CIVIL PROCEDURE NEWS

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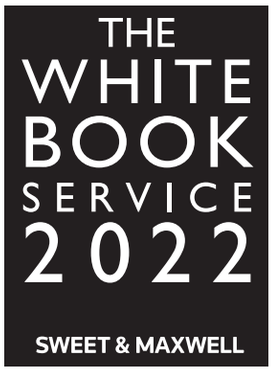

In Brief

Cases

■ **Smith v Backhouse** [2022] EWHC 3011 (KB), 8 September 2022, unrep. (Nicklin J)

Settlement – court power to refuse to accept undertaking

CPR r.40.6. The claimant commenced proceedings in December 2021, alleging online harassment, misuse of private information and breach of her data protection rights. Shortly thereafter, the claimant made a CPR Pt 36 Offer to settle. The defendant made a CPR Pt 36 counteroffer in July 2022. The claimant did not accept the counteroffer. In August 2022 the defendant accepted the claimant's Pt 36 Offer. The claimant issued an application, which sought approval of the acceptance of the Pt 36 Offer that incorporated undertakings to the court in the form of a consent order. An issue arose whether the court could refuse to accept undertakings that a party had agreed to give to the court. **Held**, while it was clear that parties could settle a dispute on whatever terms they desired, including on the basis that contractual undertakings were given and accepted, the court was under no obligation to accept undertakings given to the court. This was because undertakings to the court were enforceable by the court. To accept an undertaking the court must be prepared, and able, to enforce it, if necessary by way of proceedings for contempt (at [18]–[21]). As Nicklin J put it,

> *"[27] The problem about accepting such wide undertakings is because it increases the risk or likelihood that the parties will end up back before the Court on a contempt application. The Court has limited resources. Experience shows that contempt applications can become hard-fought litigation often involving substantial disputes of fact over what is alleged to have taken place. Undertakings given to the Court that are vague or too wide make it more likely that there will be future disputes. In terms of undertakings, in my judgment the Court can properly want to regulate the instances where it is prepared to enforce future compliance with undertakings to those cases where the parties have made proper efforts to provide undertakings that comply with the requirements of clarity and certainty. The wider the terms of an undertaking, and the more likely that they are to catch behaviour that cannot arguably be of any form of wrongdoing, the more vigilant the Court will be as to whether it is appropriate to accept those undertakings as ones properly given to the Court. The Court will not uncritically sign up to policing an agreement the terms of which are vague and unjustifiably wide. Equally, the Court is not going to agree to its powers of compulsion in respect of injunctions or undertakings to the Court being used to enforce agreements that embrace trivial or insubstantial matters (the banana-eating example).*
>
> *[28] I am satisfied that the Court has the jurisdiction to accept only some of the Defendant's contractual undertakings as undertakings given to the Court. It cannot be right, because the consequences could be absurd, that the Court has to accept any undertakings that the parties have agreed. Whilst I cannot rewrite the undertakings agreed between the parties – because they are the underlying contractual agreement that has been reached between them – I am not bound to accept such undertakings being given to the Court. What the Court is doing by accepting undertakings is adding to the powers of enforcement that are available to the Claimant."*

(See ***Civil Procedure 2022*** Vol.1, para.40.6.2.)

■ **Jinxin Inc v Aser Media PTE Ltd** [2022] EWHC 2856 (Comm), 1 November 2022, unrep. (Mr Simon Salzedo KC, sitting as a deputy judge of the High Court)

Legal professional privilege – confidentiality distinct from privacy

CPR Pt 31. An application for a declaration was made in proceedings for fraudulent misrepresentation. The declaration, which was sought was by the claimant, was that the first, second, fifth, ninth and tenth defendants were not entitled to claim privilege over data and documents held or collected on specified computer systems. The claimant argued that the declaration should be granted as the defendants could not have had a reasonable expectation of privacy on the data and documents stored on the computer system. **Held**, the application was refused. Confidentiality is an essential pre-requisite of legal professional privilege (at [26]). Privacy is not, however, a touchstone of confidentiality: ***Simpkin v Berkeley Group Holdings Plc*** (2017) doubted (at [29]–[36]). Consequently,

> *"[37]. . . I think it is mistaken to describe the reasonable expectation of privacy as being a touchstone of confidentiality. I doubt if anything in the present application turns on the point, but my own view of where the law stands at present is that privilege rests on confidentiality (which was common ground before me), and that it is more helpful to consider confidentiality directly on the basis established by Mr Justice Megarry in Coco v AN Clark, rather than to attempt an analysis which starts from the reasonable expectation of privacy and moves from there to confidentiality.*
>
> *[38] Certainly both tests involve a similar objective element based on reasonable expectations, but privacy and confi-*

dentiality are not to be equated."

Coco v AN Clark (Engineers) Ltd [1968] F.S.R. 415, ChD, ***Campbell v Mirror Group Newspapers Ltd*** [2004] UKHL 22; [2004] 2 A.C. 457, UKHL, ***Simpkin v Berkeley Group Holdings Plc*** [2017] EWHC 1472 (QB); [2017] 4 W.L.R. 116, QB, ***Brake v Guy*** [2022] EWCA Civ 235, unrep., CA, ref'd to. (See ***Civil Procedure 2022*** Vol.1, para.31.3.12.)

■ **Chedington Events Ltd v Brake** [2022] EWHC 2880 (Ch), 15 November 2022, unrep. (HHJ Matthews sitting as a judge of the High Court)

Disclosure – freezing injunctions – undertaking

CPR r.25.1(1)(f). HHJ Matthews, sitting as a judge of the High Court considered the approach to be taken to an undertaking not to use material disclosed consequent upon a freezing injunction. HHJ Matthews noted the approach taken to subsequent use of compelled disclosure under CPR Pt 31: see CPR r.31.22. At [28], he noted the summary of the principles applicable to that rule,

"[28] Tchenguiz v Serious Fraud Office [2014] EWCA Civ 1409 was not directly referred to before me. But it was the foundation of the principles applied by the judge in Manek v Wirecard AG [2020] EWHC 406 (Comm), which was very much relied on before me, and it was also discussed in the other two cases referred to me. So, I think I should mention one paragraph of the judgment here. In Tchenguiz, Jackson LJ (with whom Sharp and Vos LJJ agreed), having reviewed the authorities, said:

'66. The general principles which emerge are clear:

i) The collateral purpose rule now contained in CPR 31.22 exists for sound and long established policy reasons. The court will only grant permission under rule 31.22 (1) (b) if there are special circumstances which constitute a cogent reason for permitting collateral use.

ii) The collateral purpose rule contained in section 9 (2) of the 2003 Act is an absolute prohibition. Parliament has thereby signified the high degree of importance which it attaches to maintaining the co-operation of foreign states in the investigation of offences with an overseas dimension.

iii) There is a strong public interest in facilitating the just resolution of civil litigation. Whether that public interest warrants releasing a party from the collateral purpose rule depends upon the particular circumstances of the case. Those circumstances require careful examination. There are decisions going both ways in the authorities cited above.

iv) There is a strong public interest in preserving the integrity of criminal investigations and protecting those who provide information to prosecuting authorities from any wider dissemination of that information, other than in the resultant prosecution.

v) It is for the first instance judge to weigh up the conflicting public interests. The Court of Appeal will only intervene if the judge erred in law (as in Gohil) or failed to take proper account of the conflicting interests in play (as in IG Index).'"

The judge then went on to consider the approach taken to the application of this test where two separate proceedings had been brought, but it was arguable that they could have been brought as a single set of proceedings. In that regard he noted that in ***Manek v Wirecard* AG** (2020), Moulder J took the approach that it made no difference to an application seeking permission for collateral use if two claims could have been brought in a single set of proceedings (at [34]–[39]). HHJ Matthew then went on to conclude that the approach to collateral use under CPR Pt 31 applied to compelled disclosure under freezing injunctions. He concluded that, as a consequence, consideration should be given by judges concerning the wording of the undertaking concerning collateral use in the standard form freezing injunction. As he put it,

"[40] First of all, I am satisfied that, in principle, even though this case arises in the context of an undertaking contained in a freezing order, rather than the ordinary process of disclosure under CPR Part 31, the policy of the law is in principle the same. The judge and the parties in BDW Trading Ltd v Fitzpatrick [2015] EWHC 2490 (Ch) certainly assumed so. Where a party is compelled by law to supply information to another party as part of the legal process, this information may only be used by the recipient for the purposes for which it was compelled to be supplied, and not for any wider purpose: Marcel v Metropolitan Police Commissioner [1992] Ch 234G, 235E, 237D, 262C-D. (In Smithkline Beecham Plc v Generics (UK) Ltd [2004] 1 WLR 1479, the Court of Appeal held that the prohibition in CPR rule 31.22, unlike the position under the earlier RSC, applied more widely than the case of compulsion, to some cases of voluntary disclosure, but that is a later – and indeed somewhat contentious – development, and does not matter for present purposes.)

[41] In the case of an undertaking contained in a freezing order, however, the scope and extent of the prohibition are

obviously subject to the express terms of that order. Here those terms are clear. They are based on the standard form of freezing injunction to be found in Annex A to CPR Part 25. The undertaking is not without permission to use the information obtained for the purposes of any proceedings except the proceedings in which the order was obtained. Where the disclosure obligation is imposed on the respondent by the order simply for the purpose of 'policing' the order, those words of exception are strictly speaking too wide. It may be that, in future, judges granting such relief should consider whether to make the exception narrower."

Crest Homes Plc v Marks [1987] A.C. 829, HL, ***Marcel v Commissioner of Police of the Metropolis*** [1992] Ch. 225, ChD, ***SmithKline Beecham Plc v Generics (UK) Ltd*** [2003] EWCA Civ 1109; [2004] 1 W.L.R. 1479, CA, ***Tchenguiz v Director of the Serious Fraud Office*** [2014] EWCA Civ 1409, unrep., CA, ***BDW Trading Ltd v Fitzpatrick*** [2015] EWHC 3490 (Ch), unrep., ChD, ***Manek v Wirecard AG*** [2020] EWHC 406 (Comm), unrep., Comm., ref'd to. (See ***Civil Procedure 2022*** Vol.1, para.25.1.25.12.)

■ **Avery-Gee (as Trustee in Bankruptcy of Lawrence Coppen) v Coppen** [2022] EWHC 2958 (Ch), 21 November 2022, unrep. (HHJ Pearce)

No power for party to add penal notice to a penal notice

CPR r.81.4. In proceedings for rectification of a register of members of a company, an order was made against the first defendant. The order required rectification of the register within five business days of the order. The first defendant did not comply with the order, which did not include a penal notice. The claimant wrote to the first defendant requiring compliance with the order within a further 24 days. The claimant enclosed a copy of the order with their letter, albeit they had added a penal notice to the order. The question arose whether a party could add a penal notice to an order. **Held**, a party may not add a penal notice to a court order. CPR r.81.4 confirms that a penal notice forms part of an order. As HHJ Pearce explained,

"[15] . . . whilst the description of a penal notice as a warning on the front of an order or judgment remains the same as between the previous and current versions of CPR 81, the wording of the new CPR 81.4 goes further in referring to confirmation that the 'order ... included a penal notice' (my emphasis). Thus it contemplates that the penal notice is part of the order itself. This distinguishes the position from that both in Kermanshahchi and Deery v Deery, in both of which the central point was that the penal notice was appended to a copy of the order, rather than that forming part of the order itself. Indeed, this is the basis for the authors of Blackstone and Gee considering that the court's authority was not required to add the penal notice.

[16] I note in passing that, whilst the 2022 Edition of Blackstone refers to the new version of CPR Part 81, the Seventh Edition of Gee pre-dates the revision and refers to the former version.

[17] There can be no doubt that a court order is the document which the court authorises rather than the parties' interpretation of what the court has ordered. That is implicit in the whole structure of CPR 40 dealing with judgment and orders. For example, there would be no need for a ' slip rule' in the terms of CPR 40.12 if the parties were at liberty to correct errors in orders. Further, the very description of the document as a 'court order', as well as its status as an expression of the coercive power of the court, must mean that it is the court and not the parties that determine its content.

[18] It follows that, on the wording of the current version of CPR 81, I am satisfied that a party is not at liberty to add a penal notice to an order of its own volition.

[19] I should add that I have some doubt as to whether the practice of adding a penal notice after the order was drawn up could have amounted to proper compliance with the pre-requisite of enforcement under CPR 81.9 in its previous form as set out above. Such a notice would itself arguably form part of the judgment or order. So, for example, the practice adopted here of adding an extra sheet of paper to the order (albeit at the front of a series of pages containing a copy of the order), is arguably not a display 'on the front of the copy of the judgment or order' (the wording of the former CPR 81.9) or 'on the front of the copy of an order served under this rule' (the wording of RSC 45.7(4)).

[20] Thus I consider it arguable that Kermanshahchi was wrongly decided. However, it is unnecessary for the determination of this issue to consider that further, in [the] light of the changes that appear in the new version of CPR Part 81.

[21] For these reasons, I am satisfied that the passage in Blackstone's Civil Practice cited above [is] no longer good law (if it ever was). A party to litigation is not at liberty to add a penal notice to an order of the court of its own motion; rather, that party must apply to the court to vary the order if it wishes a penal notice to be added."

Furthermore, HHJ Pearce added that para.81.4.4 of ***Civil Procedure 2022***, Vo1.1 remained good law in dealing with the issue of enforcement of a court order that lacked a penal notice by way of committal (at [22]). ***Anglo Eastern Trust v Kermanshahchi*** (21 October 2002), [2002] All ER (D) 296, ChD, ***Deery v Deery*** [2016] NI Ch 11, unrep, ChD (NI)

ref'd to. (See ***Civil Procedure 2022*** Vol.1, para.81.4.4.)

- **Pathan v Commissioner of Police of the Metropolis** [2022] EWHC 3244 (KB), 16 December 2022, unrep. (Bourne J)

Qualified One-Way Costs Shifting – application after amendment

CPR r.44.13(1). A claim was issued seeking damages for unlawful detention and arrest. While the claim referred to medical issues, damages for personal injury were not claimed. A defence to the claim was served. Thereafter the claimant applied to amend the claim to add a personal injury claim. The amendment was refused. On appeal the amendment was allowed. The claim ultimately failed at trial. Costs were awarded against the claimant (at [2]–[10]). An issue arose as to the application of Qualified One-Way Costs Shifting (QOCS) to the costs award. The trial judge held that QOCS applied to costs awarded after the date of the amendment, which added a personal injury claim to the pleadings. The question before the court on appeal was the extent to which QOCS applied to the costs. The claimant argued it ought to apply to all the costs, both pre- and post-amendment. The defendant argued that the judge erred by not permitting enforcement of the post-amendment costs, i.e., those the judge held QOCS had applied to. **Held**, QOCS applied to the whole claim:

> *"[31] . . . I consider that the meaning of rule 44.13(1) is clear. The QOCS regime, which includes certain layers of judicial discretion, applies if proceedings include a personal injury claim and does not apply if proceedings do not include a personal injury claim. That question, to be asked and answered when the judge considers what if any order to make relating to the enforcement of a costs order, is a binary question, in other words there are only two possible answers, which are 'yes' and 'no'. In the present case the proceedings included a personal injury claim and so the answer was yes. Moreover, that was indisputably so on the date when the judge made his order, making the position in this case clearer than it was in Achille. The QOCS regime therefore applied to the proceedings. With all due respect to the judge, who gave a careful and detailed judgment on the claim, he fell into error by ruling that QOCS was to be applied only to the proceedings occurring after the amendment.*
>
> *[32] I am not persuaded that the doctrine of 'relation back' is relevant. This is not a case of an amendment having retrospective effect. Instead, a choice has been made by the drafters of the CPR about when the enforcement position is automatic and when it is discretionary."*

The defendant's cross-appeal was refused permission to appeal (at [49]). ***Achille v Lawn Tennis Association Services Ltd*** [2022] EWCA Civ 1407; [2022] Costs L.R. 1553, CA, ref'd to. (See ***Civil Procedure 2022*** Vol.1, para.44.13.1.)

Practice Updates

PRACTICE DIRECTIONS

UK SUPREME COURT PRACTICE DIRECTION UPDATE. In December 2022, the UK Supreme Court amended its website guidance to its Practice Directions to specify that *"paper copies [of documents] are no longer required except where explicitly requested in the PD for appeal hearings"*. See Practice Direction 5 – Papers for the appeal hearing, especially, para.5. The guidance is available here: *https://www.supremecourt.uk/procedures/practice-directions.html*.

PRACTICE GUIDANCE

GUIDANCE – MODES OF ADDRESS IN COURTS AND TRIBUNALS. On 1 December 2022, the Lord Chief Justice and the Senior President of Tribunals issued guidance on the appropriate modes of address for judges of the courts and tribunals. The guidance particularly alters the mode of address from Sir/Madam to Judge. The guidance is available at *https://www.judiciary.uk/message-from-the-lord-chief-justice-and-senior-president-of-tribunals-modes-of-address-in-courts-and-tribunals/*. It is reprinted below for ease of reference.

Message from the Lord Chief Justice and Senior President of Tribunals – Modes of address in courts and tribunals

We are today announcing a change in the practice of how certain Judges are addressed in court. From now on, the Judges listed below should be addressed in court or tribunal hearings as 'Judge':

- Masters
- Upper Tribunal Judges
- Judges of the Employment Appeal Tribunal
- District Judges
- District Judges (Magistrates Courts)
- First-Tier Tribunal Judges
- Employment Judges

The current practice is to address them as 'Sir/Madam' or 'Judge'. The move away from 'Sir or Madam' involves modern and simple terminology, reflecting the important judicial role whilst maintaining the necessary degree of respect. We also hope this change in language will assist litigants in person involved in court and tribunal proceedings. Up to date guidance on what to call a Judge can be found on the What do I call a Judge? webpage. Any other relevant guidance will be changed as appropriate in due course.

This change only involves the way in which Judges are addressed in court or tribunals. It does not affect judicial titles, which have a basis in statute, or the way in which Judges record their decisions.

In the tribunals non-legal members should continue to be addressed as 'Sir or Madam'.

Lord Burnett of Maldon
Lord Chief Justice of England and Wales

Sir Keith Lindblom
Senior President of Tribunals

1 December 2022

MISCELLANEOUS UPDATES

HAGUE CONVENTION CONSULTATION. On 15 December 2022, the Ministry of Justice commenced a consultation on the question whether the UK should accede to the Hague Convention the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (2 July 2019). The Convention is available at: *https://www.hcch.net/en/instruments/conventions/full-text/?cid=137*. The Convention provides a framework for the recognition and enforcement of judgments between contracting states. The following states are signatories to the Convention: Israel, Costa Rica, the European Union, the Russian Federation, Ukraine, Uruguay, and the United States of America. The Convention is available at: *https://www.gov.uk/government/consultations/hague-convention-of-2-july-2019-on-the-recognition-and-enforcement-of-foreign-judgments-in-civil-or-commercial-matters-hague-2019/consultation-on-the-hague-convention-of-2-july-2019-on-the-recognition-and-enforcement-of-foreign-judgments-in-civil-or-commercial-matters-hague-201*. The consultation runs until 11.59 p.m. on 9 February 2023. Responses may be submitted via email at: PIL@justice.gov.uk. They may also be submitted at: Private International Law, International Justice Policy Division, Ministry of Justice, 9th Floor, 102 Petty France, London, SW1H 9AJ.

FIXED RECOVERABLE COSTS EXTENSION – IMPLEMENTATION. On 18 November 2022, Lord Bellamy KC confirmed, at the Civil Justice Council's National Forum, that the introduction of the extension to the fixed recoverable costs regime to claims with a value up to £100,000, which was to come into effect in April 2023, has now been postponed until October 2023. This is due to a delay in finalising the drafting and approval of the amendments to the CPR to give effect to the extension. This extension is now also intended to introduce a new intermediate procedural case management track. The proposal to introduce a new cast management track was originally made by Sir Rupert Jackson and had previously been rejected by the Ministry of Justice. Further confirmation of the delay and intention to effect the extension via a new intermediate track is now available on the Ministry of Justice's Civil Procedure Rules webpage at: *https://www.justice.gov.uk/courts/procedure-rules/civil*.

In Detail

Party must identify themselves to court and other parties

In ***SMO (A Child) v TikTok Inc*** [2020] EWHC 3589 (QB); [2021] 2 F.L.R. 917, Warby J (at [8(1)]) considered whether it was permissible for a party to issue proceedings under a pseudonym. The consequence of the party doing so would mean that the court, and necessarily any other parties, would not know their identity. Warby J noted that the court had not yet acknowledged that the power existed for it to permit a party to do so. In that case there was no need to decide the question whether such a power existed. The claim could be issued in the normal way with the claimant afforded anonymity by way of an exception to the principle of open justice. In ***Wright v Persons Unknown*** [2022] EWHC 2982 (SCCO) Costs Judge Rowley considered the question whether a defendant could take part in detailed assessment proceedings while keeping their identity secret from the court and the other parties.

The substantive proceedings concerned an alleged infringement of copyright against a bitcoin website. It was alleged that the defendant, who used a pseudonym, had infringed the website's copyright by making a copy of a literary paper, which was made available on the website. The defendant subsequently refused to confirm their name and address in correspondence, which resulted in the proceedings being commenced with the defendant referred to as "*The Person or Persons Unknown Responsible for the Operation and Publication of the Website www.bitcoin.org (Including the Person or Persons Using the Pseudonym 'Cøbra')*".

The claimant subsequently applied for an order permitting service out of the jurisdiction and by an alternative method. The claimant considered that the defendant was based in the United States. The application was granted, however the judge did not make an order requiring the defendant to identify themselves. Mann J, who dealt with the application, did not do so, as such an order at that time presupposed that a person who was outside the jurisdiction was subject to the jurisdiction (at [7]). Mann J did, however, reserve the court's position on the question, which he considered could properly be dealt with if the defendant submitted a response to the proceedings. Consequently he ordered that if any person who was a defendant filed an acknowledgement of service, admission or defence they must thereafter provide the claimant with details of their identity. No response was made to the claim. At the hearing of the application, which was held remotely, a person took part who it was assumed was present to speak on behalf of the unknown defendants. Default judgment was granted. Detailed assessment proceedings were subsequently commenced.

In the detailed assessment proceedings, the defendant, whose identity remained unknown by the court and the claimant, served points of dispute. A question was raised whether the defendant was entitled to take part in proceedings in such circumstances.

The claimant submitted that a party was required to identify themselves. CPR Pt 7 required a claimant to identify themselves, although proceedings could be brought against persons unknown. No reported cases demonstrated that proceedings had been brought *by* persons unknown, however (at [12]). Furthermore,

> *"[13] [The claimant's counsel's] skeleton argument set out a number of reasons why the claimant said a party must identify themselves which included 'open justice', fair and just proceedings and the receiving party's ability to enforce any judgment or award (against the paying party). The reasons also avoided litigation being conducted for a collateral purpose; the risk of litigation being conducted by someone who had no title to bind the defendant (whoever or whatever they may be). The list of reasons also indicated that furthering the overriding objective would not be possible absent that identification."*

It was submitted by the defendant's counsel that in the defendant not identifying themselves there was no breach of, for instance, the Human Rights Act 1998 or the CPR (at [16]). It was also submitted, amongst other things, that there was no suggestion that the defendant would not meet the costs of the proceedings and that such assessment proceedings could properly be carried out without the defendant identifying themselves (at [17]–[18]).

The Costs judge noted that both counsel had not been able to find any reported decisions where persons unknown had taken an active role in proceedings (at [24]). Cases generally relied upon by the parties focused on proceedings against persons unknown, where those persons did not take any part in the proceedings. As such they did not have a bearing on the present case (at [24]–[25]). The fundamental difficulty facing the defendant was

> *"[29] . . . that the rules, taken as a whole, clearly expect a party to identify themselves at the outset of proceedings.*
>
> *[30] I do not think therefore that the absence in Part 47 of any requirement to provide the name and address for service is any pointer when considering the expectation of the rules regarding identification. In my view, it is plain that a party is expected to identify themselves when first actively involved in the proceedings. That requirement is clear from*

the rules concerning the commencement of a claim and the filing of a response to that claim."

It was, additionally, apparent from Mann J's judgment in the substantive proceedings that for the defendant to take an active part in the proceedings they would have to identify themselves: participation came "*at the price of self-identification*" (at [31]).

Having then held that the defendant would have to reveal their identity if they wished to participate with the proceedings, the Costs judge noted once more that counsel had not been able to identify any directly relevant authority on the point, granted permission to appeal. He did so having also reached the same conclusion as that which underpinned Warby J's judgment in ***SMO (A Child) v TikTok Inc*** (2020),

"[35] . . . I have concluded that the reason there are no such cases is because the point is in fact a simple one. If a party is not prepared to name itself, then it cannot take part in the proceedings. Where a party has concerns about the publication of its identity, an application to anonymise its name and address can be made. I accept that that does not generally prevent the opponent from knowing who the party is, but that is the extent to which a party can be involved in proceedings and limit their identification."

The Costs judge did, however, doubt if the grant of permission to appeal would be acted upon: to do so the defendant would most likely have to reveal themselves.

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