Neutral Citation Number: [2022] EWHC 1871 (QB)

Case No: QB-2022-002007

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MEDIA & COMMUNICATIONS LIST

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 July 2022

Before :

THE HONOURABLE MR JUSTICE NICKLIN

- -

Between :

Anthony Dixon	**Claimant**
- and -	
North Bristol NHS Trust	**Defendant**

- -
- -

Nicola Newbegin and **Madeline Stanley** (instructed by **Clyde & Co LLP**) for the **Claimant**
Jeremy Hyam QC (instructed by **DAC Beachcroft LLP**) for the **Defendant**

Hearing date: 14 July 2022

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Approved Judgment

(Handed down initially in private on 19 July 2022 pending appeal.
Handed down in public on 26 July 2022 following confirmation,
on 25 July 2022, that the Claimant did not intend to appeal.)

The Honourable Mr Justice Nicklin :

1. This judgment deals with an application by the Claimant seeking the anonymisation of the parties in this litigation and corresponding reporting restrictions preventing the parties being identified ("the Anonymity Application").

2. For reasons that are explained in this judgment, I have refused the Anonymity Application. Unless my decision is reversed on appeal, this judgment will be handed down publicly, removing the anonymity that was granted temporarily (see [17] below).

3. I was strictly satisfied that the hearing on 14 July 2022 had to be heard in private. I explained my reasons at the hearing, but in summary, a public hearing would have immediately defeated the Anonymity Application mainly as a result of the pre-existing media coverage (see [6]-[7] below).

A: The Parties

4. The Defendant is an NHS Trust that provides hospital and community healthcare in the areas of Bristol, South Gloucestershire and North Somerset

5. The Claimant is a general, laparoscopic, and colorectal surgeon. He was employed by the Defendant as a consultant colorectal surgeon from 1 October 1996 until the termination of his employment by the Defendant with effect from 24 June 2019. In addition, the Claimant had practising privileges with, and undertook private work as a consultant colorectal surgeon at the Spire Bristol Hospital between 1 October 1996 and 22 September 2017.

B: Background to the dispute

6. In his role as a colorectal surgeon, between 2007 and 2017, the Claimant performed a surgical procedure called laparoscopic ventral mesh rectopexy ("LVMR") on a large number of patients. Concerns were expressed as to these procedures and, in May 2017, the Defendant launched an investigation of the Claimant's performance. Pending that investigation, in August 2017, the Claimant was excluded from practice by the Defendant.

7. The easiest way of setting out further details of the background, and because one of the issues that I shall need to analyse, when considering the Anonymity Application, is the extent to which details relating to the dispute have been published in the public domain, is for me to set out a relatively recent article that appeared in *The Guardian* on 26 May 2022 (and which remains available online):

> "**Bristol surgeon 'harmed' 203 women with unnecessary operations**
>
> **Anthony Dixon performed pelvic floor surgery instead of offering less invasive alternative treatments**
>
> More than 200 women were harmed when a rogue surgeon carried out operations on them unnecessarily, an NHS inquiry has found.

Some of the women were left with life-changing physical problems or unable to work, while many also suffered trauma and serious psychological harm as a result.

Overall, 203 women on whom Anthony Dixon performed procedures between 2007 and 2017 came to harm, according to a review by the North Bristol NHS trust (NBT). Dixon, who for years was Britain's most influential pelvic surgeon, worked for both the trust and the private Spire hospital in the city.

In 2017, NBT launched a review of Dixon's performance and suspended him after dozens of women he had performed procedures on complained that they had experienced appalling consequences, including unmanageable pain and incontinence. The Guardian revealed in late 2017 that 100 women were suing him for medical negligence. Some cases have since been settled, but dozens are ongoing.

NBT sacked Dixon in 2019 and he is currently banned from practising in the UK.

During the review, 378 women were recalled and asked to set out their dealings with Dixon. All had undergone a procedure called laparoscopic ventral mesh rectopexy (LVMR), in which plastic mesh is inserted to repair weakened tissue in the pelvic floor.

In papers presented to NBT's board on Thursday, board members were told that the inquiry had concluded. 'The trust has notified 203 NHS patients that, although their LVMR operation was carried out satisfactorily, they should have been offered alternative treatments before proceeding to surgery. We have defined these patients as suffering 'harm' as a result,' it said.

The trust set up a clinical advisory group of experts to assess what had happened with each of the 378 women. It found that of the 218 women Dixon had operated on at Southmead hospital, 110 suffered harm. And among another 169 NHS patients on whom he performed LVMR at the Spire hospital, 93 came to harm.

Another 175 women he treated at both facilities suffered no harm and there were also nine other cases in which the clinical advisory group was unable to reach a conclusion.

Luke Trevorrow, a medical negligence specialist solicitor at Irwin Mitchell lawyers, one of the firms representing Dixon's victims, said: 'For many years patients have had serious concerns as to whether procedures they underwent were appropriate. Sadly the trust's own findings have now vindicated these fears.

'This latest information is incredibly concerning and has caused a great deal of distress for our clients, many of whom continue to experience physical and psychological problems following their surgery.'

The outcome of the inquiry was first reported by the BBC's west health correspondent, Matthew Hill. The trust summarised the findings in a five-page update it included in the 157 pages of papers its board were due to discuss on Thursday. NBT did not alert the media that it was finally publishing details of a major probe it had taken almost five years to complete.

> Annette Whiting, 62, from Bristol, one of those on whom Dixon performed LVMR, told the BBC: 'I felt violated. Beyond angry, beyond upset.
>
> 'It affects your everyday life. Your body aches, you have to run to the toilet, you've got no control over it whatsoever.'
>
> The trust said that with regard to the 203 patients 'harm is defined as undergoing an operation that may not have been required, where other less invasive options could have been offered first, even when the LVMR procedure was performed to the appropriate, clinical standard.'
>
> NBT said it was 'extremely sorry' for the suffering Dixon had inflicted by doing LVMRs.
>
> A spokesperson for the General Medical Council, which regulates the medical profession, confirmed that Dixon does not currently have a licence to practise medicine 'pending [the] conclusion of fitness to practise investigations'."

The underlined parts of the article contained hyperlinks to further articles that had been published by *The Guardian*, on 24 November 2017, and the BBC on 26 May 2022 (which also remain accessible online).

8. In addition to *The Guardian* article quoted above, there has been significant media reporting of the investigation into the Claimant, his suspension and later dismissal by the Defendant. Some of the media coverage has been exhibited to a witness statement of the Claimant's solicitor (see [30] below). Articles have appeared in several local and national newspapers together with media reports on BBC and ITV news. Of particular significance are those, from June 2019, reporting the termination of the Claimant's employment with the Defendant and, in May 2022, in similar terms to *The Guardian* article.

9. The recent reporting, in May 2022, was largely a result of the Defendant releasing publicly a report, titled "*Conclusion of the review and recall of Laparoscopic Ventral Mesh Rectopexy (LVMR) patients*", which named the Claimant and was included in papers for a meeting of the Board of the Defendant on 26 May 2022. The Board papers are published and made available to the public on the Defendant's website.

10. As noted in *The Guardian* article, a large number of former patients of the Claimant have brought (or threatened) civil claims arising from their treatment. The Claimant is also currently facing fitness to practise proceedings brought by the General Medical Council. Pending their resolution, his ability to practise is subject to conditions. He also currently does not have a licence to practise. The GMC hearing is schedule for the Autumn 2022.

11. Since it began its initial investigation into the concerns raised about the Defendant's clinical practice, the Defendant has sent several letters to former patients of the Claimant to give them information about the investigation. That was done, primarily to discharge what the Defendant believed was its duty of candour to those who had raised concerns or those who the Defendant had identified may also have been affected (see further [36] below).

12. On 6 May 2022, the Defendant sent a letter to the Claimant's solicitors notifying the Claimant that it proposed to make further disclosures in the context of actual and threatened litigation. The letter explained:

> "The Trust has considered its duties under the CPR in terms of pre action disclosure, as this is clearly now an issue sitting within litigation (having moved on from duty of candour issues). We now consider that [Document X] in its full content, is potentially relevant to the claims being brought against [the Defendant], where the claimants have undergone pelvic surgery by [the Claimant]. [Document X is] disclosable in the claims process unless privileged. [Document X] is not covered by legal advice privilege, litigation privilege or public interest immunity. In our view [Document X] is central to the issues in the litigation, including for those claimants that were not part of the … process [that led to Document X]. The documents are relevant because they go to credibility, propensity and how [the Claimant] conducted himself professionally. The Trust has a continuing duty of disclosure. [The terms of CPR 31.16 were set out]
>
> In addition to the above pre-action disclosure obligations, we can confirm that one of the relevant cases has now been issued and proceedings served, and therefore disclosure will shortly arise, and [Document X] and relevant MHPS [Maintaining High Professional Standards] documents will be disclosed via that procedural step in any event.
>
> We consider that the Trust has taken reasonable steps to address the rights of the patients reviewed in the … process [that led to Document X] and the MHPS process, by undertaking the disclosure of extracts to them, and securing relevant consents. The Trust continues with that process, ensuring all relevant aspects of [Document X] where the [relevant] cohort of patients are being discussed, and relevant extracts from the MHPS process, are shared with those patients.
>
> We therefore write to advise you that, in the context of the claims being brought against the [Defendant], where the claimants have undergone pelvic surgery by [the Claimant] it is the Trust's intention to now disclose [Document X] in its entirety, save for any discrete sentences or paragraphs where the patient whose care is being discussed, has not consented for that disclosure at this time. The Trust also intends to disclose relevant aspects of the MHPS process, including the MHPS outcome letter.
>
> The Trust considered you would wish to be aware of this intended step at this time. We can advise that this step will be taken 7 days from the date of this letter, which is being emailed to you. The disclosure is intended to address the Trust's duties under the CPR as described above, and to enable the progression of a number of cases where claims have been brought, including those brought by patients involved in the process."

13. The Claimant's solicitors objected to the course the Defendant was intending to take. On 11 May 2022, they sent a letter asking for further information about the proposed disclosure and sought an assurance that there would be no disclosure until the Claimant had had a proper opportunity to make clear his objections. The specific information sought by the Claimant's solicitors was:

> "(1) by whom the requests for information/disclosure have been made;

(2) to whom is it intended that disclosure may be made/shared with;

(3) what exactly the Trust is proposing to disclose, in particular, what extracts it proposes to disclose; [and]

(4) provide copies of the pleading in cases where it is said that disclosure is required."

14. On 23 May 2022, the Defendant answered the Claimant's questions:

"(1) Claimant's (sic) solicitors representing claimants bringing clinical negligence claims regarding care provided by [the Claimant] whilst he was an employee of [the Defendant] as previously advised.

(2) See above

(3) The Trust intends to disclose [Document X] in its entirety including any appendices save for where extracts relate to any patients who have not given consent to this disclosure. We can confirm that this is three patients at this time. The Trust also intends to disclose the MHPS outcome letter (minus reference to one patient who has not yet consented to their information being shared).

(4) We do not intend to provide copies of pleadings. [The Claimant] is not a party to the matters in question."

The letter concluded:

"We are satisfied that we can disclose these documents within the claims process. [The Claimant] and your firm as his legal representatives have had these materials for a number of years and have been on notice since the end of 2020 at the very latest, that there would be an intended process of disclosure within the claims setting, of these key materials. This direction of travel is not unexpected.

In the event you are instructed to seek to prevent legitimate disclosure of these materials in the claims process then please serve any relevant proceedings upon DAC Beachcroft the Trust's solicitors…"

15. The Claimant indicated that he intended to bring a claim to prevent the proposed disclosure. There was some discussion between the parties as to the mechanics of the litigation, including discussion of seeking an order for expedition from the Court rather than the Claimant proceeding by way of application for an interim injunction. The Defendant agreed that it would not make any disclosure pending the Court proceedings.

C: The Claim

16. Prior to issue of the Claim Form, on 27 June 2022, the Claimant issued an Application Notice seeking orders anonymising the parties, for reporting restrictions to enforce the anonymity and corresponding orders limiting third party access to documents on the Court file ("the Anonymity Application") (see [27]-[28] below).

17. On 28 June 2022, I made an order directing that the Anonymity Action would be heard by a Judge in the week commencing 11 July 2022. I gave directions for the service of any further evidence in support of the Anonymity Application by the Claimant, and for evidence in answer by the Defendant. Pending the hearing of the Anonymity Application, I imposed temporary orders anonymising the parties, reporting restrictions and third-party access to the Court file. I granted the Claimant permission to issue the Claim Form using initials instead of the parties' names and giving the parties' addresses as care of their solicitors.

18. Versions of the Claim Form and the Particulars of Claim were provided shortly after the Anonymity Application was issued. However, as at the close of business on Friday 15 July 2022, the Claimant had not yet successfully issued his Claim Form. There appear to have been some difficulties. I made clear, on Monday 18 July 2022, that the Claim Form must be properly issued and served. It is only by these steps being taken that the Court's jurisdiction over the Defendant and the claim is established.

19. The (now issued) Claim Form seeks "*a declaration and injunction against the Defendant to prevent a breach of contract, breach of Data Protection Act 2018/GDPR, breach of confidence, misuses (sic) of private information and breach of Article 8.*"

20. The original Particulars of Claim have been superseded (without objection) with a revised pleading that separates the statement of case into the body of the Particulars of Claim, which contains information about the claim which can be open to public inspection, and a confidential schedule. Statements of case structured in this way are commonplace in proceedings in which the claimant seeks remedies in respect of threatened (or actual) breach of confidence/misuse of private information (and similar claims). Were this expedient not adopted, then public access to statements of case would risk destroying that which the claimant was seeking, by the proceedings, to protect.

21. A further revised version of the Particulars of Claim was produced shortly prior to the hearing (again without objection from the Defendant) after the Claimant's advisors concluded, upon reflection, that material contained in the body of the Particulars of Claim ought to be moved to the confidential schedule. Although the claim seeks relief on the several grounds identified in the Claim Form, the Claimant's essential complaint that the disclosure proposed by the Defendant would be a breach of confidence. For a proper understanding of the Claimant's claim, it is necessary to consider the Particulars of Claim in some detail. The following are the key points in the Claimant's case, taken from the open section of the Particulars of Claim (i.e. information which the Claimant does not contend is confidential):

    i) All NHS Trusts are required to implement the guidance contained in Maintaining High Professional Standards in the Modern NHS 2005 ("MHPS"). Among other things, the MHPS sets out the process to be used by NHS Trusts when there are concerns about a doctor's conduct, capability or health. The Defendant has adopted an implemented MHPS.

    ii) MHPS investigations are subject to confidentiality restrictions, albeit recognised that information may need to be disclosed, for example for the protection of the public. The Claimant contends that "*effective participation of all those involved [in a MHPS investigation] is likely to be hindered if they know there is a risk*

that the information provided as part of the process may be made public at a later date, save as part of regulatory or other similar processes."

iii) The Claimant contends that there are implied terms of confidentiality in his contract of employment, including that

a) "*… the Defendant will not disclose personal and/or confidential information relating to the Claimant without the Claimant's consent. It is averred that any facts and matters relating to any internal investigations/investigations into the Claimant's practice and/or conduct constitute personal and/or confidential information*"; and

b) "*the Defendant will keep all facts and matters relating to any internal investigations/investigations into the Claimant's practice confidential*".

iv) On 24 May 2017, the Claimant attended a meeting with the Deputy Medical Director of the Defendant. At that meeting the Claimant was informed that the Defendant had received several complaints about the diagnostic and consent processes followed by the Claimant. The Claimant was informed that he was restricted from all clinical practice with the Defendant.

v) On 30 May 2017, the Claimant was advised that the Defendant would be conducting a MHPS investigation into the complaints.

vi) On 14 August 2017, the Claimant was excluded from all practice by the Defendant.

vii) On 3 October 2018, the MHPS investigation report was produced.

viii) The Claimant attended a hearing held by the Defendant between 3-7 June 2019.

ix) Following that, the Claimant's employment with the Defendant was terminated.

22. In the revised version of the Particulars of Claim all details about what happened after the conclusion of the MHPS investigation, save the fact that it led to the Claimant's employment being terminated, have been moved to the confidential schedule. At the hearing, Ms Newbegin realistically accepted that it would be common knowledge (at least amongst those familiar with NHS procedures) that, following the hearing, the Claimant would have been sent an MHPS outcome letter. She therefore accepted that the fact of the existence of the MHPS outcome letter is not something that the Claimant can claim is confidential. She does, however, maintain that the contents of the MHPS outcome letter are confidential and that the MHPS outcome letter is one of the two documents the threatened disclosure of which the Claimant seeks to prevent.

23. The other document the disclosure of which the Claimant seeks to prevent is a document I have described as Document X. This was generated during the period of Defendant's MHPS investigation. The Claimant contends both the circumstances in which this document came into existence and its contents are confidential and that he is entitled to prevent the Defendant from disclosing it in the manner proposed. The Defendant argued, at the hearing of the Anonymity Application, that the circumstances in which Document X came into existence are apparent from one newspaper article. It is not

appropriate for me, at this stage, to reach any view as to whether the Defendant is correct about this. Presently, I am concerned solely with the Anonymity Application, and this is a public judgment, so I shall say nothing further about Document X.

24. In summary, therefore, the Claimant contends that it would be a breach of confidence (amongst other claims) for the Defendant to make the proposed disclosure of the following three things:

    i) what Document X is and the circumstances in which it came into existence;

    ii) the contents of the Document X; and

    iii) the contents of the MHPS outcome letter.

    I shall refer to these collectively as the "Confidential Information".

25. Although the Defendant has not yet filed a Defence in the proceedings, its position has been set out in the evidence for, and submissions at, the hearing of the Anonymity Application. In summary, whilst the Defendant does not dispute that some of the contents of the two documents are likely to be confidential, it argues that the proposed disclosure of the documents would be lawful; indeed, the Defendant contends that it is its duty to disclose. As already noted (see [23] above), the Defendant disputes that the circumstances in which Document X came into existence is confidential. That would be an issue to be resolved in the claim.

26. In summary, therefore, the issue in these proceedings is whether the Claimant should be entitled to restrain the proposed disclosure of the Confidential Information on any, or all, of the legal grounds upon which he relies. The resolution of this question would take place ultimately at a trial if not resolved sooner. This judgment concerns only the Anonymity Application. I have set out the wider parameters of the litigation because they have an important bearing on the Anonymity Application.

D: Anonymity Application

27. As I have noted (see [16] above), the Anonymity Application was issued on 27 June 2022.

28. The Anonymity Application is made under s.11 Contempt of Court Act 1981, s.6 Human Rights Act 1998, and CPR 5.4A to 5.4D and 39.2 At the hearing, the Claimant sought an order in the following terms:

    "(1) that the identities of the Claimant and the Defendant shall not be disclosed;

    (2) there be substituted for all purposes of this case, in place of references to the Claimant by name and whether orally or in writing, references to 'EGC'. Likewise the Defendant shall be referred to as 'PGF NHS Trust';

    (3) that the Claimant and Defendant be described in all statements of case or other documents to be filed or served in the proceedings and in any judgment or order in the proceedings and in any report of the proceedings by the press or otherwise as 'EGC' and 'PGF NHS Trust' respectively;

(4) to the extent necessary to protect the Claimant's and Defendant's identities, any other references, whether to persons or places or otherwise, be adjusted appropriately, with permission to the parties to apply in default of agreement as to the manner of such adjustments;

(5) that the address of the Claimant and of the Defendant be stated in all statements of case and other documents to be filed or served in the proceedings as the address of the Claimant's and Defendant's solicitors respectively;

…

Court Files

(7) that the unredacted Claim Form and the unredacted Particulars of Claim be replaced by the redacted Claim Form and the redacted Particulars of Claim;

(8) the unredacted Claim Form and the unredacted Particulars of Claim are to be placed on the Court file marked '*not to be opened without the permission of a Judge, Master or District Judge of the Queen's Bench Division*';

…

(10) that a non-party may not inspect or obtain a copy of either the unredacted Claim Form or the unredacted Particulars of Claim from either the Court paper files or digital files without the permission of a Master or High Court Judge. Any application for such permission must be made on 14 days' notice to the Claimant's solicitor, and the Court will effect service;

(11) the court's paper and digital files are to be retained by the Court and marked '*Anonymised*';

Reporting Restriction

(12) that reporting restrictions apply as to the disclosing of any information that may lead to the subsequent identification of the Claimant or Defendant. The publication of the name and address of the Claimant or the Defendant or of any member of the Claimant's immediate family is prohibited.

(13) that reporting restrictions also apply as to the disclosing of information contained in the documents, the confidential and private nature of which the Claimant is seeking to protect by these proceedings.

(12) that any non-party affected by this Order may apply on notice to all parties to have this Order set aside or varied…"

(1) Evidence

29. When issued, the Anonymity Application was supported by the witness statement of the Claimant's solicitor, Jane Lang, dated 27 June 2022. The grounds on which the Claimant sought anonymisation (and associated orders) were identified, and explained, by Ms Lang as follows:

i) Without these orders being granted, the bringing of the proceedings would defeat their purpose; in other words, the litigation process would destroy that which the Claimant seeks to protect. In particular, without appropriate restrictions on access to the Court file, the Confidential Information (or parts of it) would be open to public inspection and the confidentiality that the Claimant is seeking to protect thereby lost.

ii) It would be inevitable that, at any interim and/or final hearing, there would be need to discuss the Confidential Information in open court which would also threaten to destroy the confidence in the information. This was not a case where the Court would be able to adopt the expedient (as suggested in ***Various Claimants -v- Independent Parliamentary Standards Authority*** **[2022] EMLR 4**) of using confidential schedules to statements of case and witness statements to ensure that the confidential information does not enter the public domain as a result of the proceedings themselves.

iii) Anonymisation of the Claimant (and the making of associated orders to enforce that anonymity) are necessary to protect the Claimant's Article 2 and Article 8 rights. As to the former, Ms Lang stated:

> "… the Claimant's Article 2 rights are potentially engaged. The Claimant suffered significant distress as a result of his initial and ongoing exclusion from practice by the Defendant… and the MHPS process, and the media coverage of the same. He was diagnosed with anxiety and depression. In or around 2017, he contemplated suicide as a result of the situation he faced and the negative reporting of the same in the media. The purported disclosure by the Defendant of [Document X and the MHPS outcome letter] puts the Claimant's health at risk, potentially including his Article 2 rights. Without the proposed orders, there is also a risk that the proceedings would themselves put the Claimant's Article 2 rights at risk. I intend to file a further statement with medical evidence in respect of the same"

As to the Claimant's Article 8 rights, Ms Lang stated:

> "… A right to practise one's profession engages Article 8 (***Volkov -v- Ukraine*** **[2013] IRLR 840**) as does the right to protect one's professional reputation (***Mikolajova -v- Slovakia*** **[2011] EHWC 4479/03** (sic) at §43… Without the granting of the above orders,… the bringing of the proceeding will interfere with the very Article 8 rights that the Claimant is seeking to protect and will of themselves lead to an interference with his article 8 rights by the making public of criticisms about him and his practice."

30. Two further statements have been filed on behalf of the Claimant. The first was a further witness statement of Ms Lang, dated 4 July 2022. This exhibited some of the existing media coverage relating to the Claimant that had been located by a trainee solicitor who was tasked with identifying whether there was any reference to the Confidential Information in the public domain. I have already referred to some of the articles that were identified by this search (see [7]-[8] above).

31. The second was a witness statement from the Claimant, also dated 4 July 2022. In this statement, the Claimant recounts the events of 2017 and their impact on him. Following the meeting on 24 May 2017, he had felt anxious and had disturbed sleep. He sought

medical advice. Newspaper reports led to him feeling "*extremely anxious with surges of adrenaline*" and to have difficulty sleeping. The Claimant states that he did have suicidal thoughts in 2017, but that he had "*sufficient insight at the time not to go through with this*". He says that "*following further media interest from the BBC and national newspapers my condition rapidly deteriorated*" and suicidal thoughts returned. Medication that was prescribed for the Claimant improved his mood. By the end of May 2019, he did not need any further medication.

32. As to the media coverage, the Claimant stated:

> "Throughout the last few years, there has been much press coverage of the complaints – with patients being interviewed by members of the press and the BBC broadcasting documentaries… It seems to me that every time there is some new information from the Defendant, the private hospital or something raised by a patient or their solicitors, the BBC reporter contacts me for a comment. I am also contacted by *The Guardian* for comments. My understanding is that the contents of [Document X and the MHPS outcome letter] have not been made public… I would be devastated if these were to be made public. It would be like returning to 2017 again."

33. As to the impact on him more generally, the Claimant added:

> "Since the question of the disclosure of [Document X] and the MHPS outcome letter was raised again by the Defendant in May 2022, I have once again become anxious, my sleep pattern is very poor and I worry that I am probably becoming depressed again… In addition, the Defendant's decision to seek to disclosure (sic) [Document X] and MHPS outcome [letter] at a time when my GMC proceedings are due to start in the Autumn has resulted in an additional amount of distress and anxiety. I need to be able to focus on preparing for those proceedings and the prospect of the contents of [Document X] in particular becoming public is impacting on my ability to prepare for that hearing…
>
> I am also most concerned about the effect of publication of [Document X] and the MHPS outcome [letter] would have on me… If the contents… were to be made public, I would be devastated and I worry that I might find myself back in the same position in which I found myself in 2017, when I contemplated suicide.
>
> I am also worried that publicity about my application to prevent publication of these documents will have a similarly adverse effect on my health. I cannot say whether [it] would be such as to result in me contemplating suicide again, but the thought of publicity is already having a negative impact on my health.
>
> I am also worried that publicity would impact on my ability to cope with the upcoming GMC hearing, particularly if the contents of [Document X] were made public, but also the impact of being named in newspapers and on television."

34. Exhibited to the Claimant's witness statement was a letter from his GP, dated 29 June 2022, which included extracts from his GP records. The letter stated:

> "Reviewing his electronic records, the last time that [the Claimant] was issued [identified medication] was on 27.3.19 and [identified medication] on 24.5.19. [The Claimant] is not taking any regular medication and the last consultation regarding depression was on 21.5.18 as below."

I will not set out the detail of the medical records, as they contain sensitive information that it is not necessary to set out in this judgment. It is sufficient to note that there are no entries suggesting that the Claimant was having any suicidal thoughts in the seven appointments he had with his GP between 2 June 2017 and 21 May 2018.

35. For its part, the Defendant has filed a witness statement, dated 6 July 2022, from its solicitor Corinne Slingo. The initial section of Ms Slingo's witness statement strayed slightly into making submissions on the law, but it did include a section which identified the extent of material concerning the Claimant and the MHPS investigation that has come into the public domain as a result of media reporting.

36. In respect of limited disclosure that had already been made of Document X and the MHPS outcome letter, Ms Slingo stated:

> "… the Defendant wrote during 2021, to [certain categories of patients] to make them aware of the findings… in so far as they related to the care of those individual patients. This was in satisfaction of the Defendant's duty of candour to such patients, both in general transparency pursuant to Regulation 20(1) of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 ('the Regulations'), and where the requisite harm has occurred, pursuant to their duty under Regulations 20(2) of the Regulations. In the process of contacting those patients, the Defendant also shared extracts of [Document X]… and/or a summary of findings from the MHPS outcome letter."

Exhibited to the witness statement was an example of such a disclosure letter to a patient together with an extract from Document X.

37. Ms Slingo's witness statement concluded with a section setting out the Defendant's position as follows:

> "… the Defendant does not accept that the purpose of the injunction to prevent disclosure of [Document X] and the MHPS outcome letter would be defeated if the application for anonymity and reporting restrictions were not granted. It is already a matter of public knowledge that the Claimant was dismissed by the Trust following an … investigation… Extracts of [Document X] have already been disclosed to patients … within the Defendant's duty of candour steps. The fact that [Document X] exists… is also known expressly (patients who have received extracts) or by implication from the press reporting.
>
> So far as strictly necessary, a reporting restriction could be imposed by the Court in relation to particular contents of [Document X or the MHPS outcome letter] (although the Defendant does not consider any such order is likely to be necessary since patient names are anonymised), but the fact that [the documents] are in existence and may be negative to the Claimant is not (when considering the criteria for such orders) a justification for the anonymity application as drafted or an order for reporting restrictions in the wide terms of the draft order sought.
>
> While it is evident from the application that the Claimant does not wish it to be publicly known that he is seeking to prevent disclosure by the NHS Defendant of the MHPS [outcome] letter and [Document X] to patients…, the Defendant considers that there is a significant public interest in:

(1) the nature of the application itself (both the anonymity application and the underlying injunctive relief application); and

(2) how the application is determined by the Court. Given the public responsibilities of the NHS Defendant, with regard to its duty of candour and with regard to protecting patients from harm, and the role of the NHS Defendant in clinical negligence claims brought by patients affected by the Claimant's care, and compliance with CPR requirements (both pre-action and issued cases), the Defendant considers that such applications should not be conducted in secret."

38. Finally, on 11 July 2022, the Claimant issued an Application Notice seeking permission to file and rely upon further evidence in support of the Anonymity Application, including principally a medical report on the Claimant, dated 11 July 2022, from Dr Pablo Vandenabeele, a consultant forensic psychiatrist. An application was necessary because the Order of 28 June 2022 provided a date by which the Claimant had to file any further evidence and this report came after that deadline. Although not particularly happy with the late receipt of this expert report, sensibly, in my view, the Defendant has not opposed it being admitted in evidence on the Anonymity Application.

39. In preparing his report, Dr Vandenabeele carried out a remote video assessment of the Claimant on 6 July 2022. He was provided with the Particulars of Claim, the Claimant's Witness Statement and exhibit, the Anonymity Application together with witness statement in support, and the further witness of Ms Lang dealing with the existing media reporting.

40. Given the importance to that part of the Anonymity Application based upon alleged interference with the Claimant's rights under Article 2 and/or 8, it is necessary to set out Dr Vandenabeele's statement in some detail. The following are the significant parts of his report, dealing with his observations of the Claimant and his presentation. Although I have redacted these extracts in this public judgment (in the interests of the Claimant and third parties) I have carefully considered the full report.

"6.3 [The Claimant] told me that prior to the events subject of the current proceedings he has never been subject of any disciplinary proceedings. He said that he was fully up to date with revalidation and the annual process…

6.4 He stated that he has not worked since August 2017 other than working on his small farm. He also stated that he has been working excessively in order to prepare for the current proceedings…

…

8.4 [The Claimant] stated that he enjoys working on the farm but he also reported that the majority of his time is spent preparing for the current proceedings and attending preparatory meetings; he said: 'I've kept on top of it because I knew nobody else was'.

…

10.4 [The Claimant] told me that since 2017 there has been a deterioration in his mental health.

10.5 He told me that when he was first told he could not go back to work, he developed symptoms of generalise anxiety and sleep disturbance (initial insomnia and early morning wakening). He stated that at the time he consulted his GP and that he was prescribed [identified medication].

10.6 [The Claimant] said that in or around July 2017 there was a further deterioration in his mental health, and he attributed this to the media attention that had emerged. He stated: 'Then the BBC started coming to my house'; he told me that journalists were asking him for comments and that he also received contacts from former patients participating with the BBC. He stated that such deterioration in his mental health was characterised by the presence of: agitation, 'surges of adrenaline' (he told me that such surges would last for hours and that he was experiencing these daily), episodes of shaking, retching, and loss of appetite (including weight loss; he said 'it dropped off me, I lost a lot of weight'). He stated he subsequently contacted his GP again and that he was started on [identified medication].

10.7 [The Claimant] told me that as the media attention increased his mental health further deteriorated and he told me: 'I completely lost it'. He said that around one week after the [medication] had been started he was still suffering from symptoms such as described in the previous paragraph but he also told me that by this time he had developed excessive tearfulness, low mood, and suicidal thinking. He stated that these suicidal thoughts were present for about two weeks… He told me 'I wasn't functioning'. He also reported that around this time the dose of the [medication] was increased and that his wife took time off work in order to care for him.

10.8 [The Claimant] stated that after the airing of the BBC programme [I was told at the hearing a *Panorama* programme in 2017] (in regards to the complaints brought against him) 'I was barely holding it together'.

10.9 He stated that during the weeks following the airing of the BBC programme and the aforementioned media attention his mental state gradually improved. He said: 'Then the drugs kicked in. Then things died down in terms of the media and that allowed me to recover.'

10.10 [The Claimant] estimated that the period of low mood had lasted around six weeks and he said: 'Then I got better but even then I would still get waves of adrenaline and my head would be racing away'. He also said that whilst his mood had improved, he continued to experience mood instability. Further, he described the presence of residual poor sleep. [The Claimant] stated that his GP had tried adding [other medication], but that he had not been able to tolerate this and that therefore this was discontinued.

…

10.12 He said that during the past four years his mental health has continued to wax and wane and he told me: 'I kinda coped, I've always been able to

compartmentalise things. Every time something happened with the investigation, I had relapses.' He stated that these relapses were characterised by the presence of a worsening in his anxiety, agitation, and a deterioration in his sleep… He stated that when these 'relapses' are at their worst these can be accompanied by feelings of being a burden and fleeting suicidal thoughts.

10.13 As aforementioned, he reported that these symptoms, as set out in the previous paragraph, have fluctuated during the past four years and he told me that this worsened when matters surrounding the current proceedings became more acute. He was of the view that in particular media attention caused his mental state to deteriorate and he explained to me: 'Every so often the BBC get involved.' He also told me 'The main thing is media. The GMC is nothing, having 200 people suing you is nothing'.

10.14 [The Claimant] told me that currently he is no longer being treated with any [medication] and he told me that he had stopped taking [identified medication] during the Covid-19 pandemic. He told me that this was due to his view that his mental state had improved; he told me 'I was doing remarkably well. I was doing alright (sic) but I couldn't have functioned as a doctor'.

…

10.16 [The Claimant] stated that more recently there has been an acute deterioration in his mental state (this is set out in detail further in this report) and he told me that he had made arrangements to see his GP later in the day of my meeting with him in order to possibly recommence [his medication]. He stated 'The episode that we're dealing with now has brought it back'.

10.17 To date I have not had sight of his medical notes and therefore I have not been able to corroborate the past medical and past psychiatric history provided to me by [the Claimant].

…

10.19 The GP notes recorded on 19 July 2017 his suicide risk to be low and it was recorded on 11 August 2017 that he did not present with suicidal ideation.

…

12.4 [The Claimant] stated that during the past three weeks there has been a worsening in his mood and he described his mood as: 'It's down. Definitely down, I feel as though I'm relapsing'. He described the presence of sleep disturbance, loss of appetite and loss of libido; these are biological symptoms that can be seen in people suffering from a depressive disorder. He also described the presence of depressive symptoms… He stated that he considers the possibility of there being further media attention extremely distressing and that in the event of him not being offered anonymity there would likely be a further deterioration in his mental health. He was of the opinion that this would likely be associated with an

increase in his suicidal thinking but that this would also negatively affect his ability to participate in these proceedings, 'it would make it very difficult for the GMC things where I have to be functioning'.

12.5 [The Claimant] also reported that in recent weeks he has again been troubled by suicidal thinking. He told me that currently he does not harbour any active plans to harm himself or commit suicide and he described having the following protective factors: 'Knowing that I'm right', his family, and his mother… [The Claimant] was of the view that the Court may not fully recognise the negative impact these matters had upon his mental health and told me: 'The only way you can prove you are right is by killing yourself'…" …

41. Dr Vandenabeele's conclusions, and answers to the specific questions he had been asked to address, were as follows:

"*The current state of [the Claimant's] mental health and wellbeing generally*

13.1 To date I have not had sight of all of his medical notes and therefore I reserve the right to alter any views formulated within this report in light of information that may be contained within his medical records should these be made available to me. It is also the case that the unavailability of medical notes should be regarded as a limitation when formulating medico-legal opinions.

13.2 As far as I was able to ascertain, it seems that prior to the events subject of the current proceedings (starting in or around 2017) [the Claimant] did not have an established history of mental health difficulties…

13.3 Based upon the findings obtained at the time of my assessment it is my view that [the Claimant] should currently be regarded as suffering from a depressive disorder that is of a moderate severity. I base this view upon the fact that he reported the presence of a lowering in his mood, he described the presence of biological symptoms that can be seen in people suffering from depressive disorders and he also described experience depressive symptoms such as: poor self care, loss of interest, social withdrawal, irritability, lack of motivation, excessive tearfulness, and bouts of suicidal thinking.

13.4 He also described the presence of symptoms of persistent anxiety and the presence of panic attacks. On balance, it is my view that these symptoms can be understood in the context of his depressive disorder although it would also be reasonable to consider these as a separate comorbid diagnosis of a panic disorder.

13.5 Based upon the information provided to me by [the Claimant] it appears that he first developed a depressive disorder in 2017 and that this condition has ebbed and flowed to date depending on the presence of stressors associated with these proceedings. It is apparent from the information he gave me that he is particularly sensitive to experiencing a deterioration in his mental health in the context of publicity or media attention. I note that whilst the history of low mood and depression could be corroborated from the information contained in the limited medical notes I have seen, it is also

the case that the information within these notes did not corroborate the history of suicidal thinking.

What effect, if any, does the possible (proposed) publication of the contents of the Documents currently have on [the Claimant]

13.6 Whilst it appears from the information provided to me by [the Claimant] that any activity or events surrounding the current proceedings are associated with a deterioration in his mental health leading to a worsening of his mood and an increase in his symptoms of anxiety, it is also the case that he made a differentiation in the stressful impact between different activities or actions surrounding these proceedings.

13.7 It is my opinion that the proposed publication of the content of the Documents, potentially to a large number of former patients, would be associated with a detrimental impact upon his mental health and this would become manifest by a likely further worsening of his depressive disorder and a worsening of his anxiety symptoms. However, based on the findings obtained at the time of my assessment it seems that the current deterioration in his mental health was mainly linked to the possibility of his anonymity being preserved and him becoming subject of further media attention rather than mere disclosure of the documents.

What effect, if any, does the possible (proposed) publicity surrounding the proceedings if they are non anonymised/subject to restricted reporting orders currently have on [the Claimant]

13.8 As highlighted within the report, it appears to be the case that when considering the range of stressors involved in these proceedings, it seems that [the Claimant] considers the lack of anonymity and the likelihood of further media attention to be the most severe of these stressors. He also attributed the emergence of suicidal thinking (current and historically) to the possibility of lack of anonymity in these proceedings.

13.9 It is therefore my view that publicity surrounding these proceedings, if not anonymised or subject to reporting restrictions, would very likely result in a further deterioration in his mood and anxiety with a likely increase in his suicidal thinking. It already appears to be the case that the possibility of such lack of anonymity has already resulted in a worsening of his mental health and a re-emergence of suicidal thinking.

If the contents [of Document X] and MHPS outcome letter were made public, what effect (if any) would such a disclosure be likely to have on [the Claimant's] mental health?

13.10 Assuming that the contents of these documents were such as not to maintain the anonymity of [the Claimant] then this would result in the same type of deterioration in his mental health as set out in paragraph 13.9. It is of course difficult to anticipate the exact extent of such a deterioration in his mental health.

If the court refuses to (1) anonymise the parties and (2) make restrictions on reporting, what effect (if any) would the publicity of proceedings (including any

publicity surrounding the making of this application for anonymity and restricted reporting orders be likely to have on [the Claimant's] mental health?

13.11 Given that [the Claimant] is already suffering from a moderate depressive disorder and that therefore his mental health should be regarded as vulnerable, the history of the detrimental impact media attention has had on his mental health, and his current distress surrounding the possibility of him being subject of media attention, it is my view that if there were no reporting restrictions and the parties not anonymised then it is more likely than not that this would be associated with a significant worsening of his depressive disorder.

13.12 As aforementioned, it is difficult to predict accurately the extent of such a deterioration in his mental state. However, this would likely involve a worsening of the depressive anxiety symptoms he is already experiencing, but this may also introduce depressive symptoms including concentration difficulties and cognitive impairment. It is also possible that the deterioration in his mental would be of such a severity as to render him incapable of participating in these proceedings; this may be the case if he developed cognitive difficulties (this can commonly be seen in depressive disorders) that were such as to render him incapable to litigate. For completeness, I should state that currently I do not have any acute concerns about his capacity to litigate but I merely raise this as a possible adverse outcome in the event of his mental health significantly deteriorating.

Do you consider there to be any threat (whether now or in the future) to [the Claimant's] life if the contents of the Documents are made public?

13.13 For completeness I state that I have interpreted 'threat to [the Claimant's] life' as risk of suicide. It is my view that other threats to his life would not be part of psychiatric expertise.

13.14 As set out within the report, it appears to be the case that [the Claimant] has a past history of suicidal thinking and that in recent weeks he has experience a re-emergence of such suicidal thoughts. These are currently not associated with active suicidal plans and he described the presence of different protective factors. It also appeared to be the case that the presence of suicidal thinking was closely linked to his fears of his anonymity not being preserved as opposed to the stress of the current proceedings per se.

13.15 Clearly, if the documents were to be made public but in a manner whereby his anonymity could be preserved, then this would still be a stressful event that may be associated with a deterioration in his mental health, namely a worsening of his depressive disorder and his anxiety. It is also the case that any deterioration of his depressive disorder could be associated with a worsening of suicidal thinking and risk of suicide. Therefore, whilst [the Claimant] mainly considered his risk of suicidal thinking to be associated with his anonymity not being preserved, it is my view that the possibility of an increase in his suicide risk cannot be excluded if the documents were to be made public even in an anonymised manner.

Do you consider there to be any threat (whether now or in the future) to [the Claimant's] life if the proceedings go ahead without anonymisation/restrictions on reporting in place?

13.16 It is apparent from the history as described to me by [the Claimant] and his current presentation that his fear of the proceedings going ahead without anonymisation or reporting restrictions is very distressing and closely linked with the recent deterioration in his mental health and the re-emergence of suicidal thinking.

13.17 I repeat that at the time of my assessment he did not describe the presence of any acute suicidal plans and he had also identified different protective factors. However, in the event of his mental health further deteriorating, as a result of his anonymity not being preserved, then I consider there to be a significant risk of there being a worsening in his suicidal thinking to such a degree that the identified protective factors may no longer be such as to maintain his safety…"

42. As a result of the lateness of the provision of Dr Vandenabeele's report, the Defendant has not had an opportunity to file expert evidence in answer. However, following receipt, in a letter dated 12 July 2022, the Defendant's solicitors set out the following initial objections to its contents:

"(ii) Dr Vandenebeele's report dated 11 July, appears to be entirely confused as to which proceedings his report is directed. The Claimant is facing an investigation by the GMC and it is understood that there is likely to be some form of hearing of his case within a couple of months. It is to those proceedings, which he calls: "*the current proceedings*" that his report appears to be addressed at paras 6.3; 6.4; 8.4; 10.13; 13.5 "*these proceedings*"; 13.9; and 13.12.

(iii) It was a remote assessment: para 1.2.

(iv) Dr Vandenebeele has not seen the Claimant's medical records: para 1.3 and 10.17.

(v) Such medical records as he has seen does not corroborate the history of suicidal thinking which the Claimant gave: para 13.5.

(vi) Para 13.7 appears to be based on a misunderstanding by the author that former patients are unaware of the contents of [Document X] and the MHPS outcome or even the generic nature of the criticisms. This is just incorrect because:

a. All 22 patients whose records were reviewed in the MHPS investigation … have been contacted and extracts from [the relevant] documents provided, and

b. Just over one month ago, on 26 May 2022, the Guardian published a report on the outcome of the recall process carried out by North Bristol NHS … saying that patients had come to harm because of the way the Claimant went about the consenting process and that there were over

> 100 patients suing. No mention of this recent adverse publicity or any effect on the Claimant is mentioned by Dr Vandenebeele."

43. Although, in that letter, the Defendant's solicitors canvassed the possibility that it might be necessary for Dr Vandenebeele to give oral evidence at the hearing, ultimately no application for him to do so was pursued by either party.

(2) The legal principles

(a) Hearings in private and anonymisation

44. CPR 39.2 provides:

> "(1) The general rule is that a hearing is to be in public. A hearing may not be held in private, irrespective of the parties' consent, unless and to the extent that the court decides that it must be held in private, applying the provisions of paragraph (3)
>
> (2) In deciding whether to hold a hearing in private, the court must consider any duty to protect or have regard to a right to freedom of expression which may be affected…
>
> (3) A hearing, or any part of it, must be held in private if, and only to the extent that, the court is satisfied that one or more of the matters set out in sub-paragraphs (a) to (g) and that it is necessary to sit in private to secure the proper administration of justice:
>
> (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 the 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 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 administration of a deceased person's estate; or
>
> (g) the court for any other reason considers this to be necessary to secure the proper administration of justice.
>
> (4) The court must order that the identity of any person shall not be disclosed if, and only if, it considers non-disclosure necessary to secure the proper administration of justice and in order to protect the interests of that person…

(b) Reporting restrictions

45. s.11 Contempt of Court Act provides:

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

46. The section does not itself confer a power to permit "*a name or other matter to be withheld from the public in proceedings before the court*". When the court has *independently* exercised a power it has to withhold information from public in proceedings, s.11 provides an ancillary statutory power to impose reporting restrictions prohibiting publication of the withheld information. An order granting anonymity to a party (or witness) under CPR 39.2(4) will usually be an order withholding the name from the public and, as such, the Court can go on to enforce the anonymity by the imposition of reporting restrictions under s.11.

47. As explained in ***Lupu -v- Rakoff*** **[2020] EMLR 6** [21], an anonymity order conventionally has two parts:

    i) an order that withholds the name of the relevant party in the proceedings and permits the proceedings to be issued replacing the party's name with a cipher under CPR 16.2; and

    ii) a reporting restriction order prohibiting the identification of the anonymised party.

48. If the necessary conditions are met, a reporting restriction order can be made under s.11 Contempt of Court Act 1981 (or other statutory powers) or, in injunction cases, it can be part of the injunction order itself (see the ***Practice Guidance (Interim Non-Disclosure Orders)*** **[2012] 1 WLR 1003** model order §6(b)).

(c) Restricting non-party access to the Court file

49. Where the Court makes an anonymity order and/or sits in private, it is usually necessary to impose restrictions on non-party access to the Court file. That is because, if restrictions are not imposed, public access to the Court file may defeat the orders for anonymity/sitting in private that the Court has made.

50. CPR 5.4C sets out the circumstances in which a non-party may obtain copies of documents from the Court file whether as of right, or with the permission of the Court. However, CPR 5.4C(4) enables the Court to impose restrictions on non-party access to documents on the court file.

(d) Derogations from open justice

51. Orders anonymising parties, directions that a hearing should be in private, reporting restrictions, and limits upon access to documents that would ordinarily be open for public inspection on the Court file are all derogations from the principle of open justice that require justification.

52. The principles that apply when seeking any derogation from open justice are summarised conveniently in ***Practice Guidance (Interim Non-Disclosure Orders)*** under the heading "*Open Justice*":

> [9] Open justice is a fundamental principle. The general rule is that hearings are carried out in, and judgments and orders are, public: see article 6.1 of the Convention, CPR 39.2 and ***Scott -v- Scott*** **[1913] AC 417**…
>
> [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. They are wholly exceptional: ***R -v- Chief Registrar of Friendly Societies, Ex p New Cross Building Society*** **[1984] QB 227, 235**; ***Donald -v- Ntuli*** [52]-[53]. 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: ***M -v- W*** **[2010] EWHC 2457 (QB)** [34].
>
> [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 expected to consider before applying for such an exclusion whether something short of exclusion can meet their concerns, as will normally be the case: ***Ambrosiadou -v- Coward*** **[2011] EMLR 21** [50]-[54]. 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: ***Scott -v- Scott*** (above) **438–439, 463, 477**; ***Lord Browne of Madingley -v- Associated Newspapers Ltd*** **[2008] QB 103** [2]-[3]; ***Secretary of State for the Home Department -v- AP*** **(No.2) [2010] 1 WLR 1652** [7]; ***Gray -v- W*** **[2010] EWHC 2367 (QB)** [6]-[8]; and ***JIH -v- News Group Newspapers Ltd (Practice Note)*** **[2011] 1 WLR 1645** [21].
>
> [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 the 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. The proper approach is set out in ***JIH***.

53. There is little dispute as to the principles to be applied. The leading authorities are ***In re S (a child)*** **[2005] 1 AC 593**; ***Re Officer L*** **[2007] 1 WLR 2135**; ***XXX -v- Camden London Borough Council*** **[2020] 4 WLR 165**; ***JIH -v- News Group Newspapers***

[2011] 1 WLR 1645; ***RXG -v- Ministry of Justice*** **[2020] QB 703**; and ***R (Rai) -v- Crown Court at Winchester*** **[2021] EMLR 21**. Counsel also referred to the following first instance decisions which help to illuminate the principles: ***Khan -v- Khan*** **[2018] EWHC 214 (QB)**; ***General Medical Council -v- X*** **[2019] EWCH 493 (Admin)**; ***Lupu -v- Rakoff*** **[2020] EMLR 6**; ***CWD -v- Nevitt*** **[2021] EMLR 6**; ***Various Claimants -v- Independent Parliamentary Standards Authority*** **[2022] EMLR 4**; and ***AG -v- BBC*** **[2022] EWHC 380 (QB)**.

54. From these authorities, I would extract the following principles.

55. CPR 39.2 reflects the fundamental rule of common law that proceedings must be heard in public, subject to certain specified classes of exceptions: ***XXX*** [17].

56. Derogations from open justice can be justified as necessary on two principal grounds: maintenance of the administration of justice and harm to other legitimate interests: ***Various Claimants -v- Independent Parliamentary Standards Authority*** [36]-[40].

    i) In the first category (recognised expressly in CPR 39.2(3)(a)) fall the cases – such as claims for breach of confidence – in which, unless some restrictions are imposed, the Court would by its process effectively destroy that which the claimant was seeking to protect. There is no general exception to the principles of open justice in cases involving alleged breach of confidence/misuse of private information. However, it is well recognised that this type of case may well justify some derogation. The challenge is usually to ensure that the measures imposed are properly justified; that they are tailored to the facts of the individual case; and that they are proportionate, i.e. the least restrictive measure(s) necessary to protect the engaged interest: ***JIH*** [21]. In breach of confidence/privacy cases, where this issue arises frequently, the Court may be confronted with a choice between anonymising the party (which may permit the confidential/private information sought to be protected to be identified in open court) and refusing anonymity (in which case, the confidential/private information would have to be withheld – at least initially – from any public hearing/judgment): see discussion in ***Khan -v- Khan*** [88]-[89]. The Court must consider whether it can fashion a procedure (for example the use of confidential schedules to witness statements and statements of case) that will properly protect the confidential/private information during the case management and trial phases of the litigation: ***Various Claimants -v- Independent Parliamentary Standards Authority*** [47]. If it can, then the applicant may fail to demonstrate that further derogations from open justice are necessary.

    ii) The second category consists of cases in which the anonymity order is sought on the grounds that identification of the party (or witness) would interfere with his/her Convention rights. In that case, the Court must assess the engaged rights and, if appropriate, perform the conventional balancing exercise from ***In re S***: ***RXG*** [25]; ***XXX*** [20]-[21].

57. The importance of parties (and witnesses) to civil proceedings being identified publicly was explained in the following paragraphs from ***Various Claimants -v- Independent Parliamentary Standards Authority***:

[38] … [T]he names of the parties to litigation are important matters that should be available to the public and the media. Any interference with the public nature of court proceedings is to be avoided unless justice requires it: ***R -v- Legal Aid Board, ex parte Kaim Todner (A Firm)*** **[1999] QB 966, 978g**. No doubt there will be many litigants in the courts who would prefer that their names, addresses and details of their affairs were not made public in the course of proceedings. In ***Kaim Todner***, Lord Woolf MR explained (p.978):

> "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. If you are a defendant you may have an interest equal to that of the plaintiff in the outcome of the proceedings but you have not chosen to initiate court proceedings which are normally conducted in public. 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. In general, however, parties and witnesses have to accept the embarrassment and damage to their reputation and the possible consequential loss which can be inherent in being involved in litigation. The protection to which they are entitled is normally provided by a judgment delivered in public which will refute unfounded allegations. Any other approach would result in wholly unacceptable inroads on the general rule… There can however be situations where a party or witness can reasonably require protection. In prosecutions for rape and blackmail, it is well established that the victim can be entitled to protection. Outside the well established cases where anonymity is provided, the reasonableness of the claim for protection is important. Although the foundation of the exceptions is the need to avoid frustrating the ability of the courts to do justice, a party cannot be allowed to achieve anonymity by insisting upon it as a condition for being involved in the proceedings irrespective of whether the demand is reasonable. There must be some objective foundation for the claim which is being made."

[39] The same point was made by Lord Sumption in ***Khuja -v- Times Newspapers Ltd*** **[2019] AC 161**:

> [29] In most of the recent decisions of this court the question has arisen whether the open justice principle may be satisfied without adversely affecting the claimant's Convention rights by permitting proceedings in court to be reported but without disclosing his name. The test which has been applied in answering it is whether the public interest served by publishing the facts extended to publishing the name. In practice, where the court is satisfied that there is a real public interest in publication, that interest has generally extended to publication of the name. This is because the anonymised reporting of issues of legitimate public concern are less likely to interest the public and therefore to provoke discussion. As Lord Steyn observed in ***In re S*** **[2005] 1 AC 593** [34]:

> "... from a newspaper's point of view a report of a sensational trial without revealing the identity of the defendant would be a very much disembodied trial. If the newspapers choose not to contest such an injunction, they are less likely to give prominence to reports of the trial. Certainly, readers will be less interested and editors will act accordingly. Informed debate about criminal justice will suffer."

"*What's in a name?*", Lord Rodger memorably asked in ***In re Guardian News and Media Ltd*** before answering his own question, at [63] ... The public interest in the administration of justice may be sufficiently served as far as lawyers are concerned by a discussion which focusses on the issues and ignores the personalities, but ([57]):

> "... the target audience of the press is likely to be different and to have a different interest in the proceedings, which will not be satisfied by an anonymised version of the judgment. In the general run of cases there is nothing to stop the press from supplying the more full-blooded account which their readers want".

cf. ***In re BBC***; ***In re Attorney General's Reference (No.3 of 1999)*** **[2010] 1 AC 145** [25]–[26] (Lord Hope of Craighead) and [56], [66] (Lord Brown of Eaton-under-Heywood).

[30] None of this means that if there is a sufficient public interest in reporting the proceedings there must necessarily be a sufficient public interest in identifying the individual involved. The identity of those involved may be wholly marginal to the public interest engaged. Thus Lord Reed remarked of the Scottish case ***Devine -v- Secretary of State for Scotland*** (unreported) 22 January 1993, in which soldiers who had been deployed to end a prison siege were allowed to give evidence from behind a screen, that "*their appearance and identities were of such peripheral, if any, relevance to the judicial process that it would have been disproportionate to require their disclosure*": ***A -v- BBC*** **[2015] AC 588** [39]. In other cases, the identity of the person involved may be more central to the point of public interest, but outweighed by the public interest in the administration of justice. This was why publication of the name was prohibited in ***A -v- BBC***. Another example in a rather different context is ***R (C) -v- Secretary of State for Justice (Media Lawyers Association intervening)*** **[2016] 1 WLR 444**, a difficult case involving the disclosure via judicial proceedings of highly personal clinical data concerning psychiatric patients serving sentences of imprisonment, which would have undermined confidential clinical relationships and thereby reduced the efficacy of the system for judicial oversight of the Home Secretary's decisions.

58. Where a claim is made that a derogation from open justice is necessary to protect interests under Article 2/3, the following principles apply.

i) A positive obligation to take steps to protect life will arise when the evidence demonstrates that there is a "*real and immediate*" threat to life; "*a real risk is one that is objectively verified and an immediate risk is one that is present and continuing*". The test is not readily satisfied, and the threshold is high. For a threat to be "*real*" it must be objectively well-founded: ***Re Officer L*** [20].

ii) The rights guaranteed by Articles 2/3 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: ***RXG*** [25(ii)].

iii) Where there is a conflict between open justice (and rights protected by Article 10) and the unqualified rights guaranteed by Articles 2/3, there can be no derogation from the latter. But even in such a case, care must nevertheless be taken to ensure that the extent of the interference with open justice is no greater than is necessary: ***RXG*** [25(vi)].

59. Applying the principles that have been developed under the *Venables* jurisdiction (see ***RXG*** [24]) which would apply by analogy, the Divisional Court in ***RXG*** [35] identified the following:

> "(i) Restrictions upon freedom of expression must be (a) in accordance with the law; (b) justifiable as necessary to satisfy a strong and pressing social need, convincingly demonstrated, to protect the rights of others; and (c) proportionate to the legitimate aim pursued: ***Venables*** **[2001] Fam 430** [44].
>
> (ii) The strong and pressing social needs which may justify a restriction upon freedom of expression, in principle, include: (a) the right to life and prohibition of torture under articles 2 and 3 (***Venables*** [45]-[47]; ***X (formerly Bell) -v- O'Brien*** **[2003] EMLR 37** [16]; ***Carr -v- News Group Newspapers Ltd*** **[2005] EWHC 971 (QB)** [2]; and ***A -v- Persons Unknown*** **[2017] EMLR 11** ("***Edlington***") [9], [35]); and (b) the right to a private and family life under article 8 (***Venables*** [48]–[51]; ***Bell*** [19]–[31]; and ***Carr*** [3]).
>
> (iii) The threshold at which article 2 and/or 3 is engaged has been described variously as: '*the real possibility of serious physical harm and possible death*' (***Venables*** [94]); '*a continuing danger of serious physical and psychological harm to the applicant*" (***Carr*** [4]); an '*extremely serious risk of physical harm*' (***Edlington*** [36]).
>
> (iv) In ***Venables*** ([87]–[89]) Dame Elizabeth Butler-Sloss P considered that the authorities of ***Davies -v- Taylor*** **[1974] AC 207** and ***In re H (Minors) (Sexual Abuse: Standard of Proof)*** **[1996] AC 563** provided helpful guidance as to the assessment of future risks to physical safety. She held that the test is not a balance of probabilities but rather that the evidence must '*demonstrate convincingly the seriousness of the risk*' and raise a real possibility of significant harm: a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm.

(v) Where an applicant demonstrates, by cogent evidence, that there is a real and immediate risk of serious physical harm or death, then there is no question of that risk being balanced against the article 10 interests: ***Carr*** [2].

(vi) In cases where articles 2 and 3 are not engaged and the conflict is between the article 8 and article 10 rights, neither right has precedence over the other. What is necessary is an intense focus on the comparative importance of the rights being claimed in the individual case. The justifications for interfering with or restricting each right must be taken into account and a proportionality test must be applied: ***Edlington*** [28].

(vii) The rights guaranteed by articles 2 and 3 are unqualified. Where the evidence demonstrates that there is a real and immediate risk of serious harm or death this cannot be balanced against any article 10 right, no matter how weighty. In that context, it should be noted that we would respectfully depart from the proposition articulated by Sir Geoffrey Vos C in ***Edlington*** [35] that article 2 and 3 rights could be balanced against article 10 (a proposition later adopted by Sir Andrew McFarlane P in ***Venables -v- News Group Newspapers Ltd*** **[2019] 2 FLR 81** [43]): see further [25(vi)] above.

(viii) However, where evidence of a threat to a person's physical safety does not reach the standard that engages articles 2 and/or 3, then the evidence as to risk of harm will usually fall to be considered in the assessment of the person's article 8 rights and balanced against the engaged article 10 rights. Whilst the level of threat may not be sufficient to engage articles 2 or 3, living in fear of such an attack may very well engage the article 8 rights of the person concerned…"

60. If an engaged right or interest, such as Article 8, falls to be balanced against a right protected by Article 10, then the Court must carry out the familiar parallel analysis from ***In re S*** [17]:

> "… First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test…"

61. However, where the Article 10 right is that protected by open justice, the Court starts from the position that significant weight is attached to free and open access to, and reporting of, court proceedings. In ***Rai***, giving the judgment for the Court of Appeal, Warby LJ explained the proper approach to assessing the engaged interests:

> [26] The central problem with Mr Rule's submissions on the law, so it seems to me, is that he focuses exclusively on the general methodology for resolving conflicts between Articles 8 and 10 that is prescribed in ***In re S*** [17], without regard to what Lord Steyn went on to say about the application of that methodology. Neither Article 8 nor Article 10 has priority *as such.* But where the open justice principle is engaged the weight to be attributed to the Article 10 right to impart and receive information is considerable. Lord Steyn made this clear at a number of points in his judgment in ***In re S***, beginning at [18], where he identified "*the general*

rule" that "*the press, as the watchdog of the public may report everything that takes place in a criminal court*", adding that "*in European and in domestic practice, this is a strong rule. It can only be displaced by unusual or exceptional circumstances*".

[27] This does not mean that a fact-sensitive approach is not required. As Lord Steyn went on to say, "*The duty of the court is to examine with care each application for a departure from the rule by reason of rights under article 8.*" The "*strong rule*" referred to by Lord Steyn reflects the fact that not all kinds of speech are of equal value. The jurisprudence shows there is a hierarchy or scale, with political speech towards the top end, via what Baroness Hale has called "*vapid tittle-tattle*", down to hate speech (to the extent this is protected by the Convention). Speech involving the communication to the public of information about what takes place in a criminal court ranks high in this scale of values. The fact-sensitive investigation must start with that recognition. The point is reflected in paragraph [30]-[31], where Lord Steyn emphasised the importance of the freedom of the press to report the progress of a criminal trial without restraint, and at [37], where Lord Steyn approved the Convention analysis of Hedley J at first instance, in these terms:

> "Given the weight traditionally given to the importance of open reporting of criminal proceedings it was… appropriate for him, in carrying out the balance required by the ECHR, to begin by acknowledging the force of the argument under article 10 before considering whether the right of the child under article 8 was sufficient to outweigh it."

As appears from ***In re S*** [11], Hedley J had begun by recognising "*the primacy in a democratic society of the open reporting of public proceedings on grave criminal charges and the inevitable price that involves in incursions on the privacy of individuals*".

[28] In my judgment, none of the later authorities relied on by Mr Rule serves to undermine or qualify the authority of these passages from ***In re S***, or to refine or add to what was said by Lord Steyn in a way that helps the argument for the appellant. On the contrary, the cases relied on contain several reaffirmations of the same approach.

(1) In ***A Local Authority -v- W*** **[2006] 1 FLR 1** [53], Sir Mark Potter P observed that Lord Steyn, having identified the methodology with its "*intense focus*", had "*strongly emphasised the interest in open justice as a factor to be accorded great weight in both the parallel analysis and the ultimate balancing test*".

(2) In ***A -v- BBC*** [56]-[57], Lord Reed said:

> "It is apparent from recent authorities at the highest level ... that the common law principle of open justice remains in vigour, even when Convention rights are also applicable … the starting point in this context is the domestic principle of open justice … Its application should normally meet the requirements of the Convention".

(3) In ***Khuja*** [23], Lord Sumption pointed out that

> "… in deciding what weight to give to the right of the press to publish proceedings in open court, the courts cannot, simply because the issues arise under the heading 'private and family life', part company with principles … which have been accepted by the common law for many years … and are reflected in a substantial and consistent body of statute law as well as the jurisprudence on article 10 …"

62. Media reports of proceedings in open court may well have an adverse impact on the rights and interests of others, but, ordinarily, "*the collateral impact that this process has on those affected is part of the price to be paid for open justice and the freedom of the press to report fairly and accurately on judicial proceedings held in public*": ***Khuja*** [34(2)]. More widely, "*courts do not exist in a vacuum. Their decisions are properly subject to criticism in the press and in Parliament. That cannot happen if the key facts are not publicly known*": ***AG -v- BBC*** [57].

(3) Submissions

63. Ms Newbegin, on behalf of the Claimant, submitted that the orders seeking anonymity (and further orders to enforce the anonymity) (see [28] above), are necessary and should be granted for:

i) the proper administration of justice, including the need to ensure that the proceedings do not defeat the purpose for which they have been brought;

ii) the protection of the Claimant's Article 2 right to life; and

iii) the protection of the Claimant's Article 8 right to respect for his private and family life and correspondence.

64. In respect of the first ground, Ms Newbegin submits that, as the Claimant is seeking to protect the confidentiality of Confidential Information, the Court must adopt suitable measures to ensure that his claim is not frustrated by putting this material into the public domain during the proceedings. Ms Newbegin argues that the use of confidential schedules to statements of case and other measures that the Court conventionally adopts to protect confidential information during the proceedings would, on their own, be insufficient. The only effective way of protecting the confidentiality is for the Court also to anonymise the Claimant (and the Defendant). She seeks to distinguish the case of ***Various Claimants -v- Independent Parliamentary Standards Authority*** and argues that the Court will be unable to fashion appropriate procedures to safeguard the confidentiality of the information the Claimant seeks to protect during the process because, she contends, there will be a need for extensive reference to the Confidential Information at all stages of the litigation. She argues that, without anonymity, the parties would be "*severely limited in their ability to put their cases before the Court*". With the orders she seeks, Ms Newbegin submits that "*the parties will be able to put their arguments fully before the Court and the Judge will be able to give an open judgment…*" (albeit she suggests that there may be need for a separate private judgment). The media reporting available in the public domain has not destroyed the confidence in the material that the Claimant is seeking to protect.

65. As to the second limb of her argument, Ms Newbegin submits that the evidence from the Claimant himself and, importantly, the report from Dr Vandenabeele demonstrates that there is a risk to the Claimant's life were the Confidential Information to be made public. At the hearing, Ms Newbegin stressed the importance of Dr Vandenabeele's report, particularly in paragraphs 12.4 and 12.5 and his conclusions in paragraphs 13.3, 13.8, 13.9, 13.12, 13.15, 13.17 and 13.18.

66. Ms Newbegin referred me to the decision in ***General Medical Council -v- X***, in which the defendant doctor was anonymised in an appeal brought by the GMC seeking to challenge the sanction decision of the Medical Practitioners Tribunal ("MPT") which had ordered the defendant to be suspended for 12 months. I have considered this decision carefully. It does not establish any new principles, but is an example of the application of established principles to the facts of the case. The Defendant had faced proceedings for misconduct before the MPT. Evidence before the tribunal from three separate forensic psychiatrists established that the defendant was suffering from a depressive episode of moderate severity, and was at "*significant and continuing risk of committing suicide*" and that "*the risk of suicide was a high one*". The MPT considered that the evidence was "*compelling*" and directed that its proceedings should be held in private. The MPT imposed a sanction of 12-months' suspension. The GMC appealed the sanction decision. The appeal against sanction was dismissed, but the Court was required additionally to consider whether publication of the sanction decision should also be anonymised. Applying the principles from ***Re Officer L***, Soole J held that the defendant should be anonymised. He explained his decision in [164]-[173]. He concluded that there was a "*real and immediate risk of suicide*" if the sanction decision identified the defendant and that the evidence "*demonstrates the true gravity of that risk*". The most recent and agreed expert opinion was "*of real and immediate continuing risk*". The Judge considered the fact that various 'trigger events' had occurred without incident, but he concluded:

> "… it is relevant that at each stage this matter has in fact proceeded without identification of Dr X. In the context of both sexuality and the findings of sexual misconduct, that is the critical matter"

Overall, Soole J concluded that "*publication of [the sanction decision] in the proposed form would constitute a breach of Dr X's right to life under Article 2*"

67. Ms Newbegin submits that the Claimant is in a similar position to Dr X in terms of the evidence of risk of suicide.

68. Finally, even if the Court were not satisfied that the evidence demonstrated a credible threat to engage Article 2, Ms Newbegin submits that the evidence demonstrates that there would be an interference with the Claimant's Article 8 rights if the orders he seeks were not to be granted. In her skeleton argument (and echoing a section of Ms Lang's witness statement – see [28] above), she submitted that the Claimant's Article 8 rights "*encompass not only [his] health but also encompasses [his] right to practise his profession … and the right to his professional reputation*." She submits that although there has been significant media coverage of the fact of his dismissal by the Defendant, there has been no civil judgment against him and there has been no finding by the Medical Practitioners Tribunal, the hearing of which is not until the Autumn 2022. Further, none of the Confidential Information is in the public domain. Ms Newbegin argues that, pursuant to s.6 Human Rights Act 1998, the Court has a duty to protect the

Claimant's Article 8 rights. She acknowledges that the Court has the same duty in respect of the engaged Article 10 rights (of both the Defendant and the public generally), but she submits that the restrictions sought would permit the hearing to remain in public "*whilst also protecting the confidential nature of the documents*". Finally, she submits that the Court must also have regard to the Article 8 rights of the patients, details of whose treatment is included in the confidential information. Although anonymised, she argues that "*by naming the parties to the litigation, the patients and their extremely intimate personal health information becomes identifiable*".

69. Mr Hyam QC, on behalf of the Defendant submits:

i) The restrictions sought by the Claimant are not necessary. The Court can adopt measures that will properly protect the confidential information during the pendency of the proceedings that will involve significantly fewer derogations from open justice than the comprehensive restrictions sought by the Claimant. He argues that the detail of Document X and the MHPS outcome letter could be protected by appropriate measures in the proceedings. In open court, the public and media would know that the Claimant (who could be identified) was seeking to prevent the disclosure of the documents by the Defendant (which could also be identified) to former patients.

ii) The situation confronting the Court is very different from the typical breach of confidence/breach of privacy claim because of the extent of the information that is already in the public domain. The following information has already been published, in which both the Claimant and the Defendant are named, and which is still available in the public domain:

a) that the Claimant was a surgeon who had specialised in a controversial rectal prolapse surgery;

b) that there were concerns over the Claimant's practice;

c) that the Defendant believed that over 200 patients had potentially been harmed by the Claimant and that a large number of clinical negligence claims had been made or were threatened;

d) that the Claimant had been suspended and then dismissed from his post following the conclusion of the MHPS investigation conducted by the Defendant; and

e) that the Claimant was subject to ongoing fitness to practise proceedings, but was currently not able to practise as a doctor.

iii) The amount of material already in the public domain would mean that the reporting restriction sought by the Claimant would effectively curtail any reporting of the case for fear that publication of details of the case would lead to the jigsaw identification of the Claimant by reason of the pre-existing media coverage. If that is right, then the Claimant is effectively asking the Court to hear and determine his claim in circumstances of complete anonymity with,

effectively, a ban on any meaningful reporting of the case. The Claimant's evidence comes nowhere near justifying such a course.

iv) The Claimant's evidence as to the alleged threat to his Article 2 rights is very far from being "*clear and cogent*". Mr Hyam QC referred and relied upon the points made by the Defendant's solicitors in their letter of 12 July 2022 (see [42] above).

v) As regards Article 8, with proper measures being adopted, the interference with the Claimant's Article 8 rights would be limited, but the restrictions he sought would have a very significant impact on open justice. There is a significant public interest in (a) the fact that the Claimant is bringing these proceedings to prevent the Defendant from making the proposed disclosures to former patients of the Claimant; and (b) that he has sought anonymity in these proceedings. The reporting restrictions sought by the Claimant would effectively curtail reporting of what is a matter of significant public interest.

(4) Decision

70. By these proceedings, the Claimant seeks to restrain the Defendant from disclosing Document X and the MHPS outcome letter to former patients of the Claimant. He claims, additionally, that the circumstances in which Document X came into existence are also confidential. As such, and although it is brought on several legal bases, the claim is relatively straightforward. Ultimately, it is likely that the Court will have to adjudicate whether the Claimant can establish a legal ground upon which to restrain the Defendant's proposed disclosure and, if there so, whether this is outweighed by other considerations. In that respect, the claim has no novel or unusual features.

71. Courts are well used to having to deal, in the context of breach of confidence claims, with the need to protect the confidentiality that is being asserted. That is done by measures ranging from the use of confidential schedules to statements of case and witness statements (with access to the confidential schedules being limited only to the parties) to conducting proceedings in private. In cases of particular sensitivity, further limitations may be required, for example the parties may agree further restrictions in the form of "confidentiality clubs". In many confidentiality cases it is not necessary to anonymise the parties. It is only in cases where identifying the party will harm the administration of justice that such a step is necessary.

72. I reject the Claimant's submission that refusing to anonymise the parties this will risk destroying that which he is seeking to preserve. On the facts of this case, I am satisfied that risk either does not exist, or has been significantly exaggerated.

73. The starting point is that it is already a matter of public record that the Claimant was suspended and then ultimately dismissed following an investigation into concerns raised by several patients as to his clinical practice. This has been the subject of significant and widespread coverage in the national and local media, dating back to 2017, when the concerns about the Claimant were first reported, and most recently at the end of May 2022. His claim is a discrete challenge to the proposed disclosure by the Defendant of two documents.

74. The proceedings are still at a very early stage. Although the Defendant's position has, to an extent, been foreshadowed in the evidence filed on the Anonymity Application, it is only once a Defence has been served that the issues in dispute will emerge clearly. At this stage, I am somewhat sceptical that a fair resolution of the claim is likely to require a prolonged examination of the contents of Document X and/or the MHPS outcome letter. The principal ground on which the Defendant contends that it ought not to be restrained from disclosing the information is that it is under a duty to disclose the documents to the Claimant's former patients in the context of actual or threatened legal proceedings. As matters stand, I am not persuaded that the resolution of that issue is likely to require a detailed examination of the contents of the documents. But even if it does, the Court can adopt procedures (short of anonymity) to protect the contents from coming into the public domain (see [56(i)] above). Ultimately, and to the extent necessary, the Court can conduct that part of a hearing, at which submissions need to be made as to the contents of the documents, in private.

75. There is something of a paradox at the heart of the Claimant's submissions. An order for anonymity, on its own, would not secure the objective that the Claimant seeks to achieve. Ms Newbegin submitted that anonymity would permit the Court to conduct the proceedings in open court. That submission is untenable in light of the pre-existing media coverage about the case. For example, as soon as the Claimant was identified as a colorectal surgeon in the context of this dispute, the existing publicity would immediately identify him by name and undermine totally the anonymity order. It was for this reason that the Anonymity Application had to be heard in private.

76. At several points, both in the evidence submitted on his behalf and in his submissions, the Claimant has identified his object to be principally the protection of the confidentiality of the contents of Document X and the MHPS outcome letter (see Ms Lang's witness statement ([29(i)] above); the Claimants witness statement ([32]-[33] above); §§13.6-13.7, 13.10 Vandenabeele Report ([41] above); and Ms Newbegin's submissions ([60] and [68] above)). Yet, this would not be achieved by an order anonymising the parties (a point that Dr Vandenabeele has not understood – see §§13.10 and 13.15 and further [86(iv)] below). The only way of maintaining the confidentiality of the contents of these documents is to withhold them from the public in the proceedings. Anonymisation cannot achieve this because, if the contents of the documents were revealed, the pre-existing media publication would immediately identify the parties and defeat the anonymisation.

77. I rather suspect that the Claimant and his advisors have recognised this (even if they apparently did not correct Dr Vandenabeele's misapprehension), hence they have sought additionally a reporting restriction on prohibiting disclosure of "*any information that may lead to the subsequent identification of the Claimant or the Defendant*". I accept Mr Hyam QC's submissions that, in the particular circumstances of the pre-existing media coverage of the Claimant, such a reporting restriction would, for all practical purposes, effectively curtail any reporting of the proceedings. On the particular facts of this case, the anonymity order (coupled with the reporting restriction order), which are usually intended as a less significant derogation from open justice and supposed to *permit* more information to be published about proceedings, would end up effectively prohibiting any media reporting of the case at all.

78. In my judgment, the Claimant has failed to establish that an anonymity order is necessary to preserve that which he is seeking to protect in these proceedings. The Court

can adopt various measures during the proceedings to ensure that this does not happen. If he is successful in his claim, and is granted an injunction, then providing the protective steps I have identified are deployed, the proceedings will not destroy the value of the injunction.

79. I can state my conclusions as to the submissions on Article 2 quite shortly, albeit that I shall have to explain my reasons in more detail. The evidence relied upon by the Claimant – in both his own witness statement and the expert report of Dr Vandenabeele – falls a long way short of demonstrating that, were the parties in these proceedings not to be anonymised, there is a real and immediate risk that the Claimant would attempt to commit suicide. In contrast with the "*compelling and overwhelming*" evidence in ***GMC -v- X***, here the evidence does not demonstrate that the Claimant is at any real and immediate risk of suicide and that, overall, the evidence is unconvincing and, in places, unclear and contradictory.

80. In the Claimant's own witness statement, he states that he did have suicidal thoughts in 2017, but that he had sufficient insight not to act upon them. He was initially prescribed medication for depression, but since the end of May 2019 he has not been taking any medication. He told Dr Vandenabeele that he was going to see his GP "*in order possibly to recommence [his medication]*" (§10.16). It appears therefore that, at present, the Claimant is not receiving any ongoing treatment for depression or taking any medication.

81. He states that he is concerned about the effect of publication of Document X and the MHPS outcome letter and that if the contents were made public, he says he would "*be devastated*"; "*I would worry that I might find myself back in the same position in which I found myself in 2017, when I contemplated suicide*". As to publicity that might attend his application to prevent disclosure of the documents, the Claimant states that would have an adverse effect on his health, but "*I cannot say whether [it] would be such as to result in me contemplating suicide again, but the thought of publicity is already having a negative impact on my health*". This evidence does not establish that there is a real and immediate risk of the Claimant attempting suicide. At its highest, this evidence demonstrates that the Claimant fears that his mental health might deteriorate were the identified stressful events to manifest and that, as he has had suicidal thoughts in the past, he worries that these feelings might return.

82. Properly analysed and considered carefully, Dr Vandenabeele's conclusions do not, themselves, demonstrate that there is a real and immediate risk of suicide.

    i) The Claimant has made no attempt to self-harm. He was not currently taking any medication for depression (§10.14). Dr Vandenabeele noted that "*the information within [the Claimant's medical notes] did not corroborate the history of suicidal thinking*" (§13.5).

    ii) Historically, the Claimant had suicidal thoughts for about 2 weeks in 2017 (§10.7) and thereafter had further "*fleeting suicidal thoughts*" when he felt that he was being a 'burden' (§10.12).

    iii) When he met Dr Vandenabeele, he presented as having been "*troubled by suicidal thinking*", but that "*currently he does not harbour any active plans to harm himself or commit suicide*". The Claimant himself identified several

factors to Dr Vandenabeele which operate to protect him from self-harm (§12.5).

iv) Dr Vandenabeele's conclusion was that the Claimant was suffering from a depressive disorder that is of a moderate severity with "*bouts of suicidal thinking*" (§13.3).

v) The conclusion that the Claimant had a "*past history of suicidal thinking*" was based solely on the information provided by the Claimant and was not, as Dr Vandenabeele had noted, corroborated by the GP notes that he had seen. The "*re-emergence*" of suicidal thoughts was, however, "*not associated with active/acute suicidal plans*" and the Claimant had described the presence of "*different protective factors*" (§§13.15 and 13.17).

vi) The final conclusion is that "*in the event of his mental health further deteriorating, as a result of his anonymity not being preserved, then I consider there to be a significant risk of there being a worsening in his suicidal thinking to such a degree that the identified protective factors may no longer be such as to maintain his safety*" (§13.17). This conclusion is unexplained as to why a refusal of anonymity in the High Court proceedings could cause such a deterioration in the Claimant's mental health and is significantly at variance both with the historic and current presentation of the Claimant as described in the Report. Without an explanation, I cannot attach much weight to it.

83. Further, the expert report of Dr Vandenabeele has several unsatisfactory features (several of which were identified by the Defendant – see [42] above) that negatively affects its credibility and the reliance that can be placed upon it.

84. First, it is the product of a single meeting. Dr Vandenabeele is not a treating clinician who has had a substantial opportunity to observe the Claimant. The report is therefore based almost exclusively on what the Claimant has told Dr Vandenabeele.

85. Second, Dr Vandenabeele has not had access to the Claimant's full medical records, only the extracts provided attached to the Claimant's witness statement. That is potentially significant, given that he identifies (§10.19) that the limited GP notes that he has seen recorded that, in July 2017, the Claimant's suicide risk was assessed as "*low*" and that, in August 2017, he did not present with suicidal ideation. That period might be regarded as a significantly stressful one, coming as it did at the time when he was first suspended and then excluded from clinical practice. I do note that, in his witness statement, the Claimant said that he did not tell his GP about his suicidal ideation at the time. But equally, the Claimant says that he had "*sufficient insight at the time not to go through with this*".

86. Finally (and particularly in respect of the conclusion set out in [82(vi)] above), Dr Vandenabeele's conclusions are undermined by his lack of clarity about what it is he considers would increase the risk of suicide and why it would do so.

i) An element of confusion is introduced by his reference to "*the current proceedings*". Although it appears in the later paragraphs of his Report that he is probably referring to the High Court proceedings, the earlier paragraphs tend to suggest that it is a reference to the GMC proceedings (see §6.3).

ii) Further, Dr Vandenabeele seems not to have discussed or considered why or how an anonymity order would assist the Claimant. It is reasonably clear from the Report (e.g. §§10.7-10.10, 10.13), that, historically, the Claimant regards the major cause of stress and anxiety (and the stimulus for his suicidal thoughts) to have been media coverage.

iii) The second question posed to Dr Vandenabeele asked about the effect of publicity surrounding the proceedings if they were not anonymised or subject to reporting restrictions. Dr Vandenabeele stated that the Claimant "*considers the lack of anonymity and the likelihood of further media attention to be the most severe of these stressors. He also attributed the emergence of suicidal thinking (current and historically) to the possibility of lack of anonymity in these proceedings*" (§13.8). This conclusion (and that expressed in §§13.9 and 13.17) needed some further explanation. The past media coverage has always identified and named the Claimant. The historic suicidal thoughts (which pre-date substantially "*these proceedings*") are linked to this media coverage. If the current suicidal thoughts are said to be linked to "*the possibility of lack of anonymity*" in the proceedings, then that needed explanation, particularly when, as recently as the end of May 2022, there had been a further burst of media publicity about the Claimant, including in particular *The Guardian* article (to which Dr Vandenabeele does not refer). Nowhere in his report does Dr Vandenabeele either explain the Claimant's understanding of what "*these proceedings*" involve (if that is a reference to the High Court claim) and why, therefore, a refusal to grant anonymity is likely to result in "*a further deterioration in [the Claimant's] mood and anxiety with a likely increase in his suicidal thinking*" (§13.9 and also §13.17).

iv) In answer to the fourth and sixth questions, Dr Vandenabeele states that, if the Court were to refuse to grant anonymity or impose reporting restrictions, then "*it is more likely that not that this would be associated with a significant worsening of [the Claimant's] depressive disorder*" (§13.11 and similar in §13.17). No explanation is provided for this conclusion. One is needed because most of the concerns expressed by the Claimant in his witness statement (and in his meeting with Dr Vandenabeele) related primarily to the threat of disclosure of the two documents. Dr Vandenabeele appears to have made no attempt to identify with the Claimant the source of his anxiety, whether it is disclosure of the documents or publicity resulting from the proceedings. If it is the latter, what is it of this publicity which is said to present a risk of aggravating his depressive disorder, having regard to the extent to which he has already been the subject of extensive media reporting.

87. For the reasons I have set out, in my judgment the evidence presented by the Claimant, including the expert report of Dr Vandenabeele, does not demonstrate convincingly that there is a real and immediate risk of significant harm to the Claimant (arising from the risk of a suicide attempt) if the Court were to refuse to grant the anonymity order he seeks. The evidence has not demonstrated the seriousness of the risk objectively or convincingly. On the contrary, in my judgment the evidence shows that the risk is remote. As such, the threshold to engage Article 2 is not met.

88. The claim based on the Claimant's Article 8 rights must also be rejected. My reasons are as follows.

89. Ms Newbegin contended that Claimant's Article 8 rights "*encompass not only [his] health but also encompasses [his] right to practise his profession … and the right to his professional reputation.*" These may all be dimensions of the Article 8 right, but the latter two are not a justification for anonymity and/or reporting restrictions in this case. These proceedings do not concern the Claimant's right to practise his profession, nor do they threaten his professional reputation. Whether the Claimant is successful in obtaining an injunction to restrain the threatened disclosure by the Defendant of the two documents to former patients of his will be resolved by application of the relevant legal principles engaged by the claim to the relevant evidence. To the extent that the Claimant may be exposed to media or other criticism for bringing proceedings by which he seeks to prevent this disclosure, then that is "*price to be paid for open justice and the freedom of the press to report fairly and accurately on judicial proceedings held in public*" (see [62] above). It is not a justification for any reporting restrictions or other derogations from open justice.

90. My task is to carry out the balancing process between any identified Article 8 rights of the Claimant, against the Article 10 rights (as embodied in the open justice principles) (see [60] above).

91. The only engaged Article 8 right identified by the Claimant is that arising from the claimed detrimental impact that public reporting of these proceedings will have on his mental health. Although I have held that the evidence does not demonstrate a threat sufficient to engage Article 2, it is recognised in the authorities I have cited above that a threat to health may still engage a person's Article 8 rights.

92. However, for reasons similar to those that have led me to reject the Claimant's case on Article 2, I not satisfied that the Claimant has demonstrated that any adverse impact on his mental health would be caused to him by the proceedings continuing, in the normal way, without the benefit of anonymity reporting restrictions. Reports of these proceedings (as distinct from criticism of his decision to bring them) are not likely to publish anything significant beyond what is already in the public domain as a result of the historic reporting. The GMC proceedings are scheduled for the Autumn. These are likely, themselves, to generate further media coverage. The fact that the Claimant finds himself at the centre of what he regards to be unwelcome publicity has little (if anything) to do with these proceedings and it is not reports of the proceedings that will pose a threat to his Article 8 rights. In my judgment, analysed properly, the Claimant has not demonstrated that a refusal of anonymity and reporting restrictions in this case will interfere with his legitimate Article 8 rights. As such, there is nothing to weigh in the balance against the principles of open justice.

93. Even were I to be wrong about that, and if I had accepted that the Claimant's health could be said to be impacted by a refusal of the anonymity order and reporting restrictions, I would nevertheless have refused to grant the Anonymity Application because any interference that the Claimant could establish to his Article 8 rights would have been significantly outweighed by the Article 10 right.

94. The extent of the interference in the Article 10 rights resulting from the anonymity order and reporting restrictions would be profound. Not only would it have prevented identification of the Claimant as someone who was bringing a claim to restrain disclosure of two documents that a Health Authority wanted to disclose to former patients of his, by reason of the extensive existing media coverage, the reporting

restriction would have effectively prohibited any meaningful reporting of the case at all. In effect, and in combination, the orders sought by the Claimant would have been tantamount to the Court sitting in private and shielding the entire proceedings from public gaze. Put simply, the Claimant has failed to demonstrate that the balancing of competing rights could justify such an outcome. He has not discharged the burden of demonstrating that such a derogation from open justice is necessary by clear and cogent evidence. In my judgment there is likely to be significant public interest in this case, for the reasons identified in Ms Slingo's witness statement (see [37] above). In that respect, the Claimant's identity is of central importance to the public interest in any reporting and it is not outweighed by any countervailing consideration. The Court should only interfere with free and open reporting of these proceedings if a compelling justification has been established. The Claimant has failed to do so.

95. For these reasons the Anonymity Application is refused. As was the case in ***Various Claimants -v- Independent Parliamentary Standards Authority***, there is justification for a limited order made under CPR 5.4C preventing third party access to any confidential schedule to a statement of case or witness statement. Later in the proceedings, the Court will address (when the time comes) whether it is necessary for any part of any court hearings to take place in private so as to protect the confidential material the disclosure of which the Claimant is seeking to prevent.