TC05575

Appeal number: TC/2015/01990

PROCEDURE – application for hearing in private – rule 32 of Tribunal Rules – celebrity status of the appellant – deductibility of expenses against income – principle of open justice – whether the test of necessity for derogation met – whether anonymity strictly necessary – whether confidentiality of information at risk of breach – whether right to privacy infringed – Convention rights under Articles 6, 8 and 10 – Human Rights Act 1998 – proportionality – alternative measures under rule 14 and s 4(2) of the Contempt of Court Act 1981 – application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

PETER ANDREA **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE HEIDI POON

Sitting in public at the Tribunal Centre, City Exchange, 11 Albion Street, Leeds on 13 January 2016, and with post-hearing submissions from the parties in February 2016

Steve Bartlett and Gary Brothers of Independent Tax, for the Appellant

Simon Bracegirdle and Mr B Horton, presenting officers of HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. By notice dated 3 September 2015, the Appellant's representative, Independent Tax, applied for the hearing of the substantive appeal to be held in private under rule 32 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ('the Tribunal Rules').

2. The case management hearing was in public, and was principally to hear the application on behalf of the appellant for the substantive hearing to be held in private.

3. HMRC do not oppose the application.

4. There was no request to list the hearing with initials in place of the actual name of the appellant prior to the hearing of the application. The session list therefore recorded the name of the appellant to this application. Although sitting in public, only the representatives for both sides attended the hearing; no member of the public was present.

5. In recognition that my decision on the application could be appealed, I have anonymised the decision and withheld details of the date and venue of the hearing until the appeal process of this decision is exhausted.

The facts in outline

Background to the appeal

6. The appellant is a self-employed media entertainer and performer who earns his income from a variety of sources, from television and public appearances, to performance on stage, to modelling and writing, within the UK and abroad. He has a public profile, and his representative refers to him as a celebrity.

7. HMRC opened enquiry into the appellant's tax return for 2010-11. The substantive matters of the appeal concern the deductibility of two sums of expenses:

(1) legal and professional expenses of £90,245 under s 34(1) and (2) of the Income Tax (Trading and Other Income) Act 2005 ('ITTOIA 2005');

(2) expenditure of £15,055 claimed as Annual Investment Allowance (AIA) under Part 2 of the Capital Allowances Act 2001 ('CAA 2001').

8. The legal and professional fees were incurred in connection with defamation proceedings brought against the appellant's ex-wife over comments she had made in the written media and on television. It is the appellant's case that he had brought the proceedings because his relationship with his children and his reputation are important to him.

9. The improvement costs to the security gates were to control entry and exit to the appellant's dwelling by an intercom system. The appellant's case is that the gates are necessary to protect him and his family from the attention of the media and the fans.

HMRC's position regarding the expense claims

10. HMRC disallowed the claims. In respect of the legal expenses, HMRC maintain that the test of 'wholly and exclusively for the purposes of the trade' cannot be satisfied, given that a clear purpose of the legal expenses was to safeguard the appellant's relationship with his children, which cannot be for any business purpose. A second purpose was to protect the appellant's reputation which cannot 'necessarily be a wholly business purpose'. Furthermore, a stated object of the claim to damages is personal in nature, and there is no reason why the legal costs should be separated from the damages they were expended to secure.

11. As regards the improvement costs for the security gates, HMRC consider that the qualifying conditions under s 33 CAA 2001 are not met. To qualify for s 33 AIA, there would have to be a special threat to the appellant's physical security. The appellant has not provided evidence that the media attention (while unwelcome) constituted a special threat to his personal physical security.

The appellant's grounds of appeal as on the Notice of Appeal

12. In relation to the legal and professional fees, the appellant contend that HMRC have failed to consider the meaning of trade in its full sense; that the appellant and his trade are 'inseparable'; that HMRC have failed to consider the 'reasoning and intent' behind the need to bring the libel action, and have instead based their decision on the outcome of the libel action.

13. As regards the AIA, HMRC have made a judgement that the attention from the media and other sources was '*unwelcome*'; that HMRC are in no position to make this judgment, especially if the judgment was based on commentary in the press or media.

The penalty assessment

14. Apart from the substantive matters concerning the deductibility of the expenses, HMRC have issued a penalty assessment, which was appealed out of time. The Tribunal directed HMRC at the hearing to consider their position in respect of the late appeal against the penalty assessment for tax year 2010-11.

15. HMRC advised the Tribunal two weeks after the hearing that they accept the late appeal against the penalty. (The appeal against the penalty will therefore be consolidated with the substantive appeal and be heard together.)

The libel action

16. The impression given by Mr Bartlett at the hearing was that the High Court had heard the libel case in private and the hearing had resulted in the award, which is to be kept confidential.

17. The Tribunal requested sight of the High Court's decision or directions to the solicitor's application to allow the libel case to be heard in private. Mr Bartlett handed the Tribunal a copy of the High Court Consent Order, and advised that he would forward the response from the High Court as regards the application to have the libel case heard in private.

Post-hearing clarification

18. In respect of the libel action, Mr Bartlett advised the Tribunal three weeks after the hearing the following:

> 'We were asked to research the position re the original defamation hearing and the context of the damages award etc being confidential. We have now done that and find that the situation was that the case as settled by a confidential mediation process that resulted in a Tomlin order. The matter was settled by a consent order and a confidential schedule, ...
>
> So it would seem that our understanding of the process was slightly askew and it was a case that settled before formal proceedings took place but nevertheless this was a process conducted in private, and endorsed by the judge in terms of the confidentiality of the damages award.'

The High Court Consent Order

19. From the Consent Order provided to the Tribunal, sealed at the High Court in 2011, it would seem that there had never been a hearing at the High Court for the defamation proceedings.

20. By virtue of the Consent Order, it would seem that the defamation proceedings have in fact been stayed. The essential purpose of the Consent Order is to enable the parties to apply to the court to enforce the agreed terms, should that become necessary, without having to commence new proceedings.

21. What Mr Bartlett meant by 'our understanding of the process was slightly askew' would seem to refer to the representation given at the hearing that the defamation proceedings at the High Court had been held in private, which was wrong in fact.

22. In actual fact, the libel action had not proceeded to a court hearing and the case was settled by a confidential mediation process, and it was the mediation process that was 'conducted in private', not a court hearing.

23. The mediation process resulted in the High Court Consent Order. It should be emphasised that the Consent Order was read in open court, and is to be distinguished from the mediation process that took place in private.

24. The Consent Order is in the format of a Tomlin Order, and the recitals to the Order stating the agreed terms are on separate schedules. The elements of the Order are set out in separate paragraphs as follows:

> '1. All restrictions previously imposed by the Court under s.4(2) Contempt of Court Act 1981 be discharged.
>
> 2. All further proceedings in this case be stayed except for the purpose of carrying this Order into effect for which purposes the parties are at liberty to apply.
>
> 3. The Defendant shall pay the Claimant a contribution towards his costs of and occasioned by these proceedings, as set out in the Confidential Schedule hereto.'

25. It would seem that there were s 4(2) restrictions in place for the reporting of the proceedings should it have taken place. The background documents for the injunction order under s 4(2) are not produced.

26. The third element of the Order concerns the settlement sum, and is stated on a separate schedule headed 'Confidential Schedule'. With the Consent Order adopting the format of a Tomlin Order, the intention would seem that the confidential schedule would remain an entirely separate document, and probably not filed at court.

Grounds of application

27. By email in January 2016, the grounds of application are stated as follows:

> '1. The celebrity status of the appellant and the nature of the issues to be discussed (concerning his libel case with his ex-wife) is likely to attract paparazzi type attention which would be best avoided.
>
> 2. The facts of the libel case involve a minor who would be better protected by a private hearing.
>
> 3. The original libel settlement was settled for a sum undisclosed to the public by the High Court. That anonymity would be breached by now putting it into the public arena in an open hearing.'

28. At the hearing, Mr Bartlett elaborated on the grounds of the application as stated in his email. In respect of the celebrity status of the appellant, Mr Bartlett emphasised that his client's ability to give evidence would be fettered if the media were allowed to be present. More specifically, the concern of how the media might report the evidence could become uppermost in his client's mind, and could prove to be an inhibiting factor and a hindrance to his client in giving evidence for his case.

29. Concerning the deductibility of the professional fees incurred to bring the libel action, Mr Bartlett submitted that there are two aspects relevant to the application. First, the libel action was brought to defend the appellant's public image as a family

man. To protect that public image is essential for maintaining the appellant's income stream. The hearing of the substantive issues would necessarily entail the various aspects of the appellant's family life being related at court. Apart from the appellant's own children with his ex-wife, the libel case also concerned the appellant's relationship with his stepson. The hearing in relation to the deductibility of the expenses in issue would necessarily touch on aspects of the father-child relationship the appellant has with all his children; and that the interests of these minors would be better protected by allowing the hearing to be in private.

30. Secondly, Mr Bartlett informed the Tribunal that the sum made to the appellant to settle his libel action at the High Court was undisclosed to the public. Mr Bartlett described 'the very essence' of the High Court order was the non-disclosure of the award of the sum.

31. In his post-hearing communication, Mr Bartlett rehearsed similar grounds covered at the hearing, but also introduced a new ground concerning the right to privacy of the appellant's ex-wife that should be respected.

32. The reasons given in support of the application after the hearing are as follows:

> 'In addition to the fact that any substantive hearing in front of the FTT would breach the confidentiality of that damages award unless it was held in private there would also be the three other matters to consider…
>
> Firstly, the potential presence of reporters from "gossip" magazine would potentially restrict and stifle the appellant in the giving of evidence regarding private family issues that led to the libel case and thus breach Rule 2(1) of the Tribunal rules in terms of the appellant getting a fair and just hearing.
>
> Secondly, the damages award was donated to a … minor and the publication of not only that fact but the circumstances that led to it could be harmful to his welfare and relationship with his mother and the appellant.
>
> Thirdly the conduct of the defendant (the child's mother) was kept confidential in the original defamation proceedings, very much at her own request and that conduct would become public knowledge, in breach of her own right of privacy.
>
> Given that HMRC have agreed that here is no pressing public interest issue in this case we would respectfully repeat the request that the proceedings be conducted in private.'

33. Taking into account Mr Bartlett's representations at various stages in relation to the application, the relevant issues for consideration are summarised as follows:

> (1) The publicity issue – whether the celebrity status of the appellant would attract publicity that would interfere with the administration of justice to the extent that justice cannot be done unless the hearing is in private;

(2) The confidentiality issue – whether the appellant is at risk of breaching the confidential agreement in settlement of the libel action unless the hearing is in private;

(3) The right to respect for private and family life – whether the Convention rights of the appellant, his children, and his ex-wife will be infringed unless the hearing is in private.

34. Mr Bartlett's representations make no specific reference to any statutory provisions or case law authorities. Apart from the High Court Consent Order, no further evidence has been produced at any stage in support of the application.

The Law

35. The relevant parts of the enactments by Parliament, whether as statutes or statutory instruments, are cited in the following paragraphs. The case law authorities referred to in this decision are listed with their citation references.

Applicable legislation in respect of the substantive issues

36. The enquiry into the appellant's Self-Assessment return for 2010-11 was opened under s 9A of the Taxes Management Act 1970.

37. In connection with the legal fees incurred for the libel action, the relevant provision is under s 34 of ITTOIA 2005, which provides:

> '(1) In calculating the profits of a trade, no deduction is allowed for—
>
> (*a*) expenses not incurred wholly and exclusively for the purposes of the trade, or
>
> …
>
> (2) If an expense is incurred for more than one purpose, this section does not prohibit a deduction for any identifiable part or identifiable proportion of the expense which is incurred wholly and exclusively for the purposes of the trade.'

38. In respect of the AIA claim for the improvement costs of the security gates, the relevant provisions are under Part 2 of CAA 2001 for plant and machinery allowances, in particular:

(1) s 21 for buildings;
(2) s 23 for expenditure unaffected by ss 21 and 22;
(3) s 33 for personal security; and
(4) s 51A for entitlement to annual investment allowance.

Tribunal Rules

39. The overriding objective of the Tribunal Rules is stated under rule 2(1), which is 'to enable the Tribunal to deal with cases fairly and justly'.

40. Under rule 14 for 'Use of documents and information':

'The Tribunal may make an order prohibiting the disclosure or publication of –

(a) specified documents or information relating to the proceedings; or

(b) any matter likely to lead members of the public to identify any person whom the Tribunal considers should not be identified,'

41. Rule 32 of the Tribunal Rules states as follows:

'(1) Subject to the following paragraphs, all hearings must be held in public.

(2) The Tribunal may give a direction that a hearing, or part of it, is to be held in private if the Tribunal considers that restricting access to the hearing is justified –

(a) in the interests of public order or national security;

(b) in order to protect a person's right to respect for their private and family life;

(c) in order to maintain the confidentiality of sensitive information;

(d) in order to avoid serous harm to the public interest; or

(e) because not to do so would prejudice the interests of justice.

(3) Where a hearing, or a part of it, is to be held in private, the Tribunal may determine who is permitted to attend the hearing or part of it …

(6) If the Tribunal publishes a report of a decision resulting from a hearing which was held wholly or partly in private, the Tribunal must, so far as practicable, ensure that the report does not disclose information which was referred to only in part of the hearing that was held in private (including such information which enables the identification of any person whose affairs were dealt with in the part of the hearing that was held in private) if to do so would undermine the purpose of holding the hearing in private. '

42. The application under rule 32, if granted, will therefore necessitate an anonymity order on the decision in relation to the proceedings.

Civil Procedure Rules

43. Rule 32 of the Tribunal Rules is in many respects analogous to rule 39.2 of the Civil Procedure Rules ('CPR'). There are, however, some notable differences as regards the considerations for granting a hearing in private, which are of relevance to the present application.

44. The considerations are stated under rule 39.2(3) as follows:

'A hearing, or any part of it, may be in private if –

(a) publicity would defeat the object of the hearing;

(b) it involves matters relating to national security;

(c) it involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality;

(d) a private hearing is necessary to protect the interests of any child or protected party;

(e) it is a hearing of an application made without notice and it would be unjust to any respondent for there to be a public hearing;

(f) it involves uncontentious matters arising in the administration of trusts or in the administration of a deceased person's estate; or

(g) the court considers this to be necessary, in the interests of justice.

Human Rights Act 1998

45. This application requires the balancing of different competing rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR'), which are given effect by the Human Rights Act 1998 ('HRA').

46. Section 1 of HRA gives effect in domestic law to what the Act refers to throughout as 'the Convention rights' as set out in Articles 2 to 12 and 14 of the Convention, which are included under Schedule 1 of the Act.

47. The Convention rights under Articles 6, 8 and 10 are of relevance to the current application.

Article 6 of the Convention

48. Under Article 6(1) of the Convention, the principle of open justice is expressly protected, whereby:

> '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.'

49. As in domestic law, the general principle of open justice set out in Article 6(1) is subject to the exception of excluding the press and public in special circumstances:

> '… the press and public may be excluded from all or part of the trial in the interest 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.'

Article 8 of the Convention

50. Article 8(1) of ECHR states: 'Everyone has the right to respect for his private and family life, his home and his correspondence.'

51. Article 8(2) qualifies the right as follows:

> ‘There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.’

Article 10 of the Convention

52. Against the right to respect for private and family life under Article 8 is the competing right to freedom of expression under Article 10(1):

> ‘This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.’

53. Like the other qualified Convention rights, the right to freedom of expression can be restricted in the public interest by reference to the limitations expressed under Article 10(2):

> ‘The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.’

Section 12 of HRA

54. Section 12 of HRA applies when a court is considering whether to grant any relief that might affect the exercise of the Convention right to freedom of expression. Under s 12(4) it is stated that:

> ‘The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to –
>
> (a) the extent to which –
>
> (i) the material has, or is about to, become available to the public; or
>
> (ii) it is, or would be, in the public interest for the material to be published;
>
> (b) any relevant privacy code.’

Contempt of Court Act 1981

55. Apart from the existing body of case law on contempt, the reporting of court proceedings is closely regulated by the Contempt of Court Act 1981 (‘CCA 1981’).

Strict liability rule

56. The principal feature of the Act is the strict liability rule under section 1:

> 'In this Act "the strict liability rule" means the rule of law whereby conduct may be treated as a contempt of court as tending to interfere with the course of justice in particular legal proceedings regardless of intent to do so.'

57. The strict liability rule only applies to 'publications' as defined by s 2(1), which include: 'any speech, writing, programme included in a programme service or other communication in whatever form, which is addressed to the public at large or any section of the public'.

58. Section 2(2) provides that:

> 'The strict liability rule applies only to a publication which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced.'

59. Section 4 of the Act on 'Contemporary reports of proceedings' states at s 4(1):

> 'Subject to this section a person is not guilty of contempt of court under the strict liability rule in respect of a fair and accurate report of legal proceedings held in public, published contemporaneously and in good faith.'

Restrictions on reporting

60. The Act also provides for two types of order, under s 4(2) and s 11, which constitute restrictions on the reporting of legal proceedings.

61. By virtue of s 4(2), a court may:

> '… where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings, or in any other proceedings pending or imminent, order that the publication of any report of the proceedings, or any part of the proceedings, be postponed for such period as the court thinks necessary for that purpose.'

62. Section 11 provides 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.'

Scope of a s 4(2) order

63. A s 4(2) order is a postponement of the reporting of the legal proceedings at the discretion of the court for a specified period of time in order to protect proceedings which are pending or imminent.

Scope of a s 11 order

64. By contrast, an order under s 11 of CCA 1981 prohibits the reporting of a particular matter, for example, the identity of the claimant or a witness. Such a prohibition has no time limit, and is not meant to cease to have effect at some point in time in the future. An anonymity order is in effect a s 11 order.

Authorities

65. The authorities referred to in this decision is listed in the alphabetical order of their short case names:

(1) *A v British Broadcasting Corporation (Scotland)* [2014] UKSC 25 (‘*A v BBC (Scotland)*’)

(2) *Al Rawli v Security Service* [2011] UKSC 34 (‘*Al Rawli*’)

(3) *Ambrosiadou v Coward* [2011] EWCA Civ 409 (‘*Ambrosiadou v Coward*)

(4) *B and P v United Kingdom* (2001) 34 EHRR 529 (‘*B and P v United Kingdom*’)

(5) *Revenue and Customs Comrs v Banerjee (No 2)* [2009] EWHC 1229 (Ch) (‘*Banerjee (No 2)*’)

(6) *Campbell v MGN Limited* [2004] UKHL 22 (‘*Campbell v MGN*’)

(7) *Diennet v France* (1995) 21 EHRR 554 (‘*Diennet v France*’)

(8) *Ex p P*, The Times, 31 March 1998 (‘*Ex p P*’)

(9) *Global Torch Ltd v Apex Global Managed Ltd & Others* [2013] EWCA Civ 819 (‘*Global Torch*’)

(10) *In re S (a child) (Identification: Restrictions on Publication)* [2004] UKHL 47 (‘*In re S (a child)*’)

(11) *JIH (also known as H) v News Group Newspapers Ltd* [2011] EWCA Civ 42 (‘*JIH v News Group*’)

(12) *McKillen v Misland* [2012] EWHC 1158 (‘*McKillen v Misland*’)

(13) *Moyles (formerly as Mr A) v Revenue and Customs Comrs* [2012] UKFTT 541 (TC) (‘*Moyles v HMRC*’)

(14) *Petrina v Romania* (application no 78060/01) (‘*Petrina v Romania*’)

(15) *R (Guardian News & Media Ltd) v City of Westminster Magistrates’ Court (Article 19 intervening)* [2012] EWCA Civ 420 (‘*R v City of Westminster Magistrates’ Court*’)

(16) *R v Legal Aid Board, ex parte Kaim Todner* [1999] QB 966 (‘*R v Legal Aid Board*’)

(17) *Re Guardian News and Media Ltd* [2010] UKSC 1 (‘*Re Guardian News*’)

(18) *Re Times Newspapers Ltd* [2007] EWCA Crim 1925 (‘*Re Times Newspapers*’)

(19) *Scott v Scott* [1913] AC 417 (‘*Scott v Scott’*)

(20) *V v T and another* [2014] EWHC 3432 (Ch) (‘*V v T*’)

Practice Guidance [2012] 1 WLR 1003

66. *Practice Guidance (Interim Non-Disclosure Orders*) [2012] 1 WLR 1003 (‘the *Practice Guidance*’) was issued by Lord Neuberger MR on 1 August 2011. The purpose of the guidance is to set out the recommended practice regarding any application for interim injunctive relief in civil proceedings to restrain the publication of information: an interim non-disclosure order.

67. The guidance also provides ‘the proper approach to the general principle of open justice in respect of such applications’, which is summarised as follows:

> ‘**Open justice**
>
> 9. Open justice is a fundamental principle. The general rule is that hearings are carried out in, and judgements and orders are, public. …
>
> 10. Derogations from the general principle can only be justified in exceptional circumstances, when they are strictly necessary as measures to secure the proper administration of justice… Derogations should, where justified, be no more than strictly necessary to achieve their purpose.
>
> 11. The grant of derogations is not a question of discretion. It is a matter of obligation and the court is under a duty to either grant the derogation or refuse it when it has applied the relevant test. …
>
> 12. There is no general exception to open justice where privacy or confidentiality is in issue. Applications will only be heard in private if and to the extent that the court is satisfied that by nothing short of the exclusion of the public can justice be done. Exclusions must be no more than the minimum strictly necessary to ensure justice is done and parties are excepted to consider before applying for such an exclusion whether something short of exclusion can meet their concerns, as will normally be the case … Anonymity will only be granted where it is strictly necessary, and then only to that extent.
>
> 13. The burden of establishing any derogation from the general principle lies on the person seeking it. It must be established by clear and cogent evidence …
>
> 14. When considering the imposition of any derogation from open justice, the court will have regard to the respective and sometimes competing Convention rights of the parties as well as the general public interest in open justice and in public reporting of court proceedings. It will also adopt procedures which seek to ensure that any ultimate vindication of Article 8 of the Convention, where that is engaged, is not undermined by the way in which the court has processed an interim application. On the other hand, the principle of open justice requires that any restrictions are the least that can be

> imposed consistent with the protection to which the party relying on their Article 8 Convention right is entitled …'

Discussion

68. Mr Bartlett's representations have made no reference to any case law or statutes, either at the hearing or during post-hearing submissions. Even though the appellant's representative has not sought to support the application with authorities, the application cannot be determined without reference to the relevant law. The Tribunal is aware that the appellant may object that his representative has not had an opportunity of commenting on the application of the legislation or authorities in this decision. Nevertheless, the appellant has a right to appeal against this decision.

69. In deciding whether to grant the application, I have adopted the approach as stated in the *Practice Guidance*: 'Derogations should, where justified, be no more than strictly necessary to achieve their purpose.' Taking this approach, I have considered this application by addressing the following questions according to the degree of derogation involved:

(1) Whether a hearing in private is justified;

(2) If not, whether an anonymity order is necessary.

Whether a hearing in private is justified

Rule 32 provisions

70. The application is made under rule 32 of the Tribunal Rules. Rule 32(1) states the overarching presumption that 'all hearings *must* be held in public'. Any application for a hearing in private under rule 32 of the Tribunal Rules should be considered as an exception to the general principle of open justice.

71. Rule 32(2) provides for instances when the presumption of open justice can be excepted, and the appellant's case seems to be drawing on the following exceptions:

(1) The publicity 'would prejudice the interests of justice';

(2) To maintain the confidentiality of sensitive information;

(3) To protect a person's right to respect for their private and family life.

The principle of open justice

72. 'The open justice principle is not a mere procedural rule. It is a fundamental common law principle' (Lord Dyson in *Al Rawli* at [11]). A hearing in private represents the most extreme form of derogation from this fundamental principle.

73. The fact that HMRC do not oppose the application would seem, from the appellant's representations, to lend support for such an application to be granted. I have, however, found it all the more important to stand back from the seeming consent, and to give heed to the warning expressed by Sir Christopher Staughton in

Ex p P that 'when both sides agree that information should be kept from the public, that was when the court had to be most vigilant'.

74. There are two aspects to the application of the principle of open justice. The first relates to the proceedings in the court itself, and requires that they should be held in open court to which the press and public are admitted. The second aspect concerns the reporting of the proceedings: not only should the judgment of the court resulting from the proceedings be made public as a record, but also that the press should be given leave to publish a fair and accurate report of the proceedings to a wider public.

75. A hearing in private, which necessitates an anonymity order for the reporting of the proceedings, should only be granted in the most compelling of circumstances.

76. In *Diennet v France* (1995), the European Court of Human Rights ('ECtHR') 'reiterates that the holding of court hearings in public constitutes a fundamental principle enshrined in article 6' (at para 33). The decision continues by explaining why the public character of proceedings is crucial in a democratic society:

> 'The public character protects the litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice visible, publicity contributes to the achievement of the aim of article 6(1), a fair hearing, the guarantee of which is one of the foundations of a democratic society…'

77. In almost identical wording to that in *Diennet v France*, the role of publicity in achieving the aim of Article 6(1) is reiterated in *B and P v United Kingdom* (2001) at para 36, and the European Court decision applied directly to the British state.

78. The public character of court proceedings being pivotal in policing justice was articulated by Lord Shaw in *Scott v Scott* (1913) by quoting Jeremy Bentham (p 477):

> '… Where there is no publicity there is no justice.
>
> 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.
>
> The security of securities is publicity.'

79. A century later, Toulson LJ in *R v City of Westminster Magistrates' Court* asked the same pertinent question at [1]:

> 'How is the rule of law itself to be policed? It is an age old question. Quis custodiet ipsos custodes – who will guard the guards themselves? In a democracy, where power depends on the consent of the people governed, the answer must lie in the transparency of the legal process. Open justice lets in the light and allows the public to scrutinise the workings of the law, for better for worse.'

The burden of establishing necessity

80. The burden of establishing any derogation from the general principle rests on the person seeking it, and 'any departure must be supported by clear and cogent evidence' (*McKillen v Misland* at [34]; para 13 of the *Practice Guidance*).

81. In deciding whether the appellant has discharged the burden, I consider the issues involved in the following order:

(1) the substantive issue of the appeal;

(2) whether the publicity issue meets the test of necessity;

(3) whether the appellant's Convention rights under Article 8 as regards confidentiality and privacy are sufficiently interfered with to justify any derogation from open justice.

The substantive issue of the appeal

82. The substantive issue of the appellant's case concerns the deductibility of legal costs incurred to bring the libel case. The action was settled out of court, and what needs to be shown by the appellant is that the expenses were incurred 'wholly and exclusively' for the purposes of his trade or business. It would seem to be common ground that the legal fees were incurred, or assumed to have been properly incurred.

83. It does not seem to matter, however, what the detail of the libel action was beyond the bare fact that the alleged libellous statements damaged or was alleged to have damaged the appellant's reputation. This raises the question whether such legal expenses were incurred for the appellant's business, which in turn involves identifying the nature of the business. None of this would seem to require any kind of detailed investigation into the libel action and the underlying facts or the personal life of the appellant with his ex-wife or with his children.

84. In my judgment, the application fails at the first hurdle, in that there is nothing in the merits of the appeal that needs to touch upon the details of the libel action, or the private life of those involved, or the father-child relationship. The appellant's ground of appeal is that HMRC have not considered the meaning of trade in its full sense, and that the appellant and his trade are 'inseparable'. It seems to me there is a fundamental contradiction between this line of argument and the essential ground for this application – namely, that a trade having been conducted in the full glare of the public should require a hearing in private in relation to this very same public trade. There are no trade secrets involved here to be excepted according to the formulation of the test of necessity in *Scott v Scott* (see §90). That said, it should be emphasised that my judgment in this respect does not concern the merits of the case, but the nature of evidence that is relevant for the determination of the substantive issue and its bearing on the present application.

The publicity issue

85. In relation to the publicity issue, Mr Bartlett submitted that since the appellant is in the public eye as a celebrity, the interest of the press in his appeal would be

intrusive and undesirable, and the reporting by certain sections of the press could prejudice the interests of justice.

86. Publicity, which the appellant is trying to avoid or minimise (on this occasion) by seeking a hearing in private, is however at the very heart of justice. To derogate from a public hearing, the appellant needs to satisfy the Tribunal that it is 'strictly necessary' and that there are 'special circumstances where publicity would prejudice the interests of justice' (Article 6(1) ECHR).

87. The 'strictly necessary' criterion under Article 6(1) echoes the test of necessity formulated by Viscount Haldane LC in the House of Lords decision of *Scott v Scott* at pp 437-438:

> '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. … 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.'

88. *Scott v Scott* is a case that concerned a nullity petition in a divorce proceeding, and the judge of the Divorce Court (set up by the Matrimonial Causes Act 1857) made an order for the hearing in camera. The House of Lords decision concerned the publication of a transcript of the evidence given at the hearing of the suit to third parties. It was in this context that the Lord Chancellor reminded any judge faced with a decision to make an order for a hearing in private that it is not a matter of discretion for the judge to exercise, but a matter of principle, turning on necessity and not on convenience.

89. A century later, the indelicacy of some media reporting, especially of the paparazzi genre, about celebrities' private lives can give rise to similar concern as to whether the exclusion of the press could be more expedient to the proceedings. But any judge faced with an application on such grounds must guard against the persuasion that this is a matter of discretion to be exercised with regard to expediency, and must consider the application as a matter of principle turning on necessity.

90. Lord Haldane's formulation of the test of necessity in *Scott v Scott* is that outside the three exceptional areas of wardship, lunacy and trade secrets, the person seeking to displace open justice 'must satisfy the Court that by nothing short of the exclusion of the public can justice be done' (at p 438).

91. With different emphasis, the Lord Chancellor repeated the test of necessity in a manner which is of particular relevance to the present application (at p 439):

> 'A mere desire to consider feelings of delicacy or to exclude from publicity the details which it would be desirable not to publish is not, I repeat, enough as the law now stands.'

92. Although this judgment was made over a century ago, it remains good law. In *Global Torch*, Kay LJ referred to the decision in *Scott v Scott* as 'a beacon of the

common law' and stated at [13] that since that judgment, 'the common law has remained resolute, subject to later exceptions provided for by statute' that the overriding principle according to necessity remains the only instance whereby the principle of open justice should be displaced.

93. The justice system has to operate even-handedly; it cannot be right to accord the appellant different treatment just because he is in the public eye. On the contrary, it would seem to weigh all the more strongly against allowing a hearing in private, because 'hearing the appeal of such a person in private would give rise to the suspicion, if no more, that riches and fame can buy anonymity, and protection from the scrutiny which others cannot avoid' (Judge Bishopp in *Moyles v HMRC* at [14]).

94. Mr Bartlett also stated that the presence of the press would have a fettering (and hence adverse) effect on the appellant's ability to give evidence. No doubt this is a sentiment shared by many witnesses, but it has to be tolerated and endured, as Lord Atkinson remarked in *Scott v Scott* at p 463:

> 'The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses, … but all this is tolerated and endured, because it is felt that in public trial is to be found, on the whole, the best scrutiny for the pure, impartial and efficient administration of justice, the best means for winning for it public confidence and respect.'

95. I am not persuaded that the publicity issue as represented by the appellant meets the test of necessity to justify any derogation from a public hearing.

The confidentiality and privacy issues

96. At the hearing, Mr Bartlett referred to the High Court proceedings as being 'in private'. It was subsequently clarified that the process that was held in private was not a hearing at the High Court, but a mediation process that had led to the settlement. Furthermore, Mr Bartlett submitted that the mediation process being conducted in private has relevance to the present application.

97. It is the appellant's case that the confidentiality issue is so central to the extent that 'any substantive hearing in front of the FTT would breach the confidentiality of that damages award unless it was held in private'.

98. Separately, Mr Bartlett submitted that the rights to privacy of the appellant's children and his ex-wife would be infringed unless the hearing is in private.

99. It should be noted at the outset that the *Practice Guidance* at sub-paragraph 12 highlights that there is 'no general exception to open justice where privacy or confidentiality is in issue'. Furthermore, exclusions must be no more than the *minimum* strictly necessary to ensure justice is done.

(a) The privacy issue

100. Turning first to the privacy issue, the substantive matter under appeal would seem to involve an examination of the nature of the appellant's business rather than an investigation into the substance of the libel action. For this reason, I do not see how the privacy issue can be pivotal to the substantive appeal.

101. Secondly, there can be no general exception to open justice where privacy is in issue. This is made amply clear in the *Practice Guidance*, at common law by applying the test of necessity, or by the fact that Article 6(1) right to open justice is an unqualified right from which there is no derogation, even if it interferes with a qualified right under Article 8.

102. Thirdly, I cannot discern how the private process of mediation to settle the libel action should have any bearing on this application. The comparable process to mediation for a tax appeal is the Alternative Dispute Resolution ('ADR') procedure whereby a taxpayer can resolve a dispute with HMRC without a hearing in open court, but ADR is not under the jurisdiction of the First-tier Tax Tribunal or its appellate courts. Insofar as the appellant is seeking for the appeal to be heard by this Tribunal, the principle of open justice should prevail, and can only be displaced as a matter of necessity.

103. Finally, the privacy issue concerns more aptly whether an anonymity order is necessary, and this is addressed separately in the decision.

(b) Confidentiality of information and reasonable expectation of privacy

104. In respect of the confidentiality issue, the relevant test to determine if the Convention right under Article 8 is engaged so as to require justification under Article 8(2) is set out by Henderson J in *Banerjee* at [26]. The test is *whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy.*

105. In *Banerjee*, the taxpayer requested anonymity of the High Court decision *after* a public hearing of her case. With reference to CPR 39.2(3), which provides that a hearing, or any part of it, may be in private if '(c) it involves confidential information (including information relating to personal financial matters) and publicity will damage that confidentiality', Henderson J stated that 'the court would clearly have had jurisdiction to entertain such an application' for anonymity and/or a hearing in private. However, he concluded that the application would not have succeeded.

106. Henderson J gave his reasoning why such confidential information would not have met the relevant test at [34]:

> '… in my judgment any such application would have been firmly rejected, on the basis that the fundamental principle of public justice enshrined in art 6(1) of the convention, and long established in the English common law, would have outweighed the very limited interference with Dr Banerjee's right to respect for her private life, and the very limited disclosure of information relating to her personal financial affairs, that a public hearing would entail.'

107. In his deliberation, Henderson J has weighed in the scales the conflicting rights of the taxpayer under Article 8 against the right under Article 6(1) of 'public justice', and concluded the latter outweighed the very limited interference with the former to justify any derogation from the principle of public justice.

(c) Confidential information broadly defined

108. In respect of confidential information broadly defined, namely the information of the appellant's financial matters that would be disclosed at a public hearing, the appellant's Convention right under Article 8 is similarly engaged as the taxpayer in *Banerjee*. Are there any truly exceptional circumstances in the present case such that the appellant's right to privacy and confidentiality might arguably have outweighed the principle of open justice?

109. In my judgment, there are no such truly exceptional circumstances to displace the principle of open justice. The substantive appeal concerns the deductibility of two items of expenditure in the appellant's Self-Assessment return for 2010-11. The focus is entirely on these two items of expenditure, and whether they can be found in fact and in law as having been incurred 'wholly and exclusively' for the purposes of the appellant's trade. It is not necessary to examine other entries on the tax return, such as the details of the appellant's turnover for the year, and the disputed amounts relate to only one tax year. Viewed objectively, 'the infringement of [the appellant's] privacy is very limited both in time and in extent' (*Banerjee* at [36]) to justify any claim of truly exceptional circumstances.

(d) Confidential information narrowly defined

110. In relation to the confidential information narrowly defined, namely only those details on the Confidential Schedule to the High Court Consent Order, the appellant does have a reasonable expectation of privacy.

111. In considering whether a hearing in private is then the only way to ensure that the appellant will not breach the confidential agreement, I have regard to the following aspects of the matter.

112. First, I am satisfied that the third element to the Tomlin Order (and referenced to a 'Confidential Schedule') has been read in open court. While the terms of the settlement are not in the public domain, the fact that there has been 'a contribution towards [the appellant's] costs of and occasioned by these proceedings' is firmly in the public domain.

113. Secondly, the crux of the matter is whether the legal expenses were incurred 'wholly and exclusively' for the purposes of the appellant's trade. What constitutes the appellant's business or the nature of his trade would seem to have more direct relevance than the confidential terms of the settlement in determining the deductibility of the legal expenses, (especially in the light of the appellant's own objection to HMRC's decision that has reference to the nature of the settlement award).

114. Thirdly, that there was a contribution to the legal costs is in the public domain. Insofar as the appellant's tax appeal needs to make reference to the fact of the settlement as in part a contribution to his legal costs, there can be no breach of confidentiality. Any reliance on this fact to argue the substantive case concerning the deductibility of the legal costs cannot be hindered by the hearing being in public.

115. Fourthly, insofar as the appellant intends to adduce evidence in this respect to support his substantive case, the details contained on the confidential schedule to the Tomlin Order can be submitted as evidence on paper, to be read by the trial Judge and by the parties only, without the document entering the public domain. (The documents can be specified and withheld form disclosure or publication under rule 14 of the Tribunal Rules.)

116. Fifthly, insofar as the facts contained in the confidential schedule are significant or material (which I doubt would be) in determining the case, the trial Judge can redact the details without any breach of confidentiality in the final decision.

Conclusion

117. The publicity issue raised by the appellant does not amount to 'special circumstances where publicity would prejudice the interests of justice' (Article 6(1) ECHR). There is no general exception to open justice where privacy or confidentiality is in issue (the *Practice Guidance*). The confidential information narrowly defined, and of which the appellant has a reasonable expectation to privacy, can be specified to ensure that it does not enter the public domain by procedural directions.

118. The person seeking to displace open justice 'must satisfy the Court that by nothing short of the exclusion of the public can justice be done' (*Scott v Scott*). Having considered all relevant aspects of the grounds in this application, I conclude that the facts of the case fall very far short of the stringent requirements to meet the test of necessity for any derogation from a public hearing.

Whether an anonymity order is necessary

119. The second aspect to the principle of open justice pertains to the reporting of the proceedings. A hearing in public can still be subject to an anonymity order that restricts the reporting of the proceedings. While the application is specifically for the hearing to be in private, I am aware that some of the grounds put forward in this application (such as the wider public interest issue) are more relevant to an application for an anonymity order. Having determined that the hearing should be in public, I now consider whether an anonymity order is necessary with reference to the issues of public interest and the protection of the individuals' right to privacy.

The general approach

120. Lord Woolf has spoken of 'the need to be vigilant' when he set out the general approach in granting anonymity in *R v Legal Aid Board* [1999] at page 977 E-G:

> ‘The need to be vigilant arises from the natural tendency for the general principle to be eroded and for exceptions to grow by accretion as the exceptions are applied by analogy to existing cases. This is the reason it is so important not to forget why proceedings are required to be subjected to the full glare of a public hearing. … If secrecy is restricted to those situations where justice would be frustrated if the cloak of anonymity is not provided, this reduces the risk of the sanction of contempt having to be invoked, with the expense and the interference with the administration of justice which this can involve.’

121. Despite the call to be vigilant, this growth by accretion that Lord Woolfe had warned against did happen. A decade later, when Lord Rodger gave his leading judgment in *Re Guardian News* in 2010, he observed with some compelling statistics that such ‘habit of anonymisation’ has become ‘so deeply ingrained’ that an anonymity order may be made by the court, ‘often by consent of both parties, without the court considering in any detail the basis or justification for it’, leading to ‘the recent efflorescence of anonymity orders’ (at [1], [2] and [22]).

122. These cautionary remarks should be firmly in the foreground for any judge faced with an application for an anonymity order. With this in mind, the general approach as stated in the *Practice Guidance* is that anonymity will only be granted where it is *strictly necessary*, and then only to that extent.

123. More detailed guidance can be found in the 1999 Court of Appeal decision of *R v Legal Aid Board*, on appeal of Kay J’s decision in refusing to grant an anonymity order save on an interim basis. Lord Woolf, giving the leading judgment, summarised the approach adopted by Kay J at [21] and listed nine factors relevant for consideration in determining any such application. The factors include: the extent of the restriction on disclosure; the nature of the proceedings; the identity of the party seeking the order; the reasonableness of the claim; distinction between the plaintiff, defendant and a witness in such a claim.

124. At the heart of any consideration in respect of an anonymity order is the interplay of rights between Articles 8 and 10. Lord Steyn’s helpful summary of the approach that has emerged from the House of Lords decision of *Campbell v MGN* is set out at [17] of *In re S (a child)* as follows:

> ‘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.’ (sub-para divisions added)

125. Both Articles 8 and 10 govern qualified rights, and as such they are on a par with each other; that is the reason why ‘neither article has as such precedence over the other’. However, when it comes to the interplay of rights between Articles 6(1) and 8

or 10, since Article 6(1) is an unqualified right, there can be no derogation of an unqualified right when it interferes with a qualified right under either Article 8 or 10.

126. In *A v BBC (Scotland),* Lord Reed stated at [46] the possible relevance of Article 8 to the derogation of Article 6(1) in the following terms:

> 'Article 8 may also be relevant. It protects the private lives of the parties, to which art 6(1) also refers, and in addition requires respect for the private lives of other persons who may be affected by legal proceedings, such as witnesses.'

127. Lord Reed continued at [49] by stating the approach to take where 'the conflict is between the media's rights under art 10 and an unqualified right of some other party, such as the rights guaranteed by arts 2, 3 and 6(1), *there can be no derogation from the latter*' (emphasis added).

128. In balancing competing Convention rights, it is crucial therefore to distinguish between qualified and unqualified rights because there can be no derogation from an unqualified right if it is interfering with a qualified right. In other words, a conflict between a qualified right on the one hand (such as Article 10) and an unqualified right (such as Article 6(1)) is resolved by interfering with the qualified right under Article 10, and not by derogating from the unqualified right under Article 6(1).

Appellant's submissions on protection of rights under Article 8

129. In addition to the appellant's own right to respect for private and family life, Mr Bartlett has stated that the rights of the appellant's children, especially his stepson, and of the appellant's ex-wife under Article 8 are also engaged, and that their rights can only be protected by a hearing in private.

130. It is not immediately obvious to the Tribunal to what extent the facts of the appellant's family life or the facts in connection with the libel action are of relevance to the substantive matter of the appeal.

131. Nevertheless, Mr Bartlett has put forward various grounds which seem to be referring to rights under Article 8: (1) the libel action was in defence of the appellant's reputation; (2) the publication of the settlement could be harmful to the welfare of a minor; (3) the appellant's ex-wife requested privacy of her conduct in the libel action.

132. Mr Bartlett's post-hearing submissions concluded by stating: 'Given that HMRC have agreed that here is no pressing public interest we would respectfully repeat the request that the proceedings be conducted in private.'

The appellant's position

(a) The public interest issue

133. In *Petrina v Romania*, the European Court has confirmed at para 19 that the right to protection of reputation is a right, which, as an element of private life, falls within the scope of Article 8. At para 40 of *Petrina v Romania*, the European Court has also suggested that where the publication concerns a question of 'general interest', Article 10(2) scarcely leaves any room for restrictions on freedom of expression.

134. Mr Bartlett has emphasised the lack of a wider public interest in the appellant's appeal to lend support to the application. This factor may be relevant to HMRC in considering whether they would oppose the application, but has little or no bearing on how the Tribunal determines this application. The Tribunal needs to decide for itself whether a case is of a wider public interest in the context of an anonymity application.

135. In *Banerjee*, the taxpayer sought anonymity after a hearing in pubic of her tax appeal, which concerned the deductibility of expenses for income tax purposes, same with the appellant's appeal. The application is refused, and one of the reasons for the refusal given by Henderson J at [35] is that taxation is 'a subject of particular sensitivity' that nearly always gives rise to a wider public interest, however mundane the substantive issues may seem:

> 'It is relevant to bear in mind, I think, that taxation always has been, and probably always will be, a subject of particular sensitivity both for the citizen and for the executive arm of government. It is an area where public and private interests intersect, if not collide; and for that reason there is nearly always a wider public interest potentially involved in even the most mundane seeming tax dispute. Nowhere is that more true, in my judgment, than in relation to the rules governing the deductibility of expenses for income tax.'

136. Contrary to Mr Bartlett's claim that the appeal has no pressing public interest, I have regard to what Henderson J said in *Banerjee* that the rules governing taxation directly affect the vast majority of taxpayers, and can be of wider significance which is not immediately apparent.

137. Mr Bartlett has also referred to the present appeal as not having any 'precedent setting' significance. Even if that is so, it does not follow that the case is of no wider public interest. Each case turns on its own facts, and whether it is of wider public interest is not a matter for Mr Bartlett alone to judge.

138. Furthermore, 'in tax cases the public interest generally requires the precise facts relevant to the decision to be a matter of public record, and not to be more or less heavily veiled by a process of redaction or anonymisation' (*Banerjee* at [35]). The precise facts that the appellant is a celebrity engaged in his line of business, for example, would seem to be the reasons giving rise to his claim that the improvement costs of the security gates were 'wholly and exclusively' incurred for his business. Whether that should be so cannot be said to be of no wider public interest.

(b) Appellant as the initiator of the proceedings

139. Against the right to respect for private and family life under Article 8 is the reasonable expectation of the press to freedom of expression under Article 10 of the ECHR. Both Articles 8 and 10 are qualified rights, and the balancing exercise with qualified rights is to apply an intense focus to the particular circumstances, and then carry out the ultimate balancing exercise on determining whether the interference with either right, and the extent of that interference, can be justified.

140. Any interference with Article 10 right on account of Article 8 right has a direct impact on the right under Article 6(1). The importance of the right 'to receive and impart information' in the administration of open justice is succinctly stated by Lord Reed in *A v BBC (Scotland)* at [26]:

> 'The connection between the principle of open justice and the reporting of court proceedings is not however merely functional. Since the rationale of the principle is that justice should be open to public scrutiny, and the media are the conduit through which most members of the public receive information about court proceedings, it follows that the principle of open justice is inextricably linked to the freedom of the media to report on court proceedings.'

141. In considering the appellant's position in any potential claim to anonymity, I have regard to what Lord Neuberger MR stated in *JIH v News Group* at [21], in sub-paragraph (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 or less.'

142. In *Re Guardian News* Lord Rodger articulated the reasons why due weight should be accorded to being able to name an individual in the reporting of court proceedings at [63]:

> 'What's in a name? "A lot", the press would answer. This is because stories about particular individuals are simply much more attractive to readers than stories about unidentified people. It is just human nature. … Writing stories which capture the attention of readers is a matter of reporting technique, and the European Court holds that article 10 protects not only the substance of ideas and information but also the form in which they are conveyed … A requirement to report it in some austere, abstract form, devoid of much of its human interest, could well mean that the report would not be read and the information would not be passed on.'

143. In *R v Legal Aid Board*, of the nine reasons Lord Woolf MR stated why Kay J had been correct in refusing to grant an anonymity order save on an interim basis, the eighth reason is of particular relevance, in that Lord Woolf drew a distinction between a plaintiff, a defendant and a third party, in their respective claim to anonymity. Concerning the plaintiff, Lord Woolf stated that it 'is not unreasonable to regard the person who initiates the proceedings as having accepted the normal incidence of the public nature of court proceedings' (at page 978).

144. Based on the authorities and the *Practice Guidance*, the appellant's position as a celebrity *and* the initiator of the proceedings can in no way justify anonymity being granted to the reporting.

(c) Appellant as a witness in the proceedings

145. I now turn to consider the appellant's position as a witness in these proceedings and his claim to anonymity. In observing the distinction of the different parties in court proceedings, Lord Woolf stated that a witness 'who has no interest in the proceedings has the strongest claim to be protected by the court if he or she will be prejudiced by publicity, since the courts and parties may depend on their co-operation' (at page 978). As a witness who has an interest in the proceedings, this strong claim to anonymity cannot be applicable to the appellant.

146. I next consider the appellant's position as a witness in the light of his Convention rights. In *A v BBC (Scotland)*, Lord Reed's analysis at [46] states the possible relevance of Article 8 to the derogation of Article 6(1) if 'it requires respect for the private lives of other persons who may be affected by legal proceedings, such as witnesses'.

147. While Article 8 may be relevant to Article 6(1), the derogation of the principle of open justice is when the unqualified rights under Articles 2 (right to life) or 3 (prohibition of torture) are also engaged. In Lord Reed's analysis at [45]:

> 'Articles 2 and 3 may for example apply where parties or witnesses are in physical danger. The rights guaranteed by those articles are, in this context, unqualified. The Convention therefore requires that proceedings must be organised in such a way that the interests protected by those articles are not unjustifiably imperilled.'

148. Are the appellant's circumstances as a witness truly exceptional to warrant the interference with Article 10 right by the grant of anonymity? In my judgment, while the appellant's Article 8 right are engaged, his circumstances are not of the kind in which the unqualified rights under Article 2 or 3 are also engaged, such as when a witness is giving evidence on matters touching on national security, or a witness whose identity needs to be protected to safeguard his or her personal safety, to justify any derogation from Article 6(1), or to interfere with the right to freedom of expression by the press under Article 10 with an anonymity order.

The child's right under Article 8

149. The case of *In re S (a child*) is of direct relevance to my consideration as regards the right of the appellant's children in these proceedings. The applicant in *In re S (a child*) was a child of eight years old, whose older brother had died of acute salt poisoning and the mother was to stand trial for murder. The guardian of the child applied for an injunction to restrain the publication by newspapers of the identity of the defendant in the murder trial in order to protect the privacy of her child. The defendant (the child's mother) waived her right to public justice under Article 6(1).

150. Giving the leading judgment, Lord Steyn stated at [23]:

> 'The House unanimously takes the view that since the 1998 Act [Human Rights 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 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.'

151. Lord Steyn's conclusion (at [27]) is that while Article 8.1 is engaged, 'none of the factors in Article 8.2 justifies the interference', and that '[t]he interference with article 8 rights, however distressing for the child, is not the same order when compared with cases of juveniles, who are directly involved in criminal trials.' The House of Lords decided by a majority that no injunction should be made restraining the publication by newspapers of the identity of the defendant in a murder trial in order to protect the privacy of her child, and that on balance, the rights under Article 10 outweigh the child's rights under Article 8.

152. One of Lord Steyn's considerations in refusing to grant an injunction is that 'without revealing the identity of the defendant [it] would be a very much disembodied trial' (at [34]). 'If the newspapers choose not to contest such an injunction, they are less likely to give prominence to reports of the trial.' In other words, the public interest in publishing the defendant's name outweighed the impact on the second son's private life.

153. In *In re S (a child)* even with the compelling expert evidence on the risks posed to the welfare of the child, it was not enough to confer anonymity on his mother standing trial for murder. The facts of the present case are nothing remotely comparable to those in *In re S (a child)* to merit a consideration of conferring anonymity to the appellant in order to protect his children's rights under Article 8.

154. In *V v T*, the interests of minor beneficiaries are involved. Morgan J reached his conclusion on whether to allow the hearing in private at [22] as follows:

> 'The parties have also submitted that a hearing in open court would lead to disclosure of the high value of the trust assets and of the identity of the beneficiaries and this would lead to a risk to the personal security of those beneficiaries. I have considered the evidence put forward in support of this submission and I regard it as very slender indeed. It does not begin to reach the standard of clear and cogent evidence which is required to justify a derogation from the open justice principle.'

155. In *V v T* the interests of the minor beneficiaries are at the centre of the substantive appeal concerning the variation of trusts. No derogation from a public hearing was granted but reporting restrictions by way of an anonymity order was made. The facts of the present appeal are very different from those in *V v T*, and the extent of interference with the children's privacy would be limited in scope, and incidental, rather than central, to the matters in dispute. I am not persuaded that a blanket anonymity order is proportionate to protect the privacy of the appellant's children. I would add that the present application shares the same defect as that

observed in *V v T*; insofar as the evidence put forward in support of this application is concerned, it is very slender indeed.

The ex-wife's position

156. The appellant's ex-wife is a public figure in her own right. The 'essential question' the trial judge Morland J asked in *Campbell v MGM* is apt for consideration in the present context:

> '… whether even if a public figure which includes an international celebrity, such as Miss Naomi Campbell, courts and expects media exposure, she is left with a residual area of privacy which the court should protect if its revelation would amount to a breach of confidentiality.'

157. The *Campbell* case reached the House of Lords in 2004, and Lord Hoffmann (dissenting, with Lord Nicholls, dismissed the appeal) observed Miss Campbell's relationship with the media in the following terms:

> 'She and they have for many years both fed upon each other. She has given them stories to sell their papers and they have given her publicity to promote her career. This does not deprive Ms Campbell of the right to privacy in respect of areas of her life which she has not chosen to make public.'

158. To be a celebrity or a public figure is to court or expect media exposure. It is no difference in the case of the appellant's ex-wife, and indeed it would seem that her own relationship with the child at the centre of the libel action is not infrequently brought up and discussed by herself with the media.

159. What is relevant to the present application is that the appellant's relationships with his ex-wife and with his stepson have been in the public domain. The allegedly libellous statements were made in public on television and the media. The question for consideration is therefore whether the appellant has the need to refer to intricate details of his relationship with his ex-wife, or the conduct of his ex-wife during the libel action, or of his ex-wife's relationship with his stepson, to the extent that it interferes with the ex-wife's 'residual area of privacy which the court should protect'. The reference to these relationships or to aspects of the libel action would appear to be incidental and limited in scope to the substantive matter of the appeal, and can be withheld from being disclosed or published under rule 14 by a separate application if necessary. Nothing in Mr Bartlett's submissions has revealed any compelling circumstances of the kind that can withstand the vigour with which the court has to exercise in scrutinising an application for an anonymity order.

Conclusion

160. Anonymity can only be granted where it is strictly necessary. There are no exceptional or compelling circumstances to justify anonymity, given that the unqualified rights under Articles 2 or 3 are not engaged, and the potential interference with the appellant's right to respect for his private and family life, and his ex-wife's

right to privacy would seem to be limited in scope. Furthermore, I have regard to proportionality, and consider that anonymity is a disproportionate measure to safeguard any potential interference with the individuals' Article 8 rights, especially in view of the alternative procedural measures that can be put in place to achieve the purpose, which the appellant is at liberty to apply for directions. Two of such measures are related in the next section.

Alternative procedural measures

To restrict reporting of the proceedings

161. As regards the concern over the potential interest of the press in this tax appeal, the Tribunal has taken into account the legislative measures in place to regulate the reporting of the proceedings under the Contempt of Court Act 1981. Section 4(1) lays upon the press a professional obligation to give 'a fair and accurate report of legal proceedings held in public' if 'published contemporaneously and in good faith'. That obligation is equally laid upon those referred to by Mr Bartlett as the 'gossip magazine', or the 'paparazzi type'.

162. If concern remains that some media reporting of the proceedings may not adhere to the standards laid down by s 4(1) of CCA 1981, and that such reporting could be inimical to the course of justice, and could amount to 'special circumstances where publicity would prejudice the interests of justice' as stipulated under Article 6(1), the right to freedom of expression can be restricted in public interest by reference to the limitations expressed under Article 10(2), which includes:

> '… for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'

163. Article 10(2) therefore specifically identifies 'maintaining the authority and impartiality of the judiciary' as a legitimate aim which may justify interference with the right to freedom of expression, and is expressly provided for by section 12 of the Human Rights Act.

164. The interference with the media's right in reporting the proceedings should be no greater than necessary in recognition of 'the important role of the media in a democratic society in scrutinising the administration of justice generally', and the role of the media 'as the conduit of information about particular proceedings which may be of public interest' (*A v BBC (Scotland)* at [49]).

165. An order under s 4(2) of CCA 1981 for an interim period can be made to restrict the reporting of the proceedings. The decision of the Court of Appeal in *Re Times Newspapers* confirms at [21] that s 4(2) permits only an order to postpone any publication of the proceedings, but is not to prohibit publication indefinitely:

> 'We find it impossible to say that the repetition of that order, with indefinite effect, after the trial has been completed fell within the jurisdiction conferred by that section. Accordingly, that order must be quashed.'

To withhold confidential information

166. Rule 14 of the Tribunal Rules prohibits the disclosure or publication of specified documents. To ensure that confidentiality of the Schedule to the Consent Order is not breached, the document can be withheld from the public domain under rule 14.

167. The guidance from Leveson LJ in *Ambrosiadou v Coward* at [54] can be readily adopted to manage this part of the proceedings without resorting to a hearing in private or an anonymity order:

> '… it is almost invariably possible to conduct a hearing of this nature in public and in such a way as demonstrates adherence to the principle of open justice, while at the same time ensuring that truly confidential material is referenced on paper and does not enter the public domain. When cases of this nature arise, therefore, it is critically important that parties conducting them prepare documents (including submissions) in a way that facilitates that approach. Without being prescriptive but by way of example, this could involve placing confidential material in an annex which the court can readily identify and order not to be disclosed.'

168. The withholding of the confidential information as narrowly defined in the present case would seem to be 'consistently with Lord Neuberger's requirement of the degree of privacy being kept to a minimum', and '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*' (*A v BBC (Scotland)* at [32], emphasis added).

Decision

169. The application for the hearing in private is refused.

170. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

DR HEIDI POON
TRIBUNAL JUDGE

RELEASE DATE: 24 MARCH 2017

This decision was first released with the appellant anonymised as 'Mr D', and has been republished with the anonymisation removed, together with amendments made under Rule 37 to correct accidental typographical slips.