it is insufficient to approach the issue of privacy exclusively from a s.8(10) perspective, but that in seeking to balance the protection of X and Y's s.7 privacy rights with the s.8 open justice principle neither right has primacy. That taking account of the evidence before the court in respect of the negative impact that publicity could have upon X and Y the proportionate qualification between the competing rights is anonymization.

52 Premised as it is on high authority, I accept Mr. Azopardi's proposition that there is no presumption of primacy as between s.7 and s.8 of the Constitution. The upshot is that the competing rights have to be balanced against each other. But it must follow that in undertaking that exercise one has to look at the primary rights and therefore s.8(10)(a) which is in the nature of a limitation to the primary right to privacy, is not engaged. Two

consequences flow. X and Y do not have to be *concerned* in the proceedings for account to be taken of their right to privacy but also the *expediency* test does not apply. Viewed from that perspective the approach to balancing those competing rights is the same whether viewed from a Gibraltar Constitution perspective or from an ECHR compliant English common law perspective. The question for the court is as stated by Lord Hoffmann in *Campbell*: "the extent to which it is *necessary* to qualify the one right in order to protect the underlying value which is protected by the other." And in the context of the conflict being between open justice and the right to privacy, the approach to be taken is that enunciated by Lord Neuberger in *H* v. *News Group Newspapers Ltd.* (6).

**Discussion**

53 In both actions the principles of open justice and identification of the identities of BB and AB are inextricably linked precisely because they are both high profile business men heading a very substantial commercial enterprise. Their identity and the fact that they are the principals of a significant commercial enterprise makes the reporting of the litigation in which they are embroiled significant, not least to business partners, lenders and competitors. Allowing for reporting with the main protagonists and the underlying business interests anonymized would render any reporting hollow. Although evidently one can only speculate as to the media interest that the litigation would generate, it is undoubtedly likely that it would be covered by the specialist press. Equally it is unlikely that mainstream media would show much interest. Against the principle of open justice must be balanced X and Y's right to privacy. Specifically their mental wellbeing which is the aspect of their private life that could be adversely affected by publicity.

54 As an aside, it is somewhat ironic that in litigation in which X and Y have no involvement, their mental health issues have been disclosed by their father, because of his stated desire to protect their right to private life. I shall use the umbrella term "mental disorder" because although I have previously identified the precise condition which X and Y are currently experiencing, I shall be ordering the redaction of paras. 21–25 of this ruling such that to the extent possible I protect their privacy.

55 Because AB and his legal team only became aware of the contents of the medical evidence relied upon by BB at the hearing, he did not have the opportunity to file evidence in rebuttal. Moreover, when evaluating the opinions expressed and the weight which I should afford them, I cannot ignore that they are statements by treating professionals; consequently they lack the rigour of approach or safeguards which apply in respect of experts appointed pursuant to CPR Part 35 with the concomitant duties and responsibilities that apply to expert witnesses, which include that the expert evidence should be, and should be seen to be independent and uninfluenced

by the exigencies of litigation; that it should be objective and unbiased and of course the requirement that the expert's overriding duty is owed to the court irrespective of who instructed him (CPR r.35.3.3). It is also evident that in the context of an interlocutory application the treating professionals have not been exposed to cross-examination. In my judgment the upshot of those considerations is that the evaluation of the opinions expressed by the treating professionals has to be undertaken with circumspection.

56 One of their treating professionals states that:

> "Public attention to this [the litigation between BB and AB] in the press, whether favourable or unfavourable, could be hugely detrimental to the emotional development, emotional stability and wellbeing of both boys."

Whilst another concludes that it is his clinical opinion—

> "that any public legal battle would negatively harm the children and any decision to make such matters public would be a safeguarding issue, as exposing them to such intrusive intimate publicity will undoubtedly harm the children."

Although ultimately the litigation arises because of disputes between BB and AB, who happen to be [closely related], it is in the nature of a commercial dispute, and I therefore struggle to understand what is meant by "intrusive intimate publicity." Rather, intrusive commercial publicity by specialist financial media might be a more accurate description of what may come about. But in any event, any media coverage of the litigation itself, will not be about X and Y or even about intimate personal family affairs.

57 I do not in any way minimize the importance of mental health, particularly in adolescents, or the serious impact that a mental disorder can have upon any of us. However, it is self-evident that not all medical conditions are the same and that the extent to which individuals may be affected by a diagnosed condition is infinitely variable. The evidence before me even when taken at its highest is that in slightly varying degrees X and Y suffer from a low level condition, and they are of course fortunate to be able to receive clinical support. Exposure to litigation especially if there is an element of publicity is always liable to cause distress and thereby affect the wellbeing of individuals who are involved in or are related to those involved in litigation. But in my judgment the possible impact that the present litigation could have upon X and Y is, particularly in the context of a family with potential access to huge wealth, part and parcel of the stresses of the life they have been born into. In my judgment the impact it may have upon them does not come near to it being *necessary* to order the anonymization of the parties. Moreover, if I am wrong in my analysis and X and Y fall within the concept of *persons concerned in the proceedings*, the adverse impact which publicity of the litigation may have

upon them is also insufficient to make it *expedient* to order anonymization. To rule otherwise would set the bar so low that a privacy regime could be obtained whenever publicity could negatively impact upon the mental wellbeing of individuals very tangentially affected by litigation. In the circumstances, subject to the following paragraph, I impose no privacy or anonymization regime in either action.

58 Subject to the redaction of paras. 21–25 I hand down this ruling in open court, which will in the usual way be uploaded onto the Gibraltar Courts Service website. There shall be no access by non-parties to the unredacted judgment or to the affidavit evidencing X and Y's condition or to a transcript of the hearing, without the permission of the court.

59 Orders accordingly, and I shall hear the parties as to costs.

*Orders accordingly.*