Neutral Citation Number: [2013] EWHC 67 (Comm)

Case No: 2012 FOLIO 1259

IN THE HIGH COURT OF JUSTICE

**QUEEN'S BENCH DIVISION**

**COMMERCIAL COURT**

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 24/01/2013

**Before** :

THE HONOURABLE MR JUSTICE FLAUX

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**Between :**

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|  | **GRAISELEY PROPERTIES LIMITED AND OTHERS** | Claimants |
|  | **- and -** |  |
|  | **BARCLAYS BANK PLC****VARIOUS EMPLOYEES AND EX EMPLOYEES OF BARCLAYS BANK PLC****TELEGRAPH MEDIA GROUP LMITED AND OTHERS** | DefendantApplicantsInterveners |

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**Mr Tim Lord QC and Mr Farhaz Khan** (instructed by **Cooke Young & Keidan LLP**) for the **Claimants**

**Mr Adrian Beltrami QC** (instructed by **Clifford Chance**) for the **Defendants**

 **Lord Pannick QC and Mr Andrew Scott** instructed by **Morrison & Foerster**) for the **Applicants**

**Mr Guy Vassall-Adams** (instructed by **the Editorial Legal Director of Telegraph Media Group Limited**) for the **Media Organisations**

Hearing date: 21 January 2013

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Judgment

**The Honourable Mr Justice Flaux:**

**Introduction and background**

1. At a Case Management Conference heard on 29 October 2012, I gave the claimants permission to amend their Particulars of Claim to make allegations that they were induced to enter the loan agreements and related hedging transactions the subject of the dispute in these proceedings by implied fraudulent misrepresentations by the defendant (to which I will refer as “Barclays”) before and at the time those contracts were entered into, that the respective interest rates under those contracts were being set by reference to LIBOR, an independent benchmark of the British Bankers Association (“BBA”), whereas Barclays was in fact making false and misleading submissions to the BBA and was manipulating or attempting to manipulate LIBOR. I held that that case was sufficiently arguable to go forward to trial.
2. At the next Case Management Conference heard on 13 and 14 November 2012, one of the issues concerned the scope of electronic disclosure by Barclays and specifically of which email accounts of employees of Barclays searches should be made. At the outset of the hearing it was apparent that because the various regulatory findings in the United Kingdom and the United States concerning manipulation of LIBOR by Barclays had anonymised the individual employees referred to in the Notices,[[1]](#footnote-1) it was not possible to discern from the Notices which employees’ email accounts had been reviewed by the regulators and, of those employees, who were the ones referred to in the Notices as involved in the setting of LIBOR.
3. Accordingly, to ensure that the issues of disclosure were properly ventilated, on the first day of the hearing I ordered Barclays to use its best endeavours to disclose to the court and the claimants’ lawyers by 8.30 am on 14 November 2012, the second day of the hearing two lists: (a) the so-called Short List identifying and stating the position within Barclays of the 25 people that Barclays believed were the ones being referred to in the Notices in respect of Libor and (b) the so-called Long List identifying and stating the position within Barclays of the 207 people (which included the 25 on the Short List) of employees whose emails had been called for and reviewed by the various regulators.
4. The part of the hearing which dealt with the production of the Lists and who should be the custodians whose emails were the subject of electronic search for disclosure purposes was held in private, in order to preserve confidentiality pending the determination of an application by Barclays in which it sought various confidentiality orders in relation to its disclosure in these proceedings. These included an order that the names referred to in the documents should not be released to the press and/or not put in the public domain until trial and should not be referred to at any interim hearings prior to trial but rather by some form of code or key or numbering which can be used at any further interlocutory hearings, rather than those individuals being named at any such interlocutory hearing. In a judgment delivered at the end of that application ([2012] EWHC 3264 (Comm)) I dismissed that application. However, because neither the individual employees nor the regulatory authorities had been represented at that hearing, I gave a period of 14 days during which the individuals or the regulators could make representations to the court as to whether or not the order sought by Barclays should be made. Following an application by Morrison & Foerster, lead or liaison solicitors for a number of firms representing the individuals, by an order dated 27 November 2012, I extended the time for making such an application to 4pm on 12 December 2012.
5. On 27 November 2012, a letter was sent to the court by the Criminal Division of the DOJ inviting the court to keep anonymous the names of all 207 individuals allegedly to protect an ongoing criminal investigation in the United States, alternatively to keep anonymous the 30 individuals referred to in code in the Statement of Facts[[2]](#footnote-2) because public disclosure of their identities could have a negative impact on that ongoing criminal investigation.
6. On 12 December 2012, written representations were served on behalf of 106 individuals out of the 207. Those 106 (to whom I will refer unless the context suggests otherwise as “the individuals”) are represented by Morrison & Foerster and other firms as identified in the written representations. Of those 106 individuals, 24 are said to be individuals on the Short List (so all but one of those individuals were represented) and the other 82 are in effect slightly under half of the 177 on the Long List who were neither on the Short List nor otherwise within the 30 to which the DOJ letter refers. In other words, those 82 are employees and ex-employees of Barclays who, on the material currently before the court, are not said to have been involved or implicated in the manipulation of LIBOR. It should be noted that the costs of the application by the individuals will be borne by Barclays as the employer or ex-employer of the individuals concerned.
7. It is striking that neither in the written representations (which were drafted by leading and junior counsel) nor in the skeleton argument of the represented individuals for this hearing is the actual identity of the 106 individuals who are represented revealed. Whilst the representations reveal that some of the individuals have been interviewed by Barclays and had disciplinary proceedings taken against them, in which some were exonerated, others received warnings and yet others received more serious sanctions, nowhere are the individuals exonerated or those disciplined identified.
8. Whilst it is true that towards the end of his oral submissions in reply Lord Pannick QC offered to identify the individuals for whom he acts if the court thought that was important to the application, the fact remains that the arguments of unfairness and potential prejudice which are the essential foundation of the individuals’ application have not been supported by any evidence of specific unfairness or prejudice to a named individual. Rather the allegations of unfairness and prejudice have been presented on a generic basis. At the very end of the hearing on 21 January 2013, I ordered that the individuals who were making the application should be identified.
9. Following the service of the written representations by the individuals, I indicated that if the media wished to make representations at the hearing of the individuals’ application they should have the opportunity to do so. In the event, written submissions were served by Mr Vassall-Adams on behalf of various media organisations: Telegraph Media Group Limited, Times Newspapers Limited, The Financial Times Limited and Bloomberg. Mr Vassall-Adams then attended the hearing on 21 January 2013 and made oral submissions on behalf of Telegraph Media Group Limited and Times Newspapers Limited. He put before the court in a coherent and cogent manner the case for open justice which obviously impacts upon the media and the public generally.
10. In addition, the claimants put in detailed written representations in opposition to the individuals’ application and Mr Tim Lord QC made written and oral submissions on behalf of the claimants for the purposes of the hearing as to why the order proposed by the individuals would prejudice the fair determination of these proceedings in accordance with the overriding objective of the Civil Procedural Rules.
11. Although Barclays’ application for an anonymity order had been dismissed at the hearing on 14 November 2012 so that it could not re-argue points before me on which it had lost, I permitted Mr Beltrami QC on behalf of Barclays to present argument on issues which had not arisen at the time of that earlier hearing. Mr Beltrami presented concise but helpful written and oral submissions, mainly on the issues related to the practical effect of the order sought by the individuals on the claimants’ ability to present their case and challenge any disputed disclosure applications.

**The order sought**

1. Before considering further the individuals’ application, it is sensible to set out in summary what the relief is that they seek. The principal order sought was that the names of the individuals and particulars of any individual which might lead to his or her identification, together with the two lists and the code or key to be used at any hearing should not be published other than to the parties and their legal advisers and any actual or potential witness or expert. Anonymity of the individuals was sought to be preserved by orders that they only be referred to in open court by a code or key or numbering and that any witness statement or exhibit filed or served and any statement made in open court should likewise not refer to any individual by name or otherwise give any particulars of any individual which might lead to his or her identification.

**Summary of the individuals’ submissions**

1. For the purposes of the present judgment, the submissions advanced by Lord Pannick QC on behalf of the individuals can be summarised as follows:
2. The approach of the courts was to seek to devise means by which private interests can be protected while maintaining general public access to hearings. He relied upon a number of cases arising in a variety of different situations, in which the courts had anonymised names of non-parties or otherwise imposed restrictions, where to disclose identity or information would be unfair to the non-party. I will deal with those cases later in this judgment.
3. The order sought involves very limited interference with the principle of open justice. The restrictions are only being sought in relation to the interlocutory stages of the case, not at trial, although Lord Pannick reserved his position in relation to trial. The restrictions are only in relation to identification of the individuals in open court. Hearings in private are not sought, nor are any restrictions sought to be placed by way of redaction of disclosed documents.
4. There are strong grounds for the limited interference with the principle of open justice which the individuals seek: (i) publication of names would prejudice those individuals who are or are at risk of becoming subject to regulatory and/or criminal proceedings here or in the United States; (ii) it would be unfair for the individuals to be named particularly in circumstances where the regulators have taken care to avoid this; (iii) so far as the FSA is concerned, the anonymisation in the Notice was in line with the protection afforded to individuals under section 393 of the Financial Services and Markets Act 2000 whereby an individual named in an FSA Notice has a right of representation first before the FSA itself, then before the Financial Services and Markets Tribunal before any Notice is issued and published.[[3]](#footnote-3) Lord Pannick seeks to draw an analogy with that procedure and, whilst recognising that it does not apply directly to court proceedings, urges the court to adopt the same approach.
5. There is no competing public interest in identification of the individuals which justifies the prejudice and unfairness to them.
6. The restrictions sought by the individuals would be an effective and proportionate means of protecting their legitimate interest in anonymity.
7. To the extent that it is necessary to set out submissions made by Lord Pannick in more detail, I do so later in the judgment. Likewise the nature of the submissions in response made by Mr Vassall-Adams on behalf of the media organisations and by Mr Lord QC on behalf of the claimants, together with the limited submissions advanced by Mr Beltrami QC on behalf of Barclays, appear sufficiently later in the judgment.

**The applicable principles of law**

1. The principles of law which the court should apply in determining whether to grant the type of anonymity order for which the individuals contend were the subject of detailed submissions made by Mr Vassall-Adams. Lord Pannick QC responded in relation to the authorities relied upon, but ultimately there was not much dispute between them as to the principles. The real battleground was as to the application of the principles to the facts.
2. The starting point for any consideration of the law in this area is the fundamental principle of English law of open justice, that the general rule (now reflected in CPR 39.2) is that all hearings, whether interlocutory or at trial are public. That fundamental principle of open justice has been stated in any number of cases, perhaps most famously in *Scott v Scott* [1913] AC 417 per Viscount Haldane LC at 435; the Earl of Halsbury at 440; Earl Loreburn at 445-6; Lord Atkinson at 463 and Lord Shaw of Dunfermline at 477-8.
3. The recognised modern formulation of the fundamental principle of the English common law is that of Lord Diplock in *Attorney-General v Leveller Magazine Limited* [1979] 440 at 449H-450D:

“As a general rule the English system of administering justice does require that it be done in public: [*Scott v. Scott* [1913] A.C. 417](http://login.westlaw.co.uk/maf/wluk/app/document?src=doc&linktype=ref&&context=4&crumb-action=replace&docguid=I9ED2F0A1E42811DA8FC2A0F0355337E9) . If the way that courts behave cannot be hidden from the public ear and eye this provides a safeguard against judicial arbitrariness or idiosyncrasy and maintains the public confidence in the administration of justice. The application of this principle of open justice has two aspects: as respects proceedings in the court itself it requires that they should be held in open court to which the press and public are admitted and that, in criminal cases at any rate, all evidence communicated to the court is communicated publicly. As respects the publication to a wider public of fair and accurate reports of proceedings that have taken place in court the principle requires that nothing should be done to discourage this.

However, since the purpose of the general rule is to serve the ends of justice it may be necessary to depart from it where the nature or circumstances of the particular proceeding are such that the application of the general rule in its entirety would frustrate or render impracticable the administration of justice or would damage some other public interest for whose protection Parliament has made some statutory derogation from the rule. Apart from statutory exceptions, however, where a court in the exercise of its inherent power to control the conduct of proceedings before it departs in any way from the general rule, the departure is justified to the extent and to no more than the extent that the court reasonably believes it to be necessary in order to serve the ends of justice.”

1. Without in any sense seeking to diminish the importance of those statements of principle or their continuing relevance, particularly in relation to one of the supposed grounds of unfairness, to which I will return later, later restatements of the same fundamental principle are perhaps more attuned to the modern context, which includes both the enactment of the Human Rights Act 1998 bringing the European Convention of Human Rights into force in this jurisdiction and the enactment of the Civil Procedural Rules (“CPR”) under which the general rule (no doubt anticipating the coming into force of the Human Rights Act) is that interlocutory hearings are no longer heard in private (as was the position at least in the Commercial Court and the Queen’s Bench Division of which it forms a part, prior to the CPR coming into force in April 1999) but in public.
2. Thus, the rationale for the principle was stated by Lord Woolf MR in *R v Legal Aid Board ex parte Kaim Todner* [1999] QB 966, a case decided when the CPR was in draft and the Human Rights Act was in the offing, albeit not yet in force. Lord Woolf MR explained why the court should be vigilant against eroding the fundamental principle in these terms at 977C-G:

“4. The fact that the outcome usually depends upon the assessment of the judge of the particular circumstances of a case explains why no consistent pattern can be identified by examining the cases where courts have made or declined to make an exception to the general rule. Furthermore in many of the cases the question will have been resolved in a summary manner, there being no objection from the other party, to anonymity. Sometimes the importance of not making an order, even where both sides agree that an inroad should be made on the general rule, if the case is not one where the interests of justice require an exception, has been overlooked. Here a comment in the judgment of Sir Christopher Staughton in *Ex parte P*., The Times, 31 March 1998; Court of Appeal (Civil Division) Transcript No. 431 of 1998, is relevant. In his judgment, Sir Christopher Staughton states: "When both sides agreed that information should be kept from the public that was when the court had to be most vigilant." The need to be vigilant arises from the natural tendency for the general principle to be eroded and for exceptions to grow by accretion as the exceptions are applied by analogy to existing cases. This is the reason it is so important not to forget why proceedings are required to be subjected to the full glare of a public hearing. It is necessary because the public nature of proceedings deters inappropriate behaviour on the part of the court. It also maintains the public's confidence in the administration of justice. It enables the public to know that justice is being administered impartially. It can result in evidence becoming available which would not become available if the proceedings were conducted behind closed doors or with one or more of the parties' or witnesses' identity concealed. It makes uninformed and inaccurate comment about the proceedings less likely. If secrecy is restricted to those situations where justice would be frustrated if the cloak of anonymity is not provided, this reduces the risk of the sanction of contempt having to be invoked, with the expense and the interference with the administration of justice which this can involve. ”

1. With the enactment of the Human Rights Act 1998, various provisions of the European Convention on Human Rights have become relevant to the consideration of the fundamental principle and the permissible derogations from it. Mr Vassall-Adams relied on two provisions of the Convention, Articles 6 and 10, which provide as follows:

“**Article 6 Right to a fair trial**

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

**Article 10 Freedom of expression**

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

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

1. The application of Article 6 on the facts of this case was one of the areas where there was some disagreement between Lord Pannick and Mr Vassall-Adams. Lord Pannick submitted, by reference to the cases cited in volume 1 of the White Book at p. 1167 that Article 6 does not apply to interlocutory hearings which are not determinative of the rights and obligations of the parties. Mr Vassall-Adams countered by referring the court to the more recent decision of the European Court in *Micallef v Malta* (2010) 50 EHRR 37; which he submitted represented a “rowing back” by the European Court of Human Rights from the position in the earlier cases that Article 6 was not engaged in interlocutory proceedings. The Court said this at [75] and [79-82]:

“75 Preliminary proceedings, like those concerned with the grant of an interim measure such as an injunction, are not normally considered to determine civil rights and obligations and do not therefore normally fall within the protection of art.6. It follows that in length-of-proceedings cases, the Court has applied art.6 only from the initiation of the case on the merits and not from the preliminary request for such measures. Nevertheless, in certain cases, the Court has applied art.6 to interim proceedings, notably by reason of their being decisive for the civil rights of the applicant. Moreover, it has held that an exception is to be made to the principle that art.6 will not apply when the character of the interim decision exceptionally requires otherwise because the measure requested was drastic, disposed of the main action to a considerable degree, and unless reversed on appeal would have affected the legal rights of the parties for a substantial period of time.

…

79 The exclusion of interim measures from the ambit of art.6 has so far been justified by the fact that they do not in principle determine civil rights and obligations. However, in circumstances where many contracting states face considerable backlogs in their overburdened justice systems leading to excessively long proceedings, a judge’s decision on an injunction will often be tantamount to a decision on the merits of the claim for a substantial period of time, even permanently in exceptional cases. It follows that, frequently, interim and main proceedings decide the same “civil rights or obligations” and have the same resulting long lasting or permanent effects.

80 Against this background the Court no longer finds it justified to automatically characterise injunction proceedings as not determinative of civil rights or obligations. Nor is it convinced that a defect in such proceedings would necessarily be remedied at a later stage, namely, in proceedings on the merits governed by art.6 since any prejudice suffered in the meantime may by then have become irreversible and with little realistic opportunity to redress the damage caused, except perhaps for the possibility of pecuniary compensation.

81 The Court thus considers that, for the above reasons, a change in the case law is necessary. While it is in the interests of legal certainty, foreseeability and equality before the law that the Court should not depart, without good reason, from precedents laid down in previous cases, a failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement. It must be remembered that the Convention is designed to, “guarantee not rights that are theoretical or illusory but rights that are practical and effective”.

82 In this light, the fact that interim decisions which also determine civil rights or obligations are not protected by art.6 under the Convention calls for a new approach.”

1. For present purposes, this “rowing back” by the European Court does not seem to be of much relevance. Given that the interlocutory hearings which are likely to take place in the present case between now and trial will concern matters such as disclosure and witness and expert evidence, it is difficult to see how they will determine civil rights and obligations and thus, Article 6 is unlikely to be engaged. However, I agree with Mr Vassall-Adams that this is of little if any significance, since the exception to open justice set out in the closing lines of Article 6.1 is essentially the same exception as applies at common law. Lord Pannick needs to invoke that exception in the present case. That the common law principle of open justice applies to interlocutory hearings as much as to trials is clear, as I discuss further below.
2. In relation to Article 10 of the European Convention, Mr Vassall-Adams pointed out that this was not a case where it was necessary to balance the right of freedom of expression of the press against the right to respect for private and family life in Article 8. The individuals cannot invoke Article 8 rights because the case concerns their professional activities rather than their private lives. Mr Vassall-Adams also emphasised, by reference to *The Sunday Times v United Kingdom* before the European Court of Human Rights that the right to freedom of expression under Article 10 included the right of the media to report news contemporaneously. That case concerned the campaign by the Sunday Times in the early 1970s to expose the truth about the drug thalidomide and the culpability of its manufacturer, Distillers. An interlocutory injunction restraining publication of an article in the Sunday Times on the application of the Attorney-General was granted by the Divisional Court, discharged by the Court of Appeal and restored by the House of Lords ([1974] AC 273).
3. The European Court held by a majority that the injunction infringed the right of freedom of expression of Times Newspapers Limited under Article 10 ((1979) 2 EHRR 245). The detail of the Court’s ruling does not matter for present purposes, but Mr Vassall-Adams relied upon a statement of principle at p.280 of the judgment, which emphasised the importance of freedom of expression for the media, in the context of court proceedings, to bring to the attention of the public information before the court which is in the public interest. This principle seems to me particularly apposite in the present case for reasons I will elaborate later:

“These principles [of freedom of expression] are of particular importance as far as the press is concerned. They are equally applicable to the field of the administration of justice, which serves the interests of the community at large and requires the co-operation of an enlightened public. There is general recognition of the fact that the courts cannot operate in a vacuum. Whilst they are the forum for the settlement of disputes, this does not mean that there can be no prior discussion of disputes elsewhere, be it in specialised journals, in the general press or amongst the public at large. Furthermore, whilst the mass media must not overstep the bounds imposed in the interests of the proper administration of justice, it is incumbent on them to impart information and ideas concerning matters that come before the courts just as in other areas of public interest. Not only do the media have the task of imparting such information and ideas: the public also has a right to receive them.”

1. Mr Vassall-Adams also relied upon a passage in the judgment of the European Court in *The Sunday Times v United Kingdom (No.2)* (1991) 14 EHRR 229, which concerned complaints by Times Newspapers Limited about interlocutory injunctions obtained by the Attorney-General restraining publication of details of the *Spycatcher* book and information emanating from its author Peter Wright. The Court held unanimously that there had been a violation of Article 10. It stated the general principles concerning the restrictions which might be ‘necessary in a democratic society’ at [50] and [51]. Mr Vassall-Adams relied in particular upon the passage at the end of [51] concerning news being a perishable commodity, to emphasise the importance of the media being able to report all aspects of the so-called “LIBOR scandal”, including the involvement of employees of Barclays and being able to do so now rather than at the trial in ten months time.
2. The relevant parts of the judgment are as follows:

“50. Argument before the Court was concentrated on the question whether the interference complained of could be regarded as "necessary in a democratic society". In this connection, the Court’s judgments relating to Article 10 (art. 10) – starting with *Handyside* (7 December 1976; Series A no. 24), concluding, most recently, with *Oberschlick* (23 May 1991; Series A no. 204) and including, amongst several others, *Sunday Times* (26 April 1979; Series A no. 30) and *Lingens* (8 July 1986; Series A no. 103) - enounce the following major principles.

(a) Freedom of expression constitutes one of the essential foundations of a democratic society; subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Freedom of expression, as enshrined in Article 10 (art. 10), is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.

(b) These principles are of particular importance as far as the press is concerned. Whilst it must not overstep the bounds set, inter alia, in the "interests of national security" or for "maintaining the authority of the judiciary", it is nevertheless incumbent on it to impart information and ideas on matters of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog".

(c) The adjective "necessary", within the meaning of Article 10 para. 2 (art. 10-2), implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with a European supervision, embracing both the law and the decisions applying it, even those given by independent courts. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10 (art. 10).

(d) The Court’s task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 (art. 10) the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient".

51. For the avoidance of doubt, and having in mind the written comments that were submitted in this case by "Article 19" (see paragraph 6 above), the Court would only add to the foregoing that Article 10 (art. 10) of the Convention does not in terms prohibit the imposition of prior restraints on publication, as such. This is evidenced not only by the words "conditions", "restrictions", "preventing" and "prevention" which appear in that provision, but also by the Court’s *Sunday Times* judgment of 26 April 1979 and its *Markt Intern Verlag GmbH and Klaus* *Beermann* judgment of 20 November 1989 (Series A no. 165). On the other hand, the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest.”

1. The right of freedom of expression under Article 10 in relation to legal proceedings is to report the proceedings as the media choose, providing that the reporting is fair and accurate. That right includes being able to name individuals involved in the proceedings rather than simply referring to anonymous people in a disembodied way. This is an aspect of the right of freedom of expression which is recognised by the Supreme Court in *Re Guardian News and Media* [2010] UKSC 1; [2010] 2 AC 697. In that case, the Supreme Court had to consider an argument on an application for an anonymity order by a suspected terrorist that the media could properly report matters of public interest without naming him.
2. At [63] Lord Rodger of Earlsferry, giving the judgment of the Supreme Court, rejected that argument emphatically in these terms:

“What's in a name? ‘A lot’, the press would answer. This is because stories about particular individuals are simply much more attractive to readers than stories about unidentified people. It is just human nature. And this is why, of course, even when reporting major disasters, journalists usually look for a story about how particular individuals are affected. Writing stories which capture the attention of readers is a matter of reporting technique, and the European Court holds that article 10 protects not only the substance of ideas and information but also the form in which they are conveyed: *News Verlags GmbH & Co KG v Austria* (2000) 31 EHRR 246, 256, para 39, quoted at para 35 above. More succinctly, Lord Hoffmann observed in *Campbell v MGN Ltd* [[2004] 2 AC 457](http://www.bailii.org/cgi-bin/redirect.cgi?path=/uk/cases/UKHL/2004/22.html" \o "Link to BAILII version), 474, para 59, "judges are not newspaper editors." See also Lord Hope of Craighead in *In re British Broadcasting Corpn* [[2009] 3 WLR 142](http://www.bailii.org/cgi-bin/redirect.cgi?path=/uk/cases/UKHL/2009/34.html), 152, para 25. This is not just a matter of deference to editorial independence. The judges are recognising that editors know best how to present material in a way that will interest the readers of their particular publication and so help them to absorb the information. A requirement to report it in some austere, abstract form, devoid of much of its human interest, could well mean that the report would not be read and the information would not be passed on. Ultimately, such an approach could threaten the viability of newspapers and magazines, which can only inform the public if they attract enough readers and make enough money to survive.”

1. The interaction between Article 10 freedom of expression and the fundamental principle of open justice is discussed by the Court of Appeal in the *Binyam Mohamed* case (*R (Mohamed) v Foreign Secretary (No.2)* [2010] EWCA Civ 65; [2011] QB 218, restating the principle and emphasising that it is for editors in the media not the courts to determine what to report and the way in which it is reported. That case concerned redactions from the judgment of the Divisional Court but, despite argument by Lord Pannick to the contrary, the principle stated seems to me to be applicable at each and every stage of proceedings.
2. Lord Judge CJ stated the principle as follows at [38] to [40]:

“38. Justice must be done between the parties. The public must be able to enter any court to see that justice is being done in that court, by a tribunal conscientiously doing its best to do justice according to law. For that reason, every judge sitting in judgment is on trial. So it should be, and any exceptions to the principle must be closely limited. In reality very few citizens can scrutinise the judicial process: that scrutiny is performed by the media, whether newspapers or television, acting on behalf of the body of citizens. Without the commitment of an independent media the operation of the principle of open justice would be irremediably diminished.

39. There is however a distinct aspect of the principle which goes beyond proper scrutiny of the processes of the courts and the judiciary. The principle has a wider resonance, which reflects the distinctive contribution made by the open administration of justice to what President Roosevelt described in 1941 as the "…first freedom, freedom of speech and expression". In litigation, particularly litigation between the executive and any of its manifestations and the citizen, the principle of open justice represents an element of democratic accountability, and the vigorous manifestation of the principle of freedom of expression. Ultimately it supports the rule of law itself. Where the court is satisfied that the executive has misconducted itself, or acted so as to facilitate misconduct by others, all these strands, democratic accountability, freedom of expression, and the rule of law are closely engaged.

40. Expressed in this way, the principle of open justice encompasses the entitlement of the media to impart and the public to receive information in accordance with article 10 of the European Convention of Human Rights. Each element of the media must be free to decide for itself what to report. One element would report those matters which reflect its distinctive social or political stance, and a different section of the media will report on different matters, reflecting a different, distinctive position. This may very well happen with this judgment, reflecting the diversity of the media, and symbolising its independence. In short, the public interest may support continuing redaction, or it may not. If it does not, each element of the media will decide for itself what, if anything, to publish.”

1. Lord Neuberger MR stated the principle of open justice in emphatic terms at [176] encapsulating the two aspects of the principle identified by Lord Diplock:

“…the central point [is] that the court should administer justice in public, which means that all parts of a judgment should be publicly available, unless there is a very powerful reason to the contrary. This principle is so important not merely because it helps to ensure that judges do not, and do not appear to, abuse their positions, but also because it enables information to become available to the public. What goes on in the courts, like what goes on in Parliament or in local authority meetings or in public inquiries, is inherently of legitimate interest, indeed of real importance, to the public.”

1. Lord Neuberger went on to consider the significance of Article 10 in the context of court proceedings at [180]:

“The Human Rights Act 1998 has enlarged the court's role for present purposes. The courts have always been a branch of government (in the wider sense of that expression), and, as such, they now have a duty to comply with the Convention. As the Divisional Court said, article 10 carries with it a right to know, which means that the courts, like any public body, have a concomitant obligation to make information available. Of course, the obligation is not unqualified or absolute, nor does it involve the court arrogating to itself some sort of roving commission. But, where the publication at issue concerns the contents of a judgment of the court, it seems to me that article 10 is plainly engaged: the public's right to know is a very important feature. And that is not merely a point of principle. The court made findings as to what UK Government officials were told about serious and sustained mistreatment (conceivably amounting to torture) by a foreign government of someone resident in the UK, in circumstances where the court has also found such officials to have been involved in the mistreatment, when the UK Government had denied any such knowledge. In those circumstances, it seems to me little short of absurd to say that the court cannot take into account the public importance of, and the obviously justified public interest in, such findings, when deciding whether it is, on balance, in the public interest in publishing those findings. Indeed, in the light of the reasons and judicial observations contained in paragraphs 44 to 53 of the fourth judgment, the importance of putting into the public domain the facts relating to what the UK Government was told by the US Government about the wrongful treatment of detainees is clear.”

1. Another modern statement of the principle of open justice to which Mr Vassall-Adams referred is that of Lord Dyson JSC in *Al Rawi v Security Service* [2011] UKSC 34; [2012] AC 531 at [10]-[12], reiterating its fundamental importance to our system of justice.
2. At various points in his submissions, Lord Pannick sought to suggest that in some way the principle of open justice might not apply in its full rigour to interlocutory hearings. Thus, he sought to distinguish the authorities to which I have referred as essentially ones where the courts were considering publication of proceedings at trial, as in *Al Rawi*, or, in the case of *Binyam Mohamed*, of the contents of a judgment. However, since CPR 39.2 makes it clear that the general rule is that all hearings are in public, I can see no principled basis for distinguishing interlocutory hearings from trials and for applying some less stringent and vigilant approach to interlocutory hearings.
3. Furthermore, that the principle of open justice applies in its full rigour at the interlocutory stage and not just at trial, is clear from the statement of the law by Lord Neuberger MR in the *Practice Guidance (Interim Non-disclosure Orders)* [2012] 1 WLR 1003. This concerns applications for interim injunctive relief restraining publication of information, which of course are matters which arise at the interlocutory stage of proceedings. Lord Neuberger summarised the principle of open justice and the limits on any derogation from it at [9] to [13]:

“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. This applies to applications for interim non-disclosure orders: *Micallef v Malta* (17056/06) [2009] ECHR 1571 at [75]ff; *Ntuli v Donald* [2010] EWCA Civ 1276 (*Ntuli*) at [50].

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 parte New Cross Building Society* [1984] Q.B. 227 at 235; *Nutuli* at [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: *AMM v HXW* [2010] EWHC 2457 (QB) at [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] EWCA Civ 409 at [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* [1913] AC 417 at 438 – 439, 463 and 477; *Lord Browne of Madingley v Associated Newspapers Ltd* [2008] 1 QB 103 at [2] – [3]; *Secretary of State for Home Department v AP (No2)* [2010] 1 WLR 1652 at [7]; *Gray v UVW* [2010] EWHC 2367 at [6] – [8]; and *JIH v News Group Newspapers* [2011] EWCA Civ 42 (*JIH*) at [21].”

1. Lord Pannick also sought to distinguish the cases in which the courts had refused to make anonymity orders, as being cases where the individual whose identity was sought to be protected was central to the case, whereas here the individuals’ involvement was incidental because it was Barclays which was the defendant. I can see no principled reason for drawing that distinction and, in any event, in relation to the individuals who were involved in manipulating LIBOR, the point made is a somewhat doubtful one. Since a corporate entity can only act through its human agents, the identity of those agents is certainly an important aspect of the case.

**No basis for derogation from the principle of open justice**

1. As Lord Neuberger MR made clear in the *Practice Guidance* at [13] the burden of establishing any derogation from the general principle of open justice lies on the person seeking to do so, here the individuals, and the derogation must be established by clear and cogent evidence. In my judgment, the individuals fail in their application at this first hurdle, as they cannot begin to establish by clear and cogent evidence that anonymisation is strictly necessary to secure the proper administration of justice. I have reached that conclusion for a number of reasons.
2. First, to the extent that it is still being argued that the identification of the individuals in these proceedings might prejudice ongoing criminal investigations (and although this point featured in the individuals’ written submissions, it was not pressed orally by Lord Pannick) it is a bad point. It is striking that neither the Financial Services Authority nor the Serious Fraud Office (who would be primarily responsible for any decision to prosecute in this jurisdiction) wished to address any submissions to the court on this issue.
3. So far as the letter from the DOJ is concerned, that does not provide any particulars of who might face prosecution or why naming them in these proceedings might prejudice any criminal investigation, let alone any criminal trial at a later stage in the United States. I agree with Mr Vassall-Adams that what is stated in the letter is no more than assertion which cannot be properly tested. Given both that the regulatory authorities know who are the individuals implicated in the manipulation of LIBOR and the individuals concerned must be aware that they are the people being referred to in the various Notices, it is difficult to see how naming them in these proceedings could impede criminal investigations in the United States. In any event, it would be fanciful to suggest that naming those individuals could prejudice a jury hearing a criminal trial at some stage in the future, let alone one in the United States.
4. Furthermore, even if this point had any force, it could only avail the individuals who are or are at risk of being the subject of a criminal investigation. It could not conceivably be a point available to the vast majority of the individuals who are simply people whose email accounts were provided to the regulatory authorities but who, on their own case, are innocent of any wrongdoing. Accordingly, this point could not conceivably justify a wholesale blanket anonymity order such as the individuals seek and they have adduced no evidence whatsoever from which the court could discern which, if any, of the individuals is or is at risk of being subject to a criminal investigation. In my judgment, this point can be discounted.
5. Second, and following on from the first reason, so far as the 82 people on the Long List but not on the Short List are concerned, on the material currently before the court, they are employees whose email accounts were disclosed to the regulatory authorities and it is not suggested in the regulatory findings that they were implicated in the fixing or manipulation of LIBOR. The only context in which it is likely that the names of any of them will be mentioned at any interlocutory stage will be if there is a debate about whether further custodians should be added to the 42 against whose email accounts electronic searches have taken or will take place, pursuant to the order I made at the Case Management Conference. Even if the media chose to report their names at that stage, it seems to me that the court should not assume that there would be anything other than fair and accurate reporting, in which case those individuals have nothing to fear.
6. Mr Beltrami referred to the fact that at the time of the last Case Management Conference there had been some misleading reporting suggesting, incorrectly, that all 207 individuals were somehow implicated in manipulation of LIBOR. However, in my judgment that inaccuracy arose precisely because, as matters then stood, the media were not aware of the status of the individuals on the two different Lists, whereas, as has now been explained to Mr Vassall-Adams on behalf of the media in open court at the hearing, on the material before the court, it is only the 25 employees on the Short List who are referred to in relation to LIBOR, in any of the Notices issued by the regulatory authorities. In this context, it seems to me that there is considerable force in the point made by Lord Woolf MR in the *Kaim Todner* case, that open justice in this case will make uninformed and inaccurate reporting less likely rather than more likely.
7. Furthermore, if in the light of Barclays’ disclosure or other evidence, it were to emerge hereafter that one or more of the 177 individuals on the Long List but not currently on the Short List was involved in some way in the manipulation of LIBOR, the same reasons pointing to open justice rather than anonymity as are set out below, would apply with equal force to any such additional individual.
8. Third, Lord Pannick placed considerable emphasis on the analogy with the procedure under section 393 of the Financial Services and Markets Act 2000 in arguing that it would be unfair for the court to order that names of employees can be disclosed at an interlocutory stage, when they have no right to respond to allegations being made in the proceedings. However, in my judgment, the analogy is not an apt one. Regulatory investigations, unlike civil court proceedings do not take place in a public forum and the fundamental principle of open justice does not apply to them.
9. Furthermore, this plea of unfairness seems to me to be somewhat exaggerated. It is striking that none of the 25 employees identified by Barclays as being the individuals referred to in the regulatory Notices has sought to suggest on this application that he or she has been incorrectly named or identified as one of the people being referred to in the Notices, let alone that the regulator in question has made an error in its findings which include references to any particular individual. It should also be borne in mind that, at least in the case of the DOJ Statement of Facts, that was expressly agreed by Barclays, which would hardly have occurred if the Statement of Facts contained material inaccuracies about the involvement of particular employees (whom of course the DOJ and Barclays would have been able to identify). In my judgment, this really answers the point Lord Pannick sought to make by analogy with the section 393 procedure, that it would be unfair to allow the individuals to be named in these proceedings at this stage, without their having any opportunity to answer allegations being made.
10. Fourth, in my judgment there is not some general exception to the principle of open justice, to protect non-parties from identification in proceedings to avoid the risk of reputational harm, which is really on analysis what Lord Pannick’s submission on unfairness comes to. As already noted above, Lord Pannick sought to rely upon a number of decisions from various areas of the law, in support of a submission that the courts would protect non-parties from being named where a claimant alleged they had been involved in serious wrongdoing.
11. Lord Pannick relied first on a statement by Tugendhat J in *Coward v Harraden* [2011] EWHC 3092 (QB) concerning protection of non-parties in a *Norwich Pharmacal* application. Tugendhat J said this at [3]:

“A *Norwich Pharmacal* order is an order made on an application by a person claiming to be the victim of wrongdoing. It is made against a respondent who is not alleged to be a wrongdoer, but who is alleged to have become innocently mixed up in the wrongdoing of some other person, unknown to the applicant. So the applicant asks for an order that the innocent respondent disclose information needed to identify the alleged wrongdoer. If the identity of the alleged wrongdoer is not known, he cannot be made a party. But even if the applicant suspects that he knows who the alleged wrongdoer is, the applicant may still have a good reason not to give notice to the alleged wrongdoer of the intended application, in order that, if his suspicions prove to be correct, the alleged wrongdoer will not have the opportunity to destroy evidence or otherwise frustrate the purpose of the application. So such applications may be heard in private. Any judgment delivered on the application may be either in private or in public. In the course of such an application allegations may be made affecting third parties who have no opportunity to state their side of the case, and there may be other reasons for not making public what has been said in court.”

1. In my judgment, reliance on this passage is misplaced. The very nature of a *Norwich Pharmacal* application, which is made without notice to the wrongdoer, involves it being heard in private, so the principle of open justice by definition simply does not apply to such a case. In any event, the learned judge does not elaborate what case concerning allegations affecting third parties he had in mind.
2. The other cases were ones where, for whatever reason, the court had anonymised the names of people who were at least arguably caught up in wrongdoing. Thus, in *Rustenburg Platinum Mines Ltd v South African Airways* [1977] 1 Lloyd’s Rep 564 at 570-1, Ackner J held that it would be unfair to name in the judgment a non-party servant who was alleged to have stolen goods for which the defendants were liable but who had not had the opportunity to make representations to the court. In *Joseph v Spiller* [2012] EWHC 2958 (QB), the claimants produced a witness statement from someone which almost certainly contained false information. Tugendhat J held that, given the seriousness of the allegations and the fact neither the individual in question nor another person implicated in the deception had been represented or given evidence at the trial, fairness required that they be not named. In the financial services context, Lord Pannick relied upon the decision of the Upper Tribunal (Tax and Chancery Chamber) Financial Services in *Karpe v The Financial Services Authority* (2012) where the Tribunal anonymised the names of customers of the bank.
3. The difficulty with all those cases, as I see it, is that in none of them is there any analysis as to why there should be a derogation from the principle of open justice. Therefore it is not possible to tell to what extent the anonymisation was agreed by the parties or, at least, was unchallenged. As Sir Christopher Staughton pointed out in the unreported case cited by Lord Woolf MR in *Kaim Todner*, it is precisely in that situation that courts need to be most vigilant to uphold the principle of open justice and only permit derogation from it where that is strictly necessary to secure the proper administration of justice. Those cases seem to me to be an unreliable foundation for any general exception to the fundamental principle of open justice, such as that for which Lord Pannick contended, that where non-parties are caught up in allegations of wrongdoing, the court will protect them by some form of anonymisation.
4. Indeed, the sort of anonymisation for which Lord Pannick appeared to be contending would subvert the normal process of open justice in many different types of case where allegations of wrongdoing are being made. In the context of cases in the Commercial Court an obvious example would be the marine insurance case where the insurers’ defence is that the ship was scuttled at the behest of the owners by some of the crew. Lord Pannick’s approach would enable the crew (both those implicated in wrongdoing and those innocent of wrongdoing) to obtain an anonymity order in circumstances where they were saying that it was unfair that they should be named without an opportunity to respond. If that were the correct approach such orders would soon become the norm at least at the interlocutory stages in very many cases in the Commercial Court and other courts for that matter and the principle of open justice would soon be subverted.
5. In my judgment, the law is clear that anonymity orders will only be made in those cases where the applicant for the order establishes that it is strictly necessary for the proper administration of justice. This emerges very clearly from the judgment of Lord Neuberger MR in *Pink Floyd Music Ltd v EMI Records Ltd* [2011] EWCA Civ 1429; [2011] 1 WLR 770 at [66]:

“I consider, therefore, that the present appeal provides a good opportunity for this court to make it clear that a private hearing or party anonymisation will be granted in the Court of Appeal only if, and only to the extent that, a member of the Court is satisfied that it is necessary for the proper administration of justice.”

1. The other case upon which Lord Pannick relied was the decision of the Court of Appeal in *Ambrosiadou v Coward* [2011] EWCA Civ 409; [2011] EMLR 21. In my judgment that case does not assist Lord Pannick’s argument. It is simply an example, as Lord Neuberger MR noted at [12] of the *Practice Guidance*, of the court only granting anonymity where it is strictly necessary and then only to that extent. There, certain confidential information concerning the child of the parents who were the litigants would be revealed during the course of the hearing. Rather than hold the whole hearing in private as counsel for the wife contended, the Court of Appeal held the hearing in public but ordered that there should be no reporting of the contents of a particular application notice which might disclose confidential information, without the permission of the court or the written agreement of the parties: see per Lord Neuberger MR at [50]-[52] and per Leveson LJ at [54]. *Deripaska v Cherney* [2012] EWCA Civ 1235, to which I referred in my judgment dismissing Barclays’ application for an anonymity order, is another recent example of the courts only ordering anonymity to the extent that it is proportionate and strictly necessary in the interests of justice, there to address fears of reprisal against witnesses in Russia.
2. That the proper administration of justice does not include protecting people from reputational harm emerges from a number of authorities. This was a point made by Lord Atkinson in *Scott v Scott* [1913] AC 417 at 463:

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

1. Similarly, in *R v Chief Registrar ex parte New Cross Society* [1984] 1 QB 227 Sir John Donaldson MR considered the circumstances in which hearings should be held in camera and summarised the guidance to be derived from the speeches in *Scott v Scott* as follows at 235D-F:

“The general rule that the courts shall conduct their proceedings in public is but an aid, albeit a very important aid, to the achievement of the paramount object of the courts which is to do justice in accordance with the law. It is only if, in wholly exceptional circumstances, the presence of the public or public knowledge of the proceedings is likely to defeat that paramount object that the courts are justified in proceeding in camera. These circumstances are incapable of definition. Each application for privacy must be considered on its merits, but the applicant must satisfy the court that nothing short of total privacy will enable justice to be done. It is not sufficient that a public hearing will create embarrassment for some or all of those concerned. It must be shown that a public hearing is likely to lead, directly or indirectly, to a denial of justice.”

1. That the public interest in the proper administration of justice does not encompass the private welfare of those caught up in that administration was made clear by the decision of the Queen’s Bench Divisional Court of Northern Ireland in *R. v Newtownabbey Magistrates Court Ex p. Belfast Telegraph Newspapers Ltd* [1997] NI 309, albeit in a more extreme context than the present case. In that case the court refused to grant anonymity to a man charged with sexual assault, who put forward evidence that he was likely to be attacked in his community if he were identified. Having cited Lord Diplock’s speech in *A-G v Leveller*, the court stated that:

“The use of the words ‘some other public interest’ indicates that Lord Diplock had in mind the protection of the public interest in the administration of justice rather than the private welfare of those caught up in that administration. ”

1. Thus, for all those reasons, I have concluded that the individuals’ application that they should remain anonymous until trial fails at the first hurdle, because they have simply not established by clear and cogent evidence, or at all, that the order they seek or any aspect of it is strictly necessary for the proper administration of justice. That being so, as Lord Neuberger MR made clear in the *Practice Guidance* at [11], there is no question of any residual discretion in the court to grant some lesser protection. The court must refuse the application.

**Other compelling reasons why open justice should apply**

1. However, even if I had not concluded that the application failed at that first hurdle, I would still conclude that the order sought was not necessary for the proper administration of justice for three principal additional reasons. First, it seems to me that Mr Lord QC for the claimants is right that the order proposed is one which would impede his clients in their presentation and preparation of the case and which would be inimical to the overriding objective under the CPR. As matters stand, the claimants still face the forensic task of piecing together exactly who at Barclays was implicated in and knew about the manipulation of LIBOR. Whilst it is correct that they would have unimpeded access to Barclays’ disclosure, if the order were granted, any contested disclosure hearing would have to involve reference to individuals and their positions in Barclays by some form of elaborate code. If it were the case that anonymity would have to be preserved for all the individuals, obvious practical difficulties would arise in devising a code that did not reveal the position for example of a senior executive, leading to the media being able to identify his name.
2. Equally if the order sought were made, quite apart from the practical difficulties that would arise at any contested disclosure hearing, Mr Lord’s instructing solicitors would have to redact documents and use code in witness statements in order to avoid inadvertent breach of any anonymity order, all of which would necessarily increase the time spent on the case and the costs. That exercise would need to be carefully supervised by a senior solicitor to ensure an inadvertent breach of the order did not occur. Whilst Mr Beltrami and Lord Pannick both sought to downplay the extent to which the claimants would be prejudiced or inconvenienced, I was not convinced by those submissions. In my judgment there is a real risk of prejudice to the claimants from the order proposed and that potential prejudice points strongly to it not being in the interests of justice to make the order sought.
3. The second reason why the order is not necessary for the proper administration of justice concerns the extent to which the identity of the individuals (or at least those being referred to in the Notices) is already in the public domain. The Treasury Select Committee Report names a number of key individuals, including Mr Diamond, the chief executive and Mr del Messier, president of Barcap and discusses their dealings with the Bank of England. Furthermore, as Mr Vassall-Adams points out in his skeleton argument, a quick public domain search of the FT and Reuters reveals information already in the public domain concerning the involvement of a number of other identifiable and identified individuals at Barclays. In those circumstances, I agree with Mr Vassall-Adams that to impose an anonymity order in these proceedings in relation to people already named as involved, in documents or websites publicly available, would be absurd.
4. That ties in with the third reason, which is that this case is a test case, but the involvement of Barclays in manipulation of LIBOR is only one part of a much bigger picture concerning the manipulation of LIBOR by a substantial number of banks. Contrary to Lord Pannick’s submission that there is no competing public interest capable of justifying the prejudice and unfairness which the individuals assert they would suffer, there is a legitimate public interest in the true picture in relation to the manipulation of LIBOR by banks generally, not just Barclays, being brought fully to light. In my judgment, fair and accurate media reporting of all aspects of LIBOR manipulation, including the involvement of employees and ex-employees of Barclays and their identity, is an important aspect of the public obtaining that true picture.
5. This is precisely the point Lord Neuberger MR was making, albeit in a different factual context, at [180] of the *Binyam Mohamed* case. Furthermore, the manipulation of LIBOR by banks, including Barclays, is in the news now and the Article 10 rights of the media include that they should be able to report the matter fully now, not at the time of a trial in ten months time. The public has a legitimate interest in learning who in the banking community is alleged to have been implicated in the manipulation of LIBOR. That interest arises now at the stage of interlocutory proceedings, not merely at trial. As *Binyam Mohamed* demonstrates, information can come out through the process of litigation which is of genuine public interest and, in circumstances where the regulators have found particular employees were implicated (albeit not named in the Notices) and those findings have not been challenged by Barclays or the individuals concerned, there is simply no justification for saying that the disclosure of that information to the public should have to await the conclusion of a trial.
6. In my judgment, for the court to permit individuals who were involved in such manipulation the protection of an anonymity order is not only not necessary for the proper administration of justice, but would be an affront to the principle of open justice and would potentially damage public confidence in the administration of justice. As I have already stated earlier in this judgment, so far as individuals who were not involved in the manipulation and are entirely innocent of any wrongdoing are concerned, the suggestion that they could be prejudiced by being identified seems to me somewhat unreal. If all proceedings are in open court, it seems to me that is likely to foster fair and accurate reporting rather than the reverse.

**The order sought is disproportionate**

1. Finally, even if I had been persuaded by Lord Pannick that the individuals had a case for derogation from the principle of open justice, the order sought is disproportionately wide. In this context, Mr Vassall-Adams is right that proportionality is not simply an aspect of the European Convention, but a critical element of any exception to the common law principle. Thus, as Lord Diplock made clear in *A-G v Leveller*, the court will only allow departure from the general rule “to the extent and to no more than the extent that the court reasonably believes it to be necessary” (450D).
2. Lord Pannick characterised the order sought as only a minor incursion on open justice. However, I agree with Mr Vassall-Adams that the form of anonymity order the individuals seek is wide-ranging. As already indicated I also accept Mr Lord’s submission that the order sought would be intrusive and prejudicial to the fair determination of interlocutory disclosure disputes which are likely to arise and, in that sense, inimical to the overriding objective under the CPR.
3. During the course of the hearing, Lord Pannick appeared to recognise the force of these criticisms; hence his willingness to adopt as a fall back position the pragmatic approach which at one point of the hearing I was considering, that the proceedings should remain in open court but that if, at a later stage of any interlocutory hearing, any particular individual were able to demonstrate a case for anonymity, an application could be made at that stage.
4. However, having heard the submissions on behalf of the media organisations and considered the matter further, it seems to me that the court must decide the issue of principle raised by the present application now. For all the reasons I have given, on the material before the court, the application fails at the first hurdle and even if it did not, there are compelling reasons why, as I have found, the interests of justice require the identification of the individuals rather than their anonymity. As I indicated at the end of the hearing, it does not follow that particular problems which might arise at a later stage might not require reconsideration of the issue in relation to one or more individuals, although for the reasons I have set out above, any subsequent application would have to be supported by clear and cogent evidence justifying a departure from the principle of open justice. Also, for the reasons given, reputational harm or the risk of reputational harm would be unlikely to justify derogation from the principle, although I would consider any subsequent such application on the evidence then before the court and on its merits.

**Conclusion**

1. For all the reasons set out above, the present application is dismissed.
1. That is the Final Notice issued by the Financial Services Authority (“FSA”) on 27 June 2012, the US Department of Justice (“DOJ”) Statement of Facts of 26 June 2012 and the US Commodity Futures Trading Commission Order of 27 June 2012 (referred to hereafter as “the Notices”). [↑](#footnote-ref-1)
2. This figure was five more than the short list because some individual employees were only concerned with EURIBOR, with which the present proceedings are not concerned. [↑](#footnote-ref-2)
3. As I noted in [16] of my judgment dismissing Barclays’ application, the FSA appears to deal with matters by anonymising in the first instance, presumably in order to avoid having to go through this procedure with individuals. [↑](#footnote-ref-3)